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REPORTERS

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Advocate.

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— Art. 19 (1) (f) — S. 46, Cls. (a) to (h), A. P. Charitable and Hindu Religious Institutions and Endowments Act is not violative of Art. 19(1) (f) of Constitution

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— See Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (17 of 1966), S. 46, Cls. (a) to (h)

SC 181 A (C N 40)

— Art. 19 (1) (g) — Madhya Pradesh Municipal Corporation Act (23 of 1956), Section 430 — Right to carry on trade in slaughtering bulls and bullocks — Restriction on — Bye-laws of Municipality regulating such trade — Notification of Governor cancelling bye-laws having effect of prohibiting trade — Notification is violative of Article 19 (1) (g)

SC 93 (C N 21)

— Art. 20(2) — Imposition of penalty, besides confiscation of gold on a person by customs authority — Neither confiscation nor infliction of penalty amounts to prosecution contemplated in Art. 20 (2) — Prosecution of such person under S. 135 of Customs Act (1962) and Rule 126 (p) (2) — Art. 20 (2) not attracted — See Defence of India (Part XII-A Gold Control) Rules (1962), R. 126-L (16) (aa)

Andh Pra 47 F (C N 7)

— Art. 20 (3) — Court directing a person to give his specimen signature and handwriting — Does not amount to testimonial compulsion offending Art. 20 (3) — (Point conceded in view of AIR 1961 SC 1808)

Mad 85 B (C N 23)

— Arts. 21, 22, 352 (1), 359 (1) — Defence of India (Part XII-A Gold Control) Rules (1962), R. 126-P (2) and (4) — Person charged with offence under R. 126-P (2) — Cannot take recourse to Court during period of emergency, even if his rights under Article 21 are infringed

Andh Pra 47 C (C N 7)

— Art. 22 — Person charged with offence under Rule 126 (p) (2) of Defence of India (Part XII-A Gold Control) Rules (1962) — Cannot take recourse to Court during period of emergency, even if his rights under Art. 21 are infringed — See Constitution of India, Art. 21

Andh Pra 47 C (C N 7)

— Art. 22 (4), (5) and (7) — Preventive Detention Act (1950), Ss. 7, 8, 9 and 13 — Right of detenu to make representation against detention order — He has dual right to have representation considered by Government and also by Advisory Board — Representation to Government made after case is referred to Advisory Board — Government not relieved of obligation to consider representation

SC 97 (C N 22)

— Art. 25 — S. 46 of Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (17 of 1966), is not violative of Art. 25 of Constitution — See Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (17 of 1966), S. 46

SC 181 C (C N 40)

— Art. 26 — Ss. 46 and 47 of Andhra Pradesh Charitable and Hindu Religious

Constitution of India (contd.)

Institutions and Endowments Act (17 of 1966), are not violative of Art. 26 — See Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (17 of 1966), S. 46

SC 181 B (C N 40)

—Art. 31 — Maharashtra Act 45 of 1961 and Hyderabad Act 21 of 1950 together with Hyderabad Act 3 of 1954 do not contravene Art. 31 — See Tenancy Laws — Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and further amendment) Act (Maharashtra Act 45 of 1961), S. 2

SC 126 A (C N 29)

—Arts. 31 (3), 111 — Assent of President to Amending Act — Assent to parent Act, even if not accorded earlier, must be taken to have been granted when Amending Act was assented to. (Obiter). AIR 1961 Andh Pra 523, Overruled.

SC 126 B (C N 29)

—Art. 31 (5) and (6) — Provision in a Pre-Constitution Act void ab initio is not "existing law" — Provision does not attract Art. 31(5) or 31-A, inclusion of the Act (Resettlement of Displaced Persons (Land Acquisition) Act, 1948) in Sch. IX of Constitution notwithstanding. (Resettlement of Displaced Persons (Land Acquisition) Act (1948), S. 7(1) (e) provisos — Provisos ultra vires S. 299(2) of the Government of India Act, 1935 — Hence ignored — Provisos not 'existing law' under Art. 366 (10) of Constitution) — See Constitution of India, Art. 366(10)

Delhi 44 B (C N 8)

—Art. 31-A — Provision in a Pre-Constitution Act void ab initio is not 'existing law' — Provision does not attract Art. 31 (5) or 31-A, inclusion of the Act (Resettlement of Displaced Persons (Land Acquisition) Act, 1948) in Sch. IX of Constitution notwithstanding. (Resettlement of Displaced Persons (Land Acquisition) Act (1948), S. 7(1)(e) provisos — Provisos ultra vires S. 299(2) of the Government of India Act, 1935 — Hence ignored — Provisos not 'existing law' under Art. 366 (10) of Constitution) — See Constitution of India, Art. 366 (10)

Delhi 44 B (C N 8)

—Art. 31-B — When the parent Act (Hyderabad Act (21 of 1950)) was protected, the Amending Act (Hyderabad Act (3 of 1954)) would be covered by same protection — See Tenancy Laws — Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and further Amendment) Act (Maharashtra Act 45 of 1961), S. 2

SC 126 A (C N 29)

—Art. 31-B — Constitution of India, Arts. 366(10), 31(5) & (6), 31-A, 31-B and Sch. IX — Provision in a Pre-Constitution Act void ab initio is not 'existing law' — Provision does not attract Art. 31 (5) or 31-A, inclusion of the Act (Resettle-

Constitution of India (contd.)

ment of Displaced Persons (Land Acquisition) Act, (1948)) in Sch. IX of Constitution notwithstanding. (Resettlement of Displaced Persons (Land Acquisition) Act (1948)), S. 7(1)(e) Provisos — Provisos ultra vires S. 299(2) of the Government of India Act, 1935 — Hence ignored — Provisos not 'existing law' under Art. 366 (10) of Constitution; (Government of India Act (1935), S. 299(2)) — See Constitution of India Art. 366(10)

Delhi 44 B (C N 8)

—Art. 39 (c) — Directive principles under — Applies both to Parliament and State Legislature — See Madras Urban Land Tax Act (12 of 1966), S. 1

SC 169 A (C N 39)

—Art. 111 — Assent of President to Amending Act — Assent to parent Act, even if not accorded earlier, must be taken to have been granted when Amending Act was assented to — See Constitution of India, Art. 31(3) **SC 126 B (C N 29)**

—Art. 132 — Certificate of fitness — Not to be granted as a mere formality — Case must involve substantial question of law as to interpretation of Constitution — Erroneous application of well settled principles regarding construction of Art. 311 to facts of a case does not raise such question **Goa 23 A (C N 4)**

—Art. 133 — Certificate of fitness for appeal — Issue of — Applicant only a lessee and not owner of the lands sought to be acquired — No indication that value of the lease-hold rights was Rs. 20,000 — Applicant although alleging that he had erected building and Saw Mill on land worth rupees one lakh, they were not subject-matter of litigation — No question of either public or private importance also involved — Certificate held could not be issued

Punj 66 (C N 10) (FB)

—Arts. 133(1) (a), (b), (c) and 226 — Cl. (c) of Art. 133(1) is wider in scope than Cls. (a) and (b) — Judgment or final order of High Court in proceedings under Art. 226 is open to appeal under Cl. (c) as proceeding is of civil nature — Discretion to grant certificate to be exercised judicially and not arbitrarily — It is intended to cover special cases which raise questions of considerable public or private importance **Goa 23 B (C N 4)**

—Art. 133 (1) (c) — Certificate of fitness — Question of considerable public or private importance — Meaning of **Goa 23 C (C N 4)**

—Arts. 133(1)(c) and 226 — Certificate of fitness — Termination of service of temporary civil servant in terms of R. 5 (1), Central Civil Services (Temporary Services) Rules (1965) without assigning any reasons though it was preceded by enquiry into his negligence — High Court quashing order of termination under

Constitution of India (contd.)

Art. 226 on ground that termination order was by way of punishment in view of allegations of negligence against civil servant contained in counter-affidavit of Government in writ petition — Civil servant submitting his resignation thereafter — Held question involved was no longer a live question and was merely an academic question not likely to affect similar cases — Certificate refused

Goa 23 D (C N 4)

—Art. 136 — Concurrent findings of fact based on proper consideration of entire evidence — No interference by Supreme Court — Finding by two lower courts that, petitioner's case about respondent's impotency could not be believed and that respondent's evidence that she had always been ready and willing to allow her husband to consummate marriage should be believed — Supreme Court refused to interfere and annul the marriage under Section 12 (1) (a) Hindu Marriage Act — AIR 1958 SC 441, (1924) AC 349 and (1912) P 173, **Disting.**

SC 137 B (C N 31)

—Art. 136 — Concurrent finding of two courts below that there is deceptive similarity between two trade marks — Finding is binding in appeal under Art. 136 — See Trade and Merchandise Marks Act. (1958), S. 12(1)

SC 146 B (C N 34)

—Art. 136 — New point — Contention that Rule 12 of M. P. Government Servants (Temporary and Quasi-Permanent Service) Rules 1960 being framed without consulting State Public Service Commission and High Court was unconstitutional — Contention raising mixed questions of law and fact — Not raised in High Court — Not allowed to be raised for first time in Supreme Court

SC 158 A (C N 36)

—Art. 136 — New point — Question that services of temporary Civil Judge could not be terminated on one month's notice as his confirmation was recommended by High Court after expiry of probationary period held could not be allowed to be raised for first time in appeal before Supreme Court

SC 158 D (C N 36)

—Art. 136 — Plea of limitation — Plea not raised either before Labour Court or even in special leave application before Supreme Court — Plea allowed as no fresh facts had to be investigated and as matter could be dealt with as pure question of law.

SC 196 A (C N 43)

—Art. 136 — Findings of fact — Supreme Court in exercise of its discretion will not normally enter upon pleas on questions of fact or interfere with findings of facts recorded in judgment or decision under appeal

SC 196 C (C N 43)

—Art. 136 — Mixed question of law and fact — Question as to what was status of appellants on facts found by Labour

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Court and whether they were entitled to supervisory special allowance — Question is not purely one of fact — Status has to be inferred as a matter of law from the facts found — Question whether inference has been correctly drawn by the Labour Court can be considered by the Supreme Court

SC 196 D (C N 43)

—Art. 136 — Judgment — Award of Motor Accidents Claims Tribunal — Appeal against — Decision of single Judge is judgment — Nature of jurisdiction of claims tribunal and of High Court explained — See Letters Patent (Cal) Cl. 10

Delhi 37 (C N 7) (FB)

—Art. 136 — Tenant fulfilling conditions under S. 13-A (d), Rajasthan Act (17 of 1950) — Tenant applying for leave to appeal to Division Bench and also for special leave to appeal to Supreme Court — He is yet entitled to apply under S. 13-A (d) — See Houses and Rents — Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950) (as amended by Act 12 of 1965), S. 13-A

Raj 26 (C N 5)

—Art. 226 — Administrative or quasi-judicial power — Matters to be considered in determining — Dividing line between two powers has become thin

SC 150 B (C N 35)

—Art. 226 — Natural Justice — Rules of — Scope and object of — Applicability to administrative inquiry — Change in concept of natural justice in recent years indicated — Since aim of both quasi-judicial as well as administrative inquiries is to arrive at a just decision these rules should apply to both — What particular rule will apply in a given case will depend upon various factors

SC 150 C (C N 35)

—Art. 226 — Administrative authority like a Selection Board — Violation of rules of natural justice — Bias — Selection made by Board one of members of which is a candidate, is vitiated — Special Selection Board constituted under Regulation 3 of Indian Forest Service (Initial Recruitment) Regulations (1966) framed under Rule 3 of Indian Forest Service (Recruitment) Rules (1966) — One member of Board was himself a candidate for selection — Though he had not taken part in deliberations of Board at time of his own selection he had taken part throughout while making selections of other candidates including his rival candidates — Conflict between interest and duty of such member — Reasonable likelihood of bias — Selection list prepared by such Board under Regulation 5 is vitiated and the final recommendations made by U. P. S. C. on its basis must also be vitiated

SC 150 D (C N 35)

—Arts. 226 and 311 — Termination of services of temporary Civil Judge — Order neither involving any element of punish-

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ment nor depriving him of any vested right to any office — No question of following principles of natural justice arises
SC 158 G (C N 36)

—Art. 226 — Quasi-judicial procedure — Procedure before Commissioner acting under S. 46 of A. P. Charitable and Hindu Religious Institutions and Endowments Act, 1966, is quasi-judicial — See Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (17 of 1966), S. 46, Cls. (a) to (h)
SC 181 A (C N 40)

—Art. 226 — Appointment of Registrar of High Court by Chief Justice — Accountant General issuing provisional pay-slip but not in conformity with the terms of appointment on ground that his appointment and its terms were invalid — Petition by Registrar for release of pay — No relief sought against Chief Justice — Chief Justice not being necessary party omission to implead him as such does not make petition defective
Assam 26 A (C N 4)

—Art. 226 — Settlement of tender in favour of highest bidder by Chief-Conservator — Government setting it aside and giving to another person on ground that he belongs to Scheduled tribes — Absence of any proof thereof — Settlement by Government struck down — See Constitution of India, Art. 15
Assam 32 B (C N 5)

—Art. 226 — Sufficiency of grounds for urgency not justiciable — Interference for Government's failure to apply its mind is, however, possible — See Land Acquisition Act (1894), S. 17 (1) (4)
Cal 90 N (C N 12)

—Art. 226 — Cl. (c) of Art. 133(1) is wider in scope than Cls. (a) and (b) — Judgment or final order of High Court in proceedings under Art. 226 is open to appeal under Cl. (c) as proceeding is of civil nature — Discretion to grant certificate to be exercised judicially and not arbitrarily — It is intended to cover special cases which raise questions of considerable public or private importance — See Constitution of India, Art. 133 (1) (a), (b), (c)
Goa 23 B (C N 4)

—Art. 226 — Grant of waste lands — Whether the grantee has acquired rights in the reserved trees — Whether contract was formed between Government and grantee — Can be considered in a suit instituted for that purpose — Court exercising jurisdiction under Art. 226 is not proper forum for deciding that matter
Ker 21 B (C N 5) (FB)

—Art. 226 — Orders of High Court on administrative side — Writ jurisdiction can be invoked to question such orders: AIR 1957 Trav. Co. 176, Overruled. AIR 1952 Pat. 309 (FB), Diss.
Ker 27 A (C N 6) (FB)

Constitution of India (contd.)

—Art. 226 — Quo Warranto — Requisites for the issue of — Office of Public Prosecutor is a public office — Importance of the office stated
Mad 63 A (C N 19)

—Art. 226 — Rule prescribing procedure for appointment of Public Prosecutor — Rules framed in exercise of power under Arts. 227 and 309 of Constitution — Contravention fatal to appointment — On facts, held, Government had appointed a person as public prosecutor not nominated by the Collector — Order of appointment quashed — Mandamus to act upon nomination sent by Collector and appoint the writ petitioner accordingly refused — Government is not bound to accept nomination sent by collector — See High Court Rules and Orders — Madras High Court Criminal Rules of Practice and Circular Order, 1958, R. 45
Mad 63 B (C N 19)

—Art. 226 — Industrial Disputes Act (1947), Ss. 10 (1) (c) and 2-A — Order of reference — Notification mentioning that industrial dispute has arisen between "workmen and the Management" — But it was clear that what the Government was considering and what it was referring was whether non-employment of worker S is justified and if not to what relief he is entitled — Held it could not be said that order was vitiated due to misconception by Government that dispute was collectively between workmen and Management — As reference was competent after introduction of S. 2-A legality of such a reference could not be questioned
Mad 82 C (C N 22)

—Art. 226 — Industrial Disputes Act (1947), S. 10 (1) (c) — Reference — In notification, report of Labour Officer referred to as conciliation report — Such an error would not vitiate order of reference
Mad 82 D (C N 22)

—Art. 226 — Equality of opportunity in the matter of promotion — Ignoring the claim vitiates the exercise of jurisdiction by appropriate authority — Writ of mandamus can issue — See Constitution of India, Art. 311
Orissa 19 (C N 8)

—Art. 226 — Order refusing to grant pension on extraneous or irrelevant grounds — High Court should normally interfere and set aside order: AIR 1959 All 769, Dissented from
Punj 75 A (C N 12)

—Art. 226 — Point not specifically taken in writ petition — Point cannot be raised during arguments in writ petition since adopting such course would seriously prejudice respondents having no opportunity to meet challenge
Punj 75 B (C N 12)

—Art. 226 — Cancellation of permit under Section 60 of Motor Vehicles Act — Order is quasi-judicial — Principles of natural justice apply — See Motor Vehicles Act (1939), S. 60
Raj 48 (C N 8)

Constitution of India (contd.)

—Art. 227 — Judgment — Award of Motor Accidents Claims Tribunal — Appeal against — Decision of single judge is judgment — Nature of jurisdiction of claims tribunal and of High Court explained — See Letters Patent (Cal.), Cl. 10

Delhi 37 (C N 7) (FB)

—Art. 227 — Rules prescribing procedure for appointment of Public Prosecutor — Rule framed in exercise of power under Arts. 227 & 309 of Constitution — Contravention fatal to appointment — See High Court Rules and Orders — Madras High Court Criminal Rules of Practice and Circular Orders, 1958, R. 45 — Mad 63 B (C N 19)

—Art. 229 — Notification by Chief Justice appointing retired person to post of Registrar of High Court without referring to Rule 142 of Assam Pension Manual — Chief Justice being competent to appoint Registrar under Article 229 non-reference to Rule 142 in Notification cannot make appointment invalid — There being no necessity to refer to Rule 142 or reasons for appointment, notification requires no modification. Assam 26 C (C N 4)

—Art. 229 — Appointment of Registrar of High Court by Chief Justice — Terms of appointment notified and Registrar accepting them by joining post — Formal contract between Chief Justice and Registrar as to terms of appointment is not necessary — Assam 26 D (C N 4)

—Arts. 229 and 245 — Assam High Court Appointment and Conditions of Service Rules (1956), Rule 3 (1) — Power of Chief Justice to fix higher pay-scale of High Court employees under the rule — Rule having approval of Governor — Nothing provided in Art. 229 that Governor should lay down by pay-scale of employees of High Court — Power given to Chief Justice under the Rule cannot be said to be delegated to him by Governor — Assam 26 F (C N 4)

—Art. 229 (1) — Assam and Nagaland High Court Services (Appointment and Conditions of Service and Conduct) Rules, (1967), R. 7 (1) — Appointment of Registrar of High Court by Notification issued by Chief Justice under power given under Art. 229 — Order of appointment referring to Rule 7 (1) of (1967) Rules, although they were not published at time of appointment — Reference to Rule 7 (1) held to be redundant — Chief Justice having power to appoint Registrar, wrong reference to R. 7 (1) in Notification cannot make it invalid — Assam 26 B (C N 4)

—Arts. 235 and 311 — M. P. Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960, Rule 12 — Termination of services of temporary Civil Judge by State Government upon recommendation of High Court is valid — SC 158 H (C N 36)

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—Art. 245 — Section 3 of All India Services Act (1951) is not ultra vires the constitution — See Civil Services — All India Services Act (1951), S. 3

SC 150 A (C N 35)

—Art. 245 — Legislative entries — Interpretation — Pith and substance rule — See Madras Urban Land Tax Act (12 of 1966), S. 1 — SC 169 A (C N 39)

—Art. 245 — Power to determine value of urban land under Section 6 — Does not constitute excessive delegation of authority — See Madras Urban Land Tax Act (12 of 1966), S. 6 — SC 169 C (C N 39)

—Arts. 245 and 265 — Illegal collection of tax under ineffective or invalid Act — Retrospective validation of such Act by Legislature — When can be done — Pre-requisites to be complied, stated — SC 192 A (C N 42)

—Art. 245 — Rates imposed and collected on lands and buildings by Rules under Section 73 of Bombay Municipal Boroughs Act (18 of 1925) — Validation of by State legislature — Competency — See Municipalities—Gujarat Imposition of Taxes by Municipalities (Validation) Act 1963 (2 of 1964), S. 3 — SC 192 B (C N 42)

—Art. 245 — Defence of India (Part XII-A Gold Control) Rules (1962) are within rule making power conferred by Section 3 (1) — See Defence of India Act (1962), S. 3 (1) — Andh Pra 47 A (C N 7)

—Art. 245 — Power given to Chief Justice under R. 3 (1) of Assam High Court Appointment and Conditions of Service Rules (1956) is not delegated to him by Governor — See Constitution of India, Art. 229 — Assam 26 F (C N 4)

—Art. 245 — Delegated legislation — Section 114 (2) (g) of City of Nagpur Corporation Act (2 of 1950), authorising Corporation to impose any other tax is not invalid for excessive delegation of power — See Municipalities — City of Nagpur Corporation Act 1948 (2 of 1950), S. 114 (2) (g) and (3) — Bom 59 (C N 8)

—Art. 245 — Conference of power under Section 45 (10), Banking Companies Act on Central Government — Does not amount to delegation or abdication of legislative power — See Banking Companies Act (1949), S. 45 (10) — Ker 43 B (C N 10)

—Art. 245 — Competence of Parliament to legislate on individual dispute — See Industrial Disputes Act (1947), S. 2-A (as inserted by Amendment Act 35 of 1965) — Mad 82 A (C N 22)

—Art. 245 — Provisions of Sections 3-A, 5-A, 42, 46 of Bihar Sales Tax Act and Rules 31-B and 8-C of Rules framed under it — Validity — See Sales Tax — Bihar Sales Tax Act (19 of 1959), S. 3-A — Pat 59 (C N 8)

—Art. 246 — Legislative Entries — Interpretation of — Pith and substance

Constitution of India (contd.)

Rule — See Madras Urban Land Tax Act (12 of 1966), S. 1 SC 169 A (C N 39)

— Art. 246—Competence of Parliament to legislate on individual dispute — See Industrial Disputes Act (1947), S. 2-A (as inserted by Amendment 35 of 1965)

Mad 82 A (C N 22)

— Art. 265 — Collection of tax under invalid Act — Retrospective validation — Pre-requisites — See Constitution of India, Art. 245 SC 192 A (C N 42)

— Art. 265 — Tax and rates — Statute authorising collection of 'rates' — Collection of 'tax' is illegal — Statute can be amended by defining 'rate' to equate it with 'tax', thus validating retrospectively the collection — See Municipalities — Gujarat Imposition of Taxes by Municipalities (Validation) Act, 1963 (2 of 1964), S. 3 SC 192 B (C N 42)

— Art. 285 (2) — Conditions necessary — Nature of the Pre-Constitution tax and not the amount is the criterion — (Municipalities — Madras District Municipalities Act (5 of 1920), S. 81 — Property tax under — Tax same as under Section 64 of the Mysore City Municipalities Act) — (Municipalities — Mysore City Municipalities Act (7 of 1933), S. 64 — Property tax under — Tax same as one under Section 81 of the Madras District Municipalities Act) — (Railways Act (1890), Sec. 135 and Railways (Local Authorities' Taxation) Act (1941), S. 3(1)—Pre-Constitution tax paid by Union at commencement of Constitution — Nature of the tax, no change in — Fresh notification, not a condition precedent for demand)

Mys 37 B (C N 8)

— Art. 286 (1) — Arrival of imported goods in Indian harbours — Its sale, long thereafter, by transfer of documents of title — Sale not being in course of import, is not covered by Art. 286 (1) — Rev. Nos. 16, 28, 81 and 98, D/- 17-7-1963 (Mad), Reversed — See Sales Tax — Central Sales Tax Act (1956), S. 5 (2)

SC 165 (C N 38)

— Art. 301—Provisions of Sections 3-A, 5-A, 42, 46 of Bihar Sales Tax Act and Rr. 31-B and 8-C of Rules framed under it — Validity — See Sales Tax — Bihar Sales Tax Act (19 of 1959), S. 3-A

Pat 59 (C N 8)

— Art. 304 (b) — Law creating State monopoly in trade of tendu leaves — Restrictions on transport — Tests of reasonableness under Art. 304 (b) are same as under Art. 19 (5) (6) — See Madhya Pradesh Tendu Patta (Vyapar Vinayaman) (Adhiniyam) (29 of 1964), S. 5

SC 129 B (C N 30)

— Art. 304 (b), Proviso—Provisions of Sections 3-A, 5-A, 42, 46 of Bihar Sales Tax Act and Rr. 31-B and 8-C of Rules framed under it — Validity — See Sales Tax — Bihar Sales Tax Act (19 of 1959), S. 3-A

Pat 59 (C N 8)

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— Art. 309 — Rules under — See Saurashtra Covenanted State Services (Superannuation Age) Rules (1955), R. 3 (i) — See Civil Services — Saurashtra Covenanted State Services (Superannuation Age) Rules (1955), R. 3 (i)

SC 143 (C N 33)

— Art. 309—Rule prescribing Procedure for appointment of Public Prosecutor — Rule framed in exercise of power under Arts. 227 and 309 of Constitution—Contravention fatal to appointment — See High Court Rules and Orders — Madras High Court Criminal Rules of Practice and Circular Orders, 1958, R. 45

Mad 63 B (C N 49)

— Art. 309 — Rules under — Orissa Ministerial Service (Method of Recruitment and Conditions of Service of Clerks and Assistants in the District Office and Offices of the Heads of Departments) Rules, (1963), R. 21 (1) (d) — Requirements of — See Constitution of India, Art. 311

Orissa 19 (C N 8)

— Art. 309 — (Paradip Port Employees (Recruitment, Seniority and Promotion) Regulations (1967), Regs. 11 (3) and 12) — Promotion in service — Employee has right to be considered for — Maintenance of seniority list and roster — Value and necessity stated

Orissa 31 (C N 13)

— Art. 311 — Temporary Civil Judge — State Government, having regard to resolution passed by High Court, terminating his services — Order not casting stigma on his character or integrity nor visiting him with any evil consequences — Order not passed by way of punishment — Provisions of Art. 311, held not attracted

SC 158 F (C N 36)

— Art. 311 — Termination of services — Order not involving punishment depriving Govt. servant of his vested rights — No question of following principles of natural justice arises — See Constitution of India, Art. 226 SC 158 G (C N 36)

— Art. 311 — Termination of services of temporary Civil Judge by State Government upon recommendation of High Court is valid — See Constitution of India, Article 235 SC 158 H (C N 36)

— Arts. 311, 14, 16, 309 and 226 — Equality of opportunity in the matter of promotion — Principles — Non-consideration for promotion — Ignoring the claim vitiates the exercise of jurisdiction by appropriate authority — Writ of mandamus can issue

Orissa 19 (C N 8)

— Art. 311 (2) — Public servant governed by Saurashtra State Services (Superannuation Age) Rules (1955)— His compulsory retirement before reaching age of 55 years — Tantamounts to dismissal or removal under Art. 311 (2) — See Civil Services — Saurashtra Covenanted State Services (Superannuation Age) Rules (1955), R. 3 (i)

SC 143 (C N 33)

Constitution of India (contd.)

—Art. 320 (3) (c) — Provisions not mandatory — Do not confer any right on public servant — Absence of consultation with State Public Service Commission in terminating his services does not afford him a cause of action — Hence the order, terminating his services cannot be said to be invalid on that ground

SC 158 E (C N 36)

—Art. 326 — Election tribunal can enquire into age qualification of candidate despite fact that his name appears in electoral roll, as a voter — See Panchayats — Andhra Pradesh Gram Panchayat Act (2 of 1964), Section 14

Andh Pra 56 (C N 8) (FB)

—Art. 352 (1) — Person charged with offence under R. 126 (p) (2) of Defence of India (Part XII-A Gold Control) Rules (1962) — Cannot take recourse to Court during period of emergency, even if his rights under Art. 21 are infringed — See Constitution of India, Art. 21

Andh Pra 47 C (C N 7)

—Art. 359 (1) — Person charged with offence under R. 126 (p) (2) of Defence of India (Part XII-A Gold Control Rules (1962) — Cannot take recourse to Court during period of emergency, even if his rights under Art. 21 are infringed — See Constitution of India, Art. 21

Andh Pra 47 C (C N 7)

—Arts. 366 (10), 31 (5) & (6), 31-A, 31-B and Sch. IX — Provision in a Pre-Constitution Act void ab initio is not 'existing law' — Provision does not attract Article 31 (5) or 31-A, inclusion of the Act (Resettlement of Displaced Persons (Land Acquisition) Act (1948) in Sch. IX of Constitution notwithstanding — (Resettlement of Displaced Persons (Land Acquisition) Act (1948), S. 7 (1) (e) Provisos—Provisos ultra vires S. 299 (2) of the Government of India Act, 1935 — Hence ignored — Provisos not 'existing law' under Art. 366 (10) of Constitution Delhi 44 B (C N 8)

—Art. 366 (12) — 'Goods' — Meaning of — It includes 'electricity' — See Calcutta City Civil Court Act (21 of 1953), Sch. 1, Cl. 4 (iv) Cal 75 (C N 8)

—Sch. 7, List 1, Entry 44 and Art. 246 — Provisions of Punjab Sikh Gurdwaras Act are within scope of Entry 44 — See Punjab Sikh Gurdwaras Act (8 of 1925), S. 79 Punj 40 B (C N 8) (FB)

—Sch. VII, List 1, Entry 86 — Acts relating to taxation on lands and buildings — Competency of State Legislature to enact — Madras Act 12 of 1966 is not beyond competence of State Legislature — See Madras Urban Land Tax Act (12 of 1966), S. 1 SC 169 A (C N 39)

—Sch. VII, List I, Entry 87 — Acts relating to taxation on lands and buildings — Competency of State Legislature to enact — Madras Act (12 of 1966) is not beyond

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competence of State Legislature — See Madras Urban Land Tax Act (12 of 1966), S. 1 SC 169 A (C N 39)

—Sch. VII, List I, Entry 88 — Acts relating to taxation on lands and buildings — Competency of State Legislature to enact — Madras Act (12 of 1966) is not beyond competence of State Legislature — See Madras Urban Land Tax Act (12 of 1966), S. 1 SC 169 A (C N 39)

—Sch. 7, List 1, Entry 97 — See Industrial Disputes Act (1947), S. 2-A (as inserted by Amendment Act 35 of 1965)

Mad 82 A (C N 22)

—Sch. VII, List II, Entry 45 — Taxes on lands and buildings — Interpretation of Statute imposing tax on lands only — Falls under Entry 49 and not under Entry 45 — See Constitution of India, Sch. VII, List II, Entry 49

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—Sch. VII, List II, Entry 48 — Acts relating to taxation on lands and buildings — Competency of State Legislature to enact — Madras Act (12 of 1966) is not beyond competence of State Legislature — See Madras Urban Land Tax Act (12 of 1966), S. 1 SC 169 A (C N 39)

—Sch. VII, List II, Entry 49 — Acts relating to taxation on lands and buildings — Competency of State Legislature to enact — Madras Act 12 of 1966 is not beyond competence of State Legislature — See Madras Urban Land Tax Act (12 of 1966), S. 1 SC 169 A (C N 39)

—Sch. VII, List II, Entries 49 and 45 — Taxes on lands and buildings — Scope of entries — Statute imposing tax on lands only — Falls under Entry 49 and not under Entry 45 SC 169 B (C N 39)

—Sch. VII, List II, Entry 49 — Imposition of tax on lands and buildings on basis of percentage of their capital value — State legislature is competent — See Municipalities — Gujarat Imposition of Taxes by Municipalities (Validation) Act 1963 (2 of 1964), S. 3 SC 192 B (C N 42)

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—Sch. 7, List 2, Entry 54 — 'Goods' — Include electricity — See Calcutta City Civil Court Act (21 of 1953), Sch. 1, Cl. 4 (iv) Cal 75 (C N 8)

—Sch. 7, List 3, Entry 22 — Interpretation of — See Industrial Disputes Act (1947), S. 2-A (as inserted by Amendment Act (35 of 1965) Mad 82 A (C N 22)

—Sch. IX — Constitution of India, Articles 366 (10), 31 (5) & (6), 31-A, 31-B and Sch. IX — Provision in a Pre-Constitution Act void ab initio is not 'existing law' — Provision does not attract Art. 31 (5) or 31-A, inclusion of the Act (Resettlement of

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—Sch. 9, Entry 35 — Inclusion under, of Maharashtra Act 45 of 1961 — Act is protected by Art. 31-B — See Tenancy Laws — Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and further Amendment) Act (Maharashtra Act 45 of 1961), S. 2 SC 126 A (C N 29)

—Sch. 9, Entry 36 — Inclusion under, of Hyderabad Act 21 of 1950 — Act is protected by Art. 31-B — See Tenancy Laws — Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and further Amendment) Act (Maharashtra Act 45 of 1961), S. 2 SC 126 A (C N 29)

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—S. 25 — Promise to perform existing contract with third person can be good and valid consideration for another contract — See Contract Act (1872), S. 2 (d) Madh Pra 40 F (C N 13)

—S. 27 — "Goodwill" — It represents business reputation of a going concern and is treated as part of assets of firm — See Partnership Act (1932), S. 14 Raj 36 B (C N 7)

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—S. 65 — Contract becoming impossible of performance due to supervening event — Each party to restore benefit received — See Contract Act (1872), S. 56 Raj 36 G (C N 7)

—S. 128 — Surety bond creating personal liability on father to pay third person's debt — Debt neither illegal nor immoral — Joint family estate in hands of sons held liable for payment of same — See Hindu Law — Debt — Joint family property Punj 67 (C N 11) (FB)

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CO-OPERATIVE SOCIETIES

—M. P. Co-operative Societies Act, 1960 (17 of 1961)

—S. 63 (1) — Word 'caused' is used in Section 63 (1) in sense of 'causa causans' meaning effective cause — Held, lack of supervision or control over employees on part of petitioner (President of Society) may have facilitated misappropriation or misconduct but it was not real effective cause of loss — Effective cause was misappropriation or misconduct of employees — Similarly, delay on part of petitioner to report to authorities about misappropriation could not be said to be cause of loss to society Madh Pra 39 A (C N 12)

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—Maharashtra Co-operative Societies Act (24 of 1961)

—S. 2 (21) — Transaction between Society and person other than its member — When becomes one under Section 45 — Dispute arising out of such transaction — Jurisdiction of Civil Court, if barred — See Co-operative Societies — Maharashtra Co-operative Societies Act (24 of 1961), S. 45 Goa 32 (C N 6)

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—Ss. 45, 91 (a), (c) and 2 (21) — Transaction between Society and person other than its member — When becomes one under Section 45 — Dispute arising out of such transaction — Jurisdiction of Civil Court, if barred Goa 32 (C N 6)

—S. 91 (a), (c) — Transaction between Society and person other than its member — When becomes one under Section 45 — Dispute arising out of such transaction — Jurisdiction of Civil Court, if barred — See Co-operative Societies — Maharashtra Co-operative Societies Act (24 of 1961), Section 45 Goa 32 (C N 6)

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—R. 44 — Transaction between Society and person other than its member — When becomes one under Section 45 — Dispute arising out of such transaction — Jurisdiction of Civil Court, if barred — See Co-operative Societies — Maharashtra Co-operative Societies Act (24 of 1961), Section 45 Goa 32 (C N 6)

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—Ss. 3, 4, 7 and 8, Sch. I, Art. 1 and Sch. II, Art. 11 — "Order relating to compensation for acquisition of land for public purpose" — 'Order' to be understood in the sense it is used in Civil P. C. — Award of compensation by arbitrator under provisions of Central Act 60 of 1948 — Award is not an 'order' — Appeal against 'award' attracts fixed court-fee under Art. 11 of Sch. II of the Court-fees Act — Ad valorem court-fee on basis of Section 8 not payable. AIR 1946 Cal 524 & AIR 1959 Cal 609 & AIR 1968 Andh Pra 348, Diss. Delhi 44 A (C N 8)

—S. 4—Award of compensation by arbitrator under provisions of Central Act 60 of 1948 — Appeal against 'award' attracts fixed court-fee under Art. 11 of Sch. II of the Court-fees Act — Ad valorem court-fee on basis of Section 8 not payable. AIR 1946 Cal 524; AIR 1959 Cal 609 and AIR 1968 AP 348, Diss. — See Court-fees Act (1870), S. 3 Delhi 44 A (C N 8)

—S. 7 — "Order relating to compensation for acquisition of land for public purpose" — 'Order' to be understood in the sense it is used in Civil P. C. — Award of compensation by arbitrator under provisions of Central Act 60 of 1948 — Award is not an 'Order' — Appeal against 'award' attracts fixed court-fee under Art. 11 of Sch. II of the Court-fees Act—Ad valorem court-fee on basis of Section 8 not payable. AIR 1946 Cal 524; AIR 1959 Cal 609 and

Court-fees and Suits Valuations—

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AIR 1968 AP 348, Diss. — See Court-fees Act (1870), S. 3 Delhi 44 A (C N 8)

—S. 8.— "Order relating to compensation.....for acquisition of land for public purpose" — 'Order' to be understood in the sense it is used in Civil P. C. — Award of compensation by arbitrator under provisions of Central Act 60 of 1948 — Award is not an 'Order' — Appeal against 'award' attracts fixed court-fee under Art. 11 of Sch. II of the Court-fees Act—Ad valorem court-fee on basis of Section 8 not payable. AIR 1946 Cal 524; AIR 1959 Cal 609 & AIR 1968 AP 348, Diss.—See Court-fees Act (1870), S. 3 Delhi 44 A (C N 8)

—Sch. I, Art. 1 — Award of compensation by arbitrator under provisions of Central Act 60 of 1948 — Appeal against 'award' attracts fixed court-fee under Art. 11 of Sch. II of the Court-fees Act — Ad valorem court-fee on basis of S. 8 not payable. AIR 1946 Cal 524; AIR 1959 Cal 609 and AIR 1968 AP 348, Diss. — See Court-fees Act (1870), S. 3

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—Sch. II, Art. 11 — Award of compensation by arbitrator under provisions of Central Act 60 of 1948 — Award is not an 'order' — Appeal against 'award' attracts fixed court-fee under Art. 11 of Sch. II of the Court-fees Act— Ad valorem court-fee on basis of Section 8 not payable. AIR 1946 Cal 524; AIR 1959 Cal 609 and AIR 1968 AP 348, Diss. — See Court-fees Act (1870), S. 3 Delhi 44 A (C N 8)

Criminal Procedure Code (5 of 1898)

—S. 4 (1) (t) — Quo Warranto — Requisites for the issue of — Office of Public Prosecutor is a public Office — Importance of the office stated — See Constitution of India, Art. 226 Mad 63 A (C N 19)

—S. 5 — Summary trial — Sentence of imprisonment not exceeding three months under Section 262 (2) — Applies only to offences under Section 260 and not to offences under any special enactment — See Defence of India (Part XII-A Gold Control) Rules (1962), R. 126 (p) (4) read with 126 (p) (2) Andh Pra 47 D (C N 7)

—S. 94— Word "thing" refers to physical or material object — Summons for purpose of taking specimen signature or handwriting is not for production of any document or thing Mad 85 A (C N 23)

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—S. 185 (1) and (2) — Fields of consideration under sub-section (1) and sub-section (2) are different — Grounds of earlier commencement and of general convenience can be considered in case falling under sub-section (1) — Presence of additional accused in one proceeding has no bearing Cal 81 (C N 9)

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—S. 262 (2) — Summary trial — Sentence of imprisonment not exceeding three months under Section 262 (2) — Applies only to offences under Section 260 and not to offences under any special enactment — See Defence of India (Part XII-A Gold Control) Rules (1962), R. 126 (p) (4) read with 126 (p) (2) Andh Pra 47 D (C N 7)

—S. 262 (2) — Summary trials — Maximum sentence of six months provided in R. 126 (p) (2), Defence of India (Part XII-A Gold Control) Rules — Validity — See Defence of India (Part XII-A Gold Control) Rules (1962), R. 126 (p) (2)

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—Ss. 345 (6), 369, 430, 403 — Trial for offences under Sections 307, 325, 324, 148 and 149 of I. P. C. — Conviction of some accused for offence under Section 323 only — Subsequent acquittal of those accused under Section 345 (6), Criminal P. C. by compounding of offence in appeal without notice to State — State appeal against acquittal of those accused of offences under Sections 307, 148 and 149 and of remaining accused for offences under Ss. 301, 325, 324, 148 and 149 is not barred

Madh Pra 26 (C N 7) (FB)

—S. 369 — Trial for offences under Sections 307, 325, 324, 148 and 149 of I. P. C. — Conviction of same accused for offences under Section 323 only — Subsequent acquittal of those accused under S. 345

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(6), Criminal P. C. by compounding of offence in appeal without notice to State — State appeal against acquittal of accused of offences under Sections 307, 148 and 149 and of remaining accused for offences under Sections 307, 325, 324, 148 and 149 is not barred — See Criminal P. C. (1898), Section 345 (6)

Madh Pra 26 (C N 7) (FB)

—S. 403 — Prohibition against double jeopardy — See Defence of India (Part XII-A Gold Control) Rules (1962), R. 126-L (16) (aa) Andh Pra 47 F (C N 7)

—S. 403 — Trial for offences under Sections 307, 325, 324, 148 and 149 of I. P. C. — Conviction of same accused for offence under Section 323 only — Subsequent acquittal of those accused under Section 345 (6), Criminal P. C. by compounding of offence in appeal without notice to State — State appeal against acquittal of accused of offences under Sections 307, 148 and 149 and of remaining accused for offences under Ss. 307, 325, 324, 148 and 149 is not barred — See Criminal P. C. (1898), Section 345 (6)

Madh Pra 26 (C N 7) (FB)

—S. 430 — Trial for offences under Sections 307, 325, 324, 148 and 149 of I. P. C. — Conviction of same accused for offence under Section 323 only — Subsequent acquittal of those accused under Section 345 (6), Criminal P. C. by compounding of offence in appeal without notice to State — State appeal against acquittal of accused of offences under Sections 307, 148 and 149 and of remaining accused for offences under Ss. 307, 325, 324, 148 and 149 is not barred — See Criminal P. C. (1898), S. 345 (6)

Madh Pra 26 (C N 7) (FB)

—S. 439 — Order of Magistrate under Section 146 (1-B) — It cannot be set aside in revision. AIR 1963 Pat 243 (FB) held impliedly overruled by AIR 1966 SC 1888 — See Criminal P. C. (1898), S. 146 (1-B), (1-D) All 119 C (C N 12)

—S. 492 — Rules prescribing procedure for appointment of Public Prosecutor — Rule framed in exercise of power under Arts. 227 and 309 of Constitution — Contravention fatal to appointment — See High Court Rules and Orders — Madras High Court Criminal Rules of Practice and Circular Orders, 1958, R. 45

Mad 63 B (C N 19)

—S. 493 — Quo Warranto — Requisites for the issue of — Office of Public Prosecutor is a public Office — Importance of the office stated — See Constitution of India, Art. 226 Mad 63 A (C N 19)

—S. 540 — Provisions of sub-sections (4) and (9) of Section 145 and Section 540 — Interpretation — Provisions are mutually exclusive — See Criminal P. C. (1898), S. 145 (4) First Proviso (9)

J. & K. 21 (C N 6)

Customs Act (52 of 1962).

—S. 135 (2) — Imposition of penalty, besides confiscation of gold on a person by customs authority — Neither confiscation nor infliction of penalty amounts to prosecution contemplated in Art. 20 (2) — Prosecution of such person under Section 135 of Customs Act (1962) and R. 126 (p) (2) — Article 20 (2) not attracted — See Defence of India (Part XII-A Gold Control) Rules (1962), R. 126-L (16) (aa) Andh Pra 47 F (C N 7)

DEBT LAWS**—M. P. Money Lenders Act (13 of 1934)**

—S. 9 — Interest awarded in decree not exceeding principal — Aggregate of amounts paid from time to time exceeding the loan — No contravention of S. 9 SC 161 B (C N 37)

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Defence of India Act (51 of 1962)

—S. 3 (1)—Defence of India (Part XII-A, Gold Control) Rules (1962), R. 126-A — Rules are within rule-making power conferred by S. 3(1) — Burden of proving invalidity of Rules lies on person who challenges their validity Andh Pra 47 A (C N 7)

—S. 3 (2) — Scope — Sub-section does not confer any additional power — It is subject to limitation imposed by sub-section (1) Andh Pra 47 B (C N 7)

Defence of India (Part XII-A Gold Control) Rules (51 of 1962)

—R. 126-A — Rules are within rule-making power conferred by S. 3(1) — Burden of proving invalidity of Rules — Lies on person who challenges their validity — See Defence of India Act (1962), S. 3(1) Andh Pra 47 A (C N 7)

—Rr. 126-L (16) (aa), 126-M (20) (aa), 126-P (2) — Constitution of India, Art. 20 (2) — Imposition of penalty, besides confiscation of gold on a person by customs authority — Neither confiscation nor infliction of penalty amounts to prosecution contemplated in Art. 20(2) — Prosecution of such person under S. 135 of Customs Act (1962) and Rule 126-P(2) — Art. 20 (2) not attracted Andh Pra 47 F (C N 7)

—R. 126-M(20)(aa) — Imposition of penalty, besides confiscation of gold on a person by customs authority — Neither confiscation nor infliction of penalty amounts to prosecution contemplated in Art. 20(2) — See Defence of India, (Part XII-A Gold Control) Rules (1962), R. 126L (16) (aa) Andh Pra 47 F (C N 7)

—R. 126-P (2) and (4) — Person charged with offence under Rule 126(p)(2) — Cannot take recourse to Court during period of emergency, even if his rights

Defence of India (Part XII. A Gold Control) Rules (contd.)

under Art. 21 are infringed — See Constitution of India, Art. 21

Andh Pra 47 C (C N 7)

—Rule 126-P (2) — Constitution of India, Art. 14 — Rule 126-P (2) is not discriminatory and does not offend Art. 14 Andh Pra 47 E (C N 7)

—R. 126-P (2) — Imposition of penalty, besides confiscation of gold on a person by customs authority — Neither confiscation nor infliction of penalty amounts to prosecution contemplated in Art. 20(2) — See Defence of India (Part XIIA Gold Control) Rules (1962), R. 126-L(16) (aa) Andh Pra 47 F (C N 7)

—R. 126-P (4) read with R. 126-P (2) — Criminal P. C. (1898), Ss. 5, 260, 262 (2) — Summary trials — Sentence of imprisonment not exceeding three months under S. 262(2) — Applies only to offences under S. 260 and not to offences under any special enactment — Rule 126-P(2) cannot be questioned on that ground — Rule 126-P (4) prescribes procedure — Rule 126-P (2) read with R. 126-P(4) is not repugnant to Art. 13(2) of Constitution Andh Pra 47 D (C N 7)

Divorce Act (4 of 1869)

—S. 10 — Cruelty — See Hindu Marriage Act (1955), S. 10

—Ss. 10 and 17 — Husband's petition for dissolution of marriage — Grounds of wife's adultery and desertion — Both respondents remaining ex parte — Petitioner examining himself alone — No corroboration — His evidence held sufficient for relief sought for Mad 91 (C N 24) (SB)

—S. 17 — Husband's petition for dissolution of marriage — Grounds of wife's adultery and desertion — Both respondents remaining ex parte — Petitioner examining himself alone — No corroboration — His evidence held sufficient for relief sought for — See Divorce Act (1869), S. 10 Mad 91 (C N 24) (SB)

—S. 19(1) — Petitioner must prove that mental or physical condition of respondent from time of marriage till institution of proceedings was such as to make consummation of marriage impossible — See Hindu Marriage Act (1955), S. 12(1)(a) SC 137 A (C N 31)

—S. 22 — Cruelty — See Hindu Marriage Act (1955), S. 10

—S. 32 — See Hindu Marriage Act (1955), S. 9

Easements Act (5 of 1882)

—S. 52 — Lease or licence — It is to be decided on basis of real intention of the parties Raj 17 C (C N 3)

—S. 52 — Question whether defendant was licensee neither tried nor raised in Courts below — Question cannot be

Easements Act (contd.)

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Raj 17 D (C N 3)

East Punjab Urban Rent Restriction Act (3 of 1949)

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—S. 7(1)(a)(ii) — Rice (Eastern Zone) Movement Control Order (1959), S. 4 — Transport of rice from place in border area to place in Eastern Zone outside border area is not prohibited under S. 4 of 1959 Order — Transport — What is

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Estate Duty Act (34 of 1953)

—S. 10 — Deceased depositing certain sums in Bank in the name of minor son — Drawing interest accrued as guardian of donee and using it for his own purpose — Deposit amount "passes on death of the deceased donor." Ker 36 A (C N 8)

—S. 10 — "To the entire exclusion of the donor" — Deeds of gift of immoveable properties in favour of sons of donor — Donor taking power of attorney from major son and managing property pursuant thereto and as guardian of minor son and utilising income — Gifts, held, hit by S. 10 Ker 36 B (C N 8)

Evidence Act (1 of 1872)

—S. 3 — Husband's petition for dissolution of marriage — Grounds of wife's adultery and desertion — Both respondents remaining ex parte — Petitioner examining himself alone — No corroboration — His evidence held sufficient for relief sought for — See Divorce Act (1869), S. 10 Mad 91 (C N 24)

—S. 18 — Admission in written statement must be taken as a whole or not at all — See Civil P. C. (1908), O. 12, R. 1 Madh Pra 40 C (C N 13)

—S. 45 — Registration of trade-mark — Similarity with existing trade-mark — Registrar's opinion that there was no deceptive similarity between two marks — Having expert knowledge in the matter his opinion should not be disturbed lightly — Concurrent finding to the contrary of courts below is however binding in appeal under Art. 136 of Constitution — See Trade and Merchandise Marks Act (1958), S. 12(1) SC 146 (C N 34)

—S. 45 — See Evidence Act (1872), S. 73 Mad 85 C (C N 23)

—S. 47 — See Evidence Act (1872), S. 73 Mad 85 C (C N 23)

—Ss. 73, 45, 47 — Court cannot direct person to give specimen signature and handwriting pending investigation by Police — Nature and extent of Court's power in such matter explained — Sine qua non of applying S. 73 is enquiry before Court — AIR 1962 Pat 255 Dissented from. Mad 85 C (C N 23)

Evidence Act (contd.)

—S. 73 — "Any person" — Interpretation of — Those words refer to persons who are parties to "cause" pending before Court Mad 85 D (C N 23)

—S. 73 — Exercise of powers under — Stage for — Warrant for arrest of accused issued under Ss. 60 to 63, Criminal P. C. — Power is not one exercised in course of enquiry or trial — Power under S. 73, Evidence Act could not be exercised. AIR 1962 Pat 255 (FB), Dissented from

Mad 85 E (C N 23)

—Ss. 93 and 98 — Meaning of particular word used in document — Extrinsic evidence admissible to show that it was used in a peculiar sense

Raj 36 C (C N 7)

—S. 98 — Meaning of particular word used in document — Extrinsic evidence as to — Admissibility — See Evidence Act (1872), S. 93 Raj 36 C (C N 7)

—Ss. 101 to 104 — Concurrent finding of two Courts below — Finding is binding in appeal under Art. 136 — Onus is upon appellant to prove that finding is erroneous — See Trade and Merchandise Marks Act (1958), S. 12(1)

SC 146 B (C N 34)

—Ss. 101-104 — Appropriation — Normally payment is towards interest — Debtor must show agreement that payment would be appropriated towards principal — See Civil P. C. (1908), O. 21, R. 1

SC 161 A (C N 37)

—Ss. 101-104 — Defence of India (Part XII-A Gold Control) Rules (1962), are within rule making power conferred by S. 3(1) — Burden of proving invalidity of Rules — Lies on person who challenges their validity — See Defence of India Act (1962), S. 3(1)

Andh Pra 47 A (C N 7)

—Ss. 101-104 — Onus is on the person alleging fraud or mala fides — See Land Acquisition Act (1894), S. 4

Cal 90 D (C N 12)

—S. 105 — Accused relying upon exception 9 of S. 499 I. P. C. — Therefore it is for him to prove that his case falls under that exception — See Penal Code (1860), S. 499, Excep. 9

Mys 34 B (C N 7)

—S. 114 — Presumption as to duration of tenancy — See T. P. Act (1882), S. 106

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—S. 114(e) — Scope — Prevention of Food Adulteration Act (1954), S. 13(5) — Presumption under S. 114(e) of Evidence Act applies to report of Public Analyst — It is rebuttable — No evidence of requirements of Rr. 7 and 18 of Prevention of Food Adulteration Rules (1955), being duly complied with — Report of Public Analyst is not rendered inadmissible — Cr. A. No. 180 of 1966, D/- 25-8-1966 (MP) & 1967 Cri LJ 1723 (MP) Overruled; AIR 1964 Guj 136 & AIR 1966 Mys 244

Evidence Act (contd.)

& AIR 1967 Raj 237 & AIR 1968 Mys 196 Dissented from

Madh Pra 29 (C N 8) (FB)

—S. 115 — Objection to jurisdiction — Waiver — Wife's petition under Sections 10 and 13 of Hindu Marriage Act — Ex parte decree passed — That decree set aside in appeal and case remanded — Husband before trial Court contesting petition on merits — Objection as to territorial jurisdiction of Court also raised — Such objection not raised in appeal against ex parte decree — Husband neither waived such objection nor submitted to jurisdiction of Court — (Hindu Marriage Act (1955), Ss. 10, 13 and 19) — (Civil P. C. (1908), S. 21)

J. & K. 19 (C N 5)

—S. 115 — Estoppel against statute — Exceptions to the bar of, stated — Fixation of fair rent by consent of parties — Second application for the same relief, is, barred — Previous order operates as estoppel by conduct — Plea that estoppel could not lie against a statute, held, would not apply — See Houses and Rents — Jammu and Kashmir Houses and Shops Rent Control Act (14 of 2009), S. 8

J. & K. 26 (C N 7)

—S. 115 — Plea of estoppel — It must be proved that a party suffered detriment by acting upon representation of other party

Ker 21 D (C N 5) (FB)

—S. 115 — No estoppel on a point involving mixed question of law and fact

Raj 36 D (C N 7)

—S. 115 — Share certificate — Nominal or face value of shares not conclusive — Company not estopped from showing that consideration for issue of shares had failed or that the transaction of particular shares had become illusory or inoperative — See Companies Act (1956), S. 84

Raj 36 F (C N 7)

—S. 120 — Petition for nullity of marriage by wife on ground of husband's incapacity — Evidence of wife alone if reliable, can be accepted, without corroboration — See Hindu Marriage Act (1955), S. 12(1)(a)

Guj 43 (C N 7)

—S. 120 — Husband's petition for dissolution of marriage — Grounds of wife's adultery and desertion — Both respondents remaining ex parte — Petitioner examining himself alone — No corroboration — His evidence held sufficient for relief sought for — See Divorce Act (1869), S. 10

Mad 91 (C N 24)

—Ss. 126, 146 and 149 — Scope — Privilege under S. 126 is not absolute — Defamatory questions put by lawyer to a witness in cross-examination on client's instructions — No reasonable basis available for putting them — Such communication is not professional — Its disclosure

Evidence Act (contd.)

is not protected under S. 126 — Witness, on instructions of client, asked in cross-examination whether he was doing opium smuggling business, whether he was involved in opium smuggling case in a particular year, whether he was doing cloth smuggling trade and whether he came away from Rajasthan to Bangalore because of a warrant against him — Imputation conveyed by those questions is per se defamatory — Hence client is liable under S. 500 Penal Code. 1935 MWN 460, Dissented from — (Penal Code (1860), S. 499 Exception 9 — Judicial proceedings — Privilege of witnesses).

Mys 34 A (C N 7)

—S. 134 — Wife's petition for nullity of marriage on ground of husband's incapacity — Testimony only of wife available — Corroboration not essential, if evidence is reliable — Standard of proof required — See Hindu Marriage Act (1955), S. 12(1)(a)

Guj 43 (C N 7)

—S. 134 — Husband's petition for dissolution of marriage — Grounds of wife's adultery and desertion — Both respondents remaining ex parte — Petitioner examining himself alone — No corroboration — His evidence held sufficient for relief sought for — See Divorce Act (1869), S. 10

Mad 91 (C N 24)

—S. 146 — Defamatory questions put by lawyer to a witness in cross-examination on client's instructions — No reasonable basis available for putting them — Such communication is not professional — Its disclosure is not protected under S. 126 — Imputation conveyed by those questions held per se defamatory — Hence client is liable under S. 500 Penal Code — See Evidence Act (1872), S. 126

Mys 34 A (C N 7)

—S. 149 — Defamatory questions put by lawyer to a witness in cross-examination on client's instructions — No reasonable basis available for putting them — Imputation conveyed by those questions is per se defamatory — Hence client is liable under S. 500 Penal Code — See Evidence Act (1872), S. 126

Mys 34 A (C N 7)

Fundamental Rules

See under Civil Services.

General Clauses Act (10 of 1897)

—S. 3 (36) — 'Movable property' — Includes electricity — See City Calcutta Civil Court Act (21 of 1953), Sch. 1, Cl. 4 (iv)

Cal 75 (C N 8)

—S. 26 — Prohibition under, is against punishment twice for same offence — Simultaneous prosecution under more than one enactment is not barred — Choice of enactment or enactments for

General Clauses Act (contd.)

prosecution is with prosecutor or authority concerned

Andh Pra 47 G (C N 7)

Goa, Daman and Diu Civil Courts Act (16 of 1965)

—S. 22 — Suits instituted under Portuguese Civil Procedure Code — Remedy of appeal and Limitation governed by that code only — Extension of Indian Civil Procedure Code to the Union territory during pendency of suits notwithstanding — Change of names of courts under S. 35 did not put an end to Portuguese courts — S. 22 has no application to appeals against suits filed under Portuguese Code — Limitation Act (1963) S. 29(2) and Sch. 1, Art. 116 — Appeal time — Period applies to appeals under Indian Civil Procedure Code and not to those under Portuguese Civil Procedure Code — S. 29(2) does not repeal provisions under the Portuguese Code — Repeal of Portuguese Code did not affect rights and remedies accrued — See Goa, Daman and Diu Civil Courts Act (1965) S. 35

Goa 28 (C N 5)

—Ss. 35 and 22 — Suits instituted under Portuguese Civil Procedure Code — Remedy of appeal and limitation governed by that Code only — Extension of Indian Civil Procedure Code to the Union Territory during pendency of suits, notwithstanding change of names of Courts under S. 35 did not put an end to Portuguese Courts — S. 22 has no application to appeals against suits filed under Portuguese Code

Goa 28 (C N 5)

Goa Daman Diu (Extension of Code of Civil Procedure and Arbitration) Act (30 of 1965)

—S. 4 — Suits instituted under Portuguese Civil Procedure Code — Remedy of appeal and Limitation governed by that code only — Extension of Indian Civil Procedure Code to the Union territory during pendency of suits, notwithstanding — See Goa, Daman and Diu Civil Courts Act (1965), S. 35

Goa 28 (C N 5)

Government Land Assignment Regulation (3 of 1971 ME)

—S. 7(1), Cl. (f), Rr. 26A and 26B — Grant of land — Rights of grantee — Government in 1099 ME holding that on payment of timber value of reserved trees at flat rate of Rs. 35 per acre of wooded area grantee would acquire full rights to reserved trees — Payment of instalments to be made within four years from date of decision and consequential notification — Paragraph in notification not specifying point of time from which instalment payment should commence as regards grantee before 1099 — Grantee, held could not choose his own time for paying instal-

Government Land Assignment, Regulation (contd.)

ments and payments made in 1964 were invalid O. P. No. 337 of 1957 (Ker) and A. S. No. 550 of 1962 (Ker) Overruled.

Ker 21 A (C N 5) (FB)

—S. 7 (1) (f) — "Kuttikanom" — It is neither fee nor tax — It is Government's share of value of reserved trees — It can vary with market value of timber.

Ker 21 C (C N 5) (FB)

—R. 26A — Govt. in 1099 ME holding that on payment of timber value of reserved trees at flat rate of Rs. 35 per acre of wooded area, grantee would acquire full rights to reserved trees — Payment of instalments to be made within four years from date of decision and consequential notification — Paragraph in notification not specifying point of time from which instalment payment should commence — Grantee, held, could not choose his own time — Payments made in 1964 were invalid — See Government Land Assignment Regulation (3 of 1971 ME), S. 7(1), Cl. (f)

Ker 21 A (C N 5) (FB)

—R. 26B — Govt. in 1099 ME holding that on payment of timber value of reserved trees at flat rate of Rs. 35 per acre of wooded area, grantee would acquire full rights to reserved trees — Payment of instalments to be made within four years from date of decision and consequential notification — Paragraph in notification not specifying point of time from which instalment payment should commence — Grantee, held, could not choose his own time — Payments made in 1964 were invalid — See Government Land Assignment Regulation (3 of 1971 ME), S. 7(1), Cl. (f)

Ker 21 A (C N 5) (FB)

Government of India Act (1935) (26 Geo V and 1 Edw VIII, C 2)

—S. 299(2) — Constitution of India, Art. 366(10), 31(5) & (6), 31-A, 31-B and Sch. IX — Provision in a Pre-Constitution Act void ab initio is not 'existing law' — Provision does not attract Art. 31(5) or 31-A, inclusion of the Act (Resettlement of Displaced Persons (Land Acquisition) Act, (1948), in Sch. IX of Constitution notwithstanding (Resettlement of Displaced Persons (Land Acquisition) Act (1948), S. 7(1)(e) Provisos — Provisos ultra vires S. 299(2) of the Government of India Act, 1935 — Hence ignored — Provisos not 'existing law' under Art. 366(10) of Constitution — See Constitution of India, Art. 366(10)

Delhi 44 (C N 8)

Guardians and Wards Act (3 of 1890)

—S. 4(2) — Guardian — Meaning of — It means all kinds of guardians whether testamentary, certificated, natural or even

Guardians and Wards Act (contd.)

de facto — See Guardians and Wards Act (1890), S. 25 Mad 92 A (C N 25)

—S. 4(2) — Illegitimate child — There is no authority to hold that under English law mother of illegitimate child is natural guardian of the child — See Guardians and Wards Act (1890), S. 25

Mad 92 B (C N 25)

—S. 7 — Scope — Declaration is merely recognition of pre-existing right — Declaration as to guardianship — When can be made Mad 92 C (C N 25)

—Ss. 7 and 25 — Appointment of guardian — Petitioner a permanent resident of England — Held, she could not be appointed as guardian of minor so as to enable her to obtain custody of minor under S. 25; AIR 1937 Lah 797 & AIR 1942 Lah 162 & AIR 1933 All 780 & AIR 1937 Bom 158, **Not Foll** — Held further on facts that the case did not constitute an exception to aforesaid rule

Mad 92 D (C N 25)

—Ss. 25 and 4(2) — Guardian — Meaning of — It means all kinds of guardians whether testamentary, certificated, natural or even de facto

Mad 92 A (C N 25)

—Ss. 25 and 4(2) — Illegitimate child — There is no authority to hold that under English law mother of illegitimate child is natural guardian of the child

Mad 92 B (C N 25)

—S. 25 — Guardians and Wards Act (1890), Ss. 7 and 25 — Appointment of guardian — Petitioner a permanent resident of England — Held, she could not be appointed as guardian of minor so as to enable her to obtain custody of minor under S. 25 — See Guardians and Wards Act (1890), S. 7 Mad 92 D (C N 25)

Gujarat Imposition of Taxes by Municipalities (Validation) Act 1963 (2 of 1964)
See under Municipalities.

Gujarat Municipalities Act (34 of 1964)
See under Municipalities

HIGH COURT RULES AND ORDERS

—**Madras High Court Criminal Rules of Practice and Circular Orders, 1958**

—R. 45 — Rule valid and mandatory — Rules framed in exercise of power under Articles 227 and 309 of Constitution — Contravention fatal to appointment — On facts, held, Government had appointed a person as public prosecutor not nominated by the Collector — Order of appointment quashed — Mandamus to act upon nomination sent by collector and appoint writ petitioner accordingly refused — Government is not bound to accept nomination sent by Collector — Order in W. P. No. 436 of 1968 (Mad) by Kailasam J. Reversed on facts

Mad 63 B (C N 19)

—R. 45 and Standing Orders of the Government relating to appointment of

High Court Rules and Orders — Madras High Court Criminal Rules of Practice and Circular Orders (contd.)

Law Officers in the mofussil — Standing Orders have no statutory force — Government can relax them in suitable cases

Mad 63 D (C N 19)

—R. 45 — Object of the Rule

Mad 63 E (C N 19)

Hindu Adoptions and Maintenance Act (78 of 1956)

—S. 18 — Hindu woman's right to maintenance and in particular from stepson — See Hindu Law — Maintenance

Andh Pra 33 A (C N 4)

—S. 18(2) — Right to live separately from husband under — Is not same as a right of judicial separation under S. 10(2) of Hindu Marriage Act (1955) — See Hindu Marriage Act (1955), S. 10

All 102 (C N 9)

—S. 21 — Hindu Woman's right to maintenance and in particular from stepson — See Hindu Law—Maintenance

Andh Pra 33 A (C N 4)

—S. 22 — Hindu Woman's right to maintenance and in particular from stepson — See Hindu Law — Maintenance

Hindu Law

—Debt — Joint family property — Surety bond creating personal liability on father to pay third person's debt — Debt neither illegal nor immoral — Joint family estate in hands of sons held liable for payment of same in view of pious obligation of sons to pay father's debt

Punj 67 (C N 11) (FB)

—Joint family — Manager — Widow — Widow cannot be a karta of a joint family. AIR 1947 Nag 178 held **Overruled** by AIR 1966 SC 24 and no longer good law

Orissa 32 B (C N 14)

—Maintenance — Hindu woman's right to maintenance and in particular from stepson

Andh Pra 33 A (C N 4)

—Maintenance — Charge created by decree for maintenance obtained by wife of manager of joint Hindu family over joint family property — Charge is binding on her stepson subsequent to partition of joint family property. AIR 1944 Bom 235 (2) **Dissent from**

Andh Pra 33 B (C N 4)

—Representation of estate — Principle — Mother representing minor's estate — Mother impleaded in action but not minor — Principle, held, applied — See Civil P. C. (1908), O. 22, R. 4

Orissa 32 A (C N 14)

Hindu Marriage Act (25 of 1955)

—S. 9 — Reasonable excuse — Meaning of — Even those excuses which do not strictly fall under S. 9(2) can be considered as reasonable excuses — If husband is not guilty of misconduct, his

Hindu Marriage Act (contd.)

petition cannot be dismissed merely because wife does not like to stay with him
Madh Pra 36 C (C N 11)

—S. 9 — Husband's petition for restitution of conjugal rights — Defence of maltreatment on part of husband — Burden is on respondent — Wife to prove it
Madh Pra 36 D (C N 11)

—S. 10 — Scope — Desertion — Meaning of — There must be determination to put an end to marital relations and to put an end to cohabitation permanently — Remarriage of husband by itself, cannot afford reasonable cause for desertion. AIR 1959 Andh Pra 547 (FB) & AIR 1963 Andh Pra 323 & AIR 1965 Mys 299, Dissent. from. All 102 (C N 9)

—S. 10 — Ex parte decree, passed in petition filed by wife under S. 10, set aside in appeal by husband and case remanded — Husband contesting petition on merits before trial Court — Raising objection as to territorial jurisdiction — Omission to raise such objection in appeal — Effect — See Evidence Act (1872), S. 115 J. & K. 19 (C N 5)

—S. 10(1)(b) — Cruelty — Husband's petition for restitution of conjugal rights — Defence of cruelty — Husband, on certain occasions, persuading his wife to accompany him and even pressing her for the same — This conduct on the husband's part giving rise to unpleasantness because wife was unwilling to go with him — Held, such conduct on husband's part was perfectly justified and could, by no stretch of imagination, be treated as cruelty
Madh Pra 36 A (C N 11)

—S. 12 (1) (a) — Petitioner must prove that mental or physical condition of respondent from time of marriage till institution of proceedings was such as to make consummation of marriage a practical impossibility
SC 137 A (C N 31)

—S. 12(1)(a) — Finding by two lower courts that petitioner's case about respondent's impotency could not be believed and that respondent's evidence that she had always been ready and willing to allow her husband to consummate marriage should be believed — Supreme Court refused to interfere and annul the marriage under S. 12(1)(a) — See Constitution of India, Art. 136
SC 137 B (C N 31)

—S. 12(1)(a) — Wife's petition for nullity on ground of husband's incapacity — Evidence of impotency — Testimony of only petitioner available — Corroboration not essential, if evidence is reliable and there is no collusion — Impotency can be due to psychological inhibition or physical incapacity — However standard of proof required is not different in either case — Wife's evidence must be tested in the light of probabilities and conduct of parties — Husband and wife

Hindu Marriage Act (contd.)

not alleged to be on bad terms — Wife waiting for seven years since marriage before making such petition — Husband not contesting — All these indicate truth of wife's allegation — Evidence of wife should held be accepted and marriage annulled
Guj 43 (C N 7)

—S. 13 — Ex parte decree, passed in petition filed by wife under Ss. 10 and 13, set aside in appeal by husband and case remanded — Husband contesting petition on merits before trial Court — Raising objection as to territorial jurisdiction — Failure to raise such objection in appeal — Effect — See Evidence Act (1872), S. 115 J. & K. 19 (C N 5)

—S. 19 — Failure to raise an objection to the jurisdiction does not turn the Court into a legally constituted one if otherwise it does not possess the requisite jurisdiction — See Evidence Act (1872), S. 115 J. & K. 19 (C N 5)

—S. 23 (1)(d) — Delay — In order to disentitle petitioner to relief on ground of delay it has to be shown that delay was both unnecessary and improper — Conduct of parties must be taken into account to see if delay was really culpable
Madh Pra 36 B (C N 11)

HOUSES AND RENTS

—Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947)

—S. 11—Small cause court at Ahmedabad exercising jurisdiction under Bombay Act — Can issue distress warrant under S. 53, Presidency Small Cause Courts Act read with R. 5 — See Houses and Rents—Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947) S. 28 SC 102 (C N 23)

—Ss. 28, 11, 49(2)(iii) — Bombay Rents, Hotel and Lodging House Rates (Control) Rules (1948), Chap. IV, Rules 5, 6 — Small Cause Court, at Ahmedabad exercising jurisdiction in the matter of fixation of standard rent, under Bombay Act — Municipal taxes payable by tenant due and deposited into Court by order of Court — Landlord not to withdraw — Distress warrant in respect of taxes can be issued on application by landlord under S. 53, Presidency Small Cause Courts Act SC 102 (C N 23)

—S. 49 (2) (iii) — Small Cause Court at Ahmedabad exercising jurisdiction under Bombay Act — Can issue distress warrant under S. 53 Presidency Small Causes Courts Act read with R. 5. — See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947), S. 28
SC 102 (C N 23)

—Bombay Rents, Hotel & Lodging House Rates (Control) Rules (1948)

—Ch. IV Rule 5 — Small Cause Court at Ahmedabad exercising jurisdiction

Houses and Rents—Bombay Rents, Hotel and Lodging House Rates (Control) Rules (contd.)

under Bombay Act — Can issue distress warrant under S. 53, Presidency Small Cause Courts Act read with R. 5 — See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947), S. 28 SC 102 (C N 23) — Ch. IV Rule 6 — Small Cause Court at Ahmedabad exercising jurisdiction under Bombay Act — Can issue distress warrant under S. 53, Presidency Small Cause Courts Act — See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1957), S. 28 SC 102 (C N 23)

—East Punjab Urban Rent Restriction Act (3 of 1949)

—S. 13 — Evacuee property forming part of compensation pool and exempt from operation of Act — Sub-letting by tenant during such period — Purchaser of property can evict the tenant by an application under S. 13 notwithstanding that the property when sublet was exempt from operation of the Act. Civil Revn. No. 675 of 1963, D/- 13-11-1964 (Punj) & Civil Revn. No. 222 of 1964, D/- 21-5-1965 (Punj) & Civil Revn. No. 295 of 1965, D/- 21-5-1965 (Punj) & Civil Revn. No. 321 of 1965, D/- 17-12-1965 (Punj) Overruled. Punj 60 A (C N 9) (FB)

—S. 13 — Eviction on ground of sub-letting—Tenant of a house subletting premises without permission of landlord — Rent Control Act prohibiting such sub-letting coming into force later — Tenant can be evicted notwithstanding the fact that the Act prohibiting such sub-letting was not in force when the premises were sub-let. — See Transfer of Property Act (1882), S. 108 (J)

Punj 60 B (C N 9) (FB)

—Jammu and Kashmir Houses and Shops Rent Control Act (14 of 2009)

—S. 8 — Fixation of fair rent by consent of parties — Second application for the same relief is barred — Previous order operates as estoppel by conduct — Plea that estoppel could not lie against a statute is not available — Principles as to availability of plea of estoppel against statute, stated. AIR 1956 Punj 95, Dissented from — (Evidence Act (1872), Sec. 115 Estoppel against statute — Exceptions to the bar of, stated).

J. & K. 26 (C N 7) (FB)

— Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950, as amended by Act 12 of 1965)

—Section 13A — "Appeal" — Meaning — Tenants filing appeal or revision against eviction decree — Other conditions under S. 13A (d) fulfilled — Clause (d) covers even such tenants — Application for leave to appeal is not "appeal" within the meaning of Cl. (d) — Tenants applying

Houses and Rents — Rajasthan Premises (Control of Rent and Eviction) Act (contd.)

for leave to appeal to Division Bench and also for special leave to appeal to Supreme Court under Art. 136, Constitution — Tenants yet entitled to apply under Section 13A (d).

Raj 26 (C N 5)

— U. P. Temporary Control of Rent and Eviction Act (3 of 1947)

—S. 3 — Commissioner's order under Section 3 effective on the date of filing of suit — Cancellation by State Government subsequent to filing of suit—Suit is maintainable — Jurisdiction of Civil Court—AIR 1965 All 498(FB) Held overruled by (1968) All WR (HC) 713 (SC).

All 125 A (C N 14)

—S. 3 — Act attaches finality to the order of Commissioner — See Civil Procedure Code (5 of 1908), S. 9

All 125 C (C N 14)

—Section 3 (3) — Commissioner in hearing revision entitled to take into consideration subsequent events either of facts or law which are germane to the existence of power of revision — He can act on compromise. (1968) 22 STC 26 (All) Dissented from.

All 125 D (C N 14)

—Section 16 — Finality to Commissioner's order is attached by Section 3 (4) and not Section 16 — Provisions do not affect orders of Commissioner—Civil Court competent to adjudicate such orders.

All 125 B (C N 14)

Hyderabad Tenancy and Agricultural Lands Act (21 of 1950 as amended by Act 3 of 1954)

See under Tenancy Laws.

Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and Further Amendment) Act (Maharashtra Act 45 of 1961)

See under Tenancy Laws.

Identification of Prisoners Act (33 of 1920)

—S. 5 — Contrast between the section and Section 73, Evidence Act — See Evidence Act (1872), S. 73

Mad 85 C (C N 23)

Income-tax Act (11 of 1922)

—S. 46 (5-A) — Suit by firm for refund of excess custom duty recovered by Collector — Decree against Union of India — Notice under Section requiring Collector to pay decretal amount to Income-tax Authorities for Income-tax and penalty due on firm — Notice to Collector held legal—See Civil P. C. (1908), O. 21, R. 2 SC 118 (C N 27)

Indian Forest Service (Initial Recruitment) Regulations (1966)

See under Civil Services.

Indian Forest Service (Recruitment) Rules (1966)

See under Civil Services.

Indore Stamp Act (2 of 1907)

See under Stamp Duty.

Industrial Disputes Act (14 of 1947)

—S. 2 (a) — Industry carried on by a corporation incorporated under Companies Act and not directly by Central Government or any of its departments — Industry is not one carried by Central Government though all the shares are owned by President of India and some officials — (Point conceded) SC 82 A (C N 19)

—Ss. 2 (a), 2 (g) and 10 — "Under the authority of" — Meaning of — Corporation incorporated under Companies Act — When an agent of the State — Undertaking carried by Heavy Engineering Corporation Ltd., though controlled wholly or partially by Government department not an industry carried on under the authority of Central Government

SC 82 B (C N 19)

—S. 2 (a) — Under Authority of Central Government — Company incorporated under Companies Act — Is an entity distinct from its share-holders — Shares owned by President of India and some officials — Does not make the company an agent of Central Government — See Companies Act (1956), S. 34 (2)

SC 82 D (C N 19)

—S. 2 (g) — "Under the authority of" — Undertaking carried by Heavy Engineering Corporation Ltd. though controlled wholly or partially by Government department not an industry carried on under the authority of Central Government — See Industrial Disputes Act (1947), S. 2 (a)

SC 82 B (C N 19)

—S. 2-A (as inserted by Amendment Act 35 of 1965) — Constitution of India, Articles 245, 246; Sch. 7, List 3, Entry 22 and List 1, Entry 97 — Validity of Sec. 2-A — By amendment a dispute between single workman and management is deemed to be an industrial dispute — Competence of Parliament to legislate on individual dispute — Interpretation of Entry 22

Mad 82 A (C N 22)

—S. 2-A — Reference under S. 10 (1) (c) competent after introduction of Section 2-A — Legality of such reference cannot be questioned — See Constitution of India, Art. 226 Mad 82 C (C N 22)

—S. 10 — Dispute concerning industry carried on by Heavy Engineering Corporation Ltd. — State Government and not Central Government is appropriate Government to make reference — See Industrial Disputes Act (1947), S. 2 (a)

SC 82 B (C N 19)

—S. 10 — Question referred to Industrial Tribunal regulated by company's standing orders — Application for modifying standing order actually pending before the certifying officer under the

Industrial Disputes Act (contd.)

Industrial Employees (Standing Orders) Act, 1946 — Reference under S. 10 not precluded and is valid SC 82 C (C N 19)
—S. 10 (1) (c) — Reference — Government can make a reference even if it had declined to make a reference earlier

Mad 82 B (C N 22)

—S. 10 (1) (c) — See Constitution of India, Art. 226 Mad 82 C (C N 22)

—S. 10 (1) (c) — Notification referring to report of Labour Officer as conciliation report — Such error would not vitiate order of reference — See Constitution of India, Art. 226 Mad 82 D (C N 22)

—S. 33-C (2) — Application under — Article 137 of Limitation Act, 1963, is not applicable — No limitation is prescribed for such application SC 196 B (C N 43)

—Sch. 3, Item 1 — Sastry Award (Bank Award) — Para 164 (b) (9) — Desai Award, Paras 5, 218, 221, 231, 288, 289 — Supervisory special allowance — When can be claimed SC 196 E (C N 43)

—Sch. 3, Items 2, 5 — Payment of minimum wages by Electricity Board to its employees — Demand for fair or living wage — Grant of, depends on capacity of employer to meet expenditure — Capacity to pay — Factors to be considered

SC 87 (C N 20)

—Sch. 3, Item 5 — Payment of minimum wages by Electricity Board to its employees — Demand for fair or living wages — Grant of, depends on capacity of employer to meet expenditure — See Industrial Disputes Act (1947), Sch. 3, Item 2

SC 87 (C N 20)

Interpretation of Statutes

See Constitution of India, Preamble.

—Mandatory provision — Determination — See Rajasthan Armed Constabulary Act (12 of 1950), S. 6 (e)

Raj 32 (C N 6)

Jammu and Kashmir Houses and Shops Rent Control Act (14 of 2009)

See under Houses and Rents.

Jammu and Kashmir Village Panchayat Act (23 of 1958)

See under Panchayats.

Kerala Civil Courts Act (1 of 1957)

—S. 12 — All appeal from decisions of Subordinate Judge in land acquisition proceeding lie to High Court irrespective of value of subject-matter — See Land Acquisition Act (1894), S. 54

Ker 30 A (C N 7) (FB)

—S. 13 — All appeal from decisions of Subordinate Judge in land acquisition proceeding lie to High Court irrespective of value of subject-matter — Proceeding under Land Acquisition Act is not suit within S. 13 — See Land Acquisition Act (1894), S. 54 Ker 30 A (C N 7) (FB)

Kerala Land Acquisition Act (21 of 1962)

—S. 20 — Decision of Subordinate Judge in Land Acquisition proceedings — Ap-

Kerala Land Acquisition Act (contd.)

peal lies to High Court irrespective of value of subject-matter and even if decision is under Section 18 or Section 30 of Land Acquisition Act — See Land Acquisition Act (1894), S. 54

Ker 30 A (C N 7) (FB)

—S. 32 — Decision of Subordinate Judge in Land Acquisition Proceedings — Appeal lies to High Court irrespective of value of subject-matter and even if decision is under Section 18 or Section 30 of Land Acquisition Act — See Land Acquisition Act (1894), S. 54

Ker 30 A (C N 7) (FB)

—S. 60 — Provision is not *pari materia* with any of the provisions of Land Acquisition Act — See Land Acquisition Act (1894), S. 54

Ker 30 A (C N 7) (FB)

Land Acquisition Act (1 of 1894)

—S. 3 (d) — Dispute as to apportionment of compensation — District Court referring dispute to Civil Judge (S. D.) under Section 3 (d) — By reason of transfer of dispute, Civil Judge (S. D.) does not become principal Court such as District Court so that its decision would become appealable only to High Court — See Land Acquisition Act (1894), S. 54

Guj 37 A (C N 6)

—Ss. 4, 6 and 40 — 'Company Provisions', when not applicable, though acquisition is for a company

Cal 90 B (C N 12)

—Ss. 4 and 6 — "Public purpose" — Government declaring that the payment would be made "in due course on finalisation" — Lack of intention to pay on the part of Government, held, not inferable — Further contribution not required to be made prior to proceedings under Sections 4 and 6

Cal 90 C (C N 12)

—Ss. 4 and 6 — 'Public purpose' — Token contribution by Government — Itself no ground to hold the exercise of power is colourable or mala fide — Existence of additional circumstances necessary to hold so — Onus on the person alleging fraud or mala fides

Cal 90 D (C N 12)

—S. 4 — Public Purpose — Declaration need not recite the precise purposes — Enough, if from the evidence a public purpose can be discerned — See Land Acquisition Act (1894), S. 6

Cal 90 G (C N 12)

—Ss. 4 and 6 — Quarters for members of staff of educational institution, if a public purpose

Cal 90 H (C N 12)

—Ss. 4 and 6 — Notification under, composite, mentioning both public and non-public purposes — Parcels of land not demarcated — Notification fails

Cal 90 I (C N 12)

—Ss. 4 and 6 — Attempt to purchase by private treaty — No condition precedent to acquisition under the Act

Cal 90 J (C N 12)

Land Acquisition Act (contd.)

—Ss. 4 and 6 — 'Public purpose' — Presence of — Fact that proceeding was at instance of an individual or benefits him, no criteria

Cal 90 K (C N 12)

—S. 5-A — Lands fit for habitation after putting up buildings, not waste lands — Treating them to be so and applying Section 17 (4), held invalid — Such procedure denied an inquiry under Section 5-A — See Land Acquisition Act (1894), S. 17 (1) and (4)

Cal 90 M (C N 12)

—S. 5-A — Government to apply its mind as to existence of urgency if inquiry under S. 5-A is to be dispensed with — See Land Acquisition Act (1894), S. 17 (1)(4)

Cal 90 N (C N 12)

—S. 6 (3) — 'Public purpose' — Declaration under S. 6, is conclusive — Validity of proceedings can still be challenged — Grounds stated

Cal 90 A (C N 12)

—S. 6 — Company Provisions, when not applicable, though acquisition is for a company — See Land Acquisition Act (1894), S. 4

Cal 90 B (C N 12)

—S. 6 — Public Purpose — Govt. declaring that the payment would be made in due course on finalisation — Lack of intention to pay on the part of Government, held not inferable — Further, contribution not required to be made prior to proceedings under Ss. 4 and 6 — See Land Acquisition Act (1894), S. 4

Cal 90 C (C N 12)

—S. 6 — Public purpose — Token contribution by Government — Itself no ground to hold the exercise of power is colourable or mala fide — See Land Acquisition Act (1894), S. 4

Cal 90 D (C N 12)

—S. 6 — Requisites needed for the declaration under — Facts that the institution for which the acquisition was made was not popular, held, could not be canvassed — It was a matter for the Government to consider

Cal 90 E (C N 12)

—S. 6 — 'Public purpose' — Need for — Government to apply its mind to see if it exists — Declaration using the word 'etc', after mentioning some purposes — Use of 'etc'. deplored

Cal 90 F (C N 12)

—Ss. 6 and 4 — "Public purpose" — Declaration need not recite the precise purposes — Enough, if from the evidence a public purpose can be discerned

Cal 90 G (C N 12)

—S. 6 — Quarters for members of staff of educational institution if a public purpose — See Land Acquisition Act (1894), S. 4

Cal 90 H (C N 12)

—S. 6 — Notification under composite, mentioning both public and non-public purposes — Parcels of land not demarcated — Notification fails — See Land Acquisition Act (1894), S. 4

Cal 90 I (C N 12)

—S. 6 — Attempt to purchase by private treaty — No condition precedent to

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acquisition under the Act — See Land Acquisition Act (1894), S. 4

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—S. 6 — Public Purpose — Presence of — Fact that proceeding was at instance of an individual or benefits him, no criteria — See Land Acquisition Act (1894), S. 4 Cal 90 K (C N 12)

—S. 6—Waste land—Lands fit for habitation after putting up buildings, not waste lands — Treating them to be so and applying S. 17(4), held invalid — See Land Acquisition Act (1894), S. 17(1) and (4) Cal 90 M (C N 12)

—S. 6 — Declaration under — Sufficiency of grounds for urgency not justiciable — Interference for Government's failure to apply its mind is, however, possible — See Land Acquisition Act (1894), S. 17(1) (4) Cal 90 N (C N 12)

—S. 11 — Collector reserving question as to which among several claimants is entitled to compensation for decision of Court — Deposit of amount of compensation in Court — Proceeding in Court is no different from an interpleader suit — See Land Acquisition Act (1894), S. 54

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—S. 18 — Decision of Subordinate Judge in land acquisition proceeding — Appeal lies to High Court irrespective of value of subject-matter even if decision is on reference under S. 18. 1965 Ker. L. T. 616, Partly overruled — See Land Acquisition Act (1894), S. 54

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—S. 26 — Dispute as to apportionment of compensation — District Court referring dispute to Civil Judge (S.D.) under S. 3 (d) — Since decision of Civil Judge (S.D.) does not fall under part III of Act of 1894, it cannot be called award and hence is not appealable under S. 54 — See Land Acquisition Act (1894), S. 54

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—S. 26(2) — Decision of Subordinate Judge in land acquisition proceedings — Appeal lies to High Court irrespective of value of subject-matter — See Land Acquisition Act (1894), S. 54

Ker 30 A (C N 7) (FB)
—S. 30 — Dispute as to apportionment of compensation — District Court referring dispute to Civil Judge (S.D.) under S. 3(d) — Since decision of Civil Judge

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(S.D.) does not fall under Part III of Act of 1894, it cannot be called award and hence is not appealable under S. 54 — It amounts to decree and is applicable under S. 96 — See Land Acquisition Act (1894), S. 54 Guj 37 A (C N 6)

—S. 30—Decision of Subordinate Judge in land acquisition proceeding — Appeal lies to High Court irrespective of value of subject-matter, even if decision is one under S. 30. 1965 Ker. L. T. 616, Partly overruled — See Land Acquisition Act (1894), S. 54 Ker 30 A (C N 7) (FB)

—S. 40 — Company Provisions, when not applicable, though acquisition is for a company — See Land Acquisition Act (1894), S. 4 Cal 90 B (C N 12)

—S. 54 — Section refers to award of 'Court' and not that of Land Acquisition Officer Guj 37 B (C N 6)

—Ss. 54, 18, 30, 11, 26 (2) — Kerala Civil Courts Act (1 of 1957), Ss. 12, 13 — All appeals from decisions of Subordinate Judge in land acquisition proceeding lie to High Court irrespective of value of subject-matter — Proceeding under Land Acquisition Statutes is not suit within S. 13 of latter Act — Whether reference under Section 18 of former Act amounts to award or only decree makes no difference — 1965 K. L. T. 616, Partly overruled Ker 30 A (C N 7) (FB)

—S. 54 — Land acquisition appeals — High Court deciding after hearing of parties that appeal lay to District Court — Decision is binding on parties — See Civil P. C. (1908), S. 96

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—Ss. 54, 3(d), 26 and 30 — Civil P. C. (1908), Ss. 2(2) and 96 — Bombay Civil Courts Act (14 of 1869), Ss. 8, 21, 24 and 26 — Dispute as to apportionment of compensation — District Court referring dispute to Civil Judge (S.D.) under S. 3 (d) — Since decision of Civil Judge (S.D.) does not fall under Part III of Act of 1894, it cannot be called award and hence is not appealable under S. 54 — It amounts to decree and is appealable under S. 96 — Since decision relates to the value which is below ten thousand rupees, appeal lies to District Court to which Court of Civil Judge (S.D.) is subordinate and not to High Court — By reason of transfer of dispute, Civil Judge (S.D.) does not become principal Court such as District Court so that its decision would become appealable only to High Court — Even if High Court had authority to decide appeal, usurpation of jurisdiction of District Court to hear appeal would not be proper Guj 37 A (C N 6)

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—CL 10 (Cal)—'Judgment'—Award of Motor Accidents Claims Tribunal — Appeal against under S. 110-D of Motor Vehicles Act — Decision of single Judge

Letters Patent (Cal). (contd.)

is "judgment" — Nature of jurisdiction of claims Tribunal and of High Court, explained — AIR 1968 Punj & Har 277, **Dissented from.** Delhi 37 (C N 7) (FB) — Cl. 17 (Mad)—Guardians and Wards Act (1890), Ss. 7 and 25 — Appointment of guardian — Petitioner a permanent resident of England — **Held**, she could not be appointed as guardian of minor so as to enable her to obtain custody of minor under S. 25 — See Guardians and Wards Act (1890), S. 7 Mad 92 D (C N 25)

Limitation Act (9 of 1908)

—Preamble — Act must be regarded as an exhaustive code — It is piece of adjective law and not of substantive law — See Limitation Act (1908), Art. 182

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—S. 14 — Pendency of Civil proceeding — Court must ascertain period during which proceeding, actually remained, pending — Only this period has to be excluded under S. 14(1) and nothing more — AIR 1963 Pat 62 held to be not good law in view of AIR 1958 SC 827; AIR 1965 Andh Pra 388 (FB), **Dissented from.** Pat 50 A (C N 7)

—Art 120 — Suit by Municipality to recover property and other taxes — Provision under Article 120 attracted

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—Art. 181 — Madras Estates Abolition and Conversion into Ryotwari Act (26 of 1948), S. 43 — Compensation paid to persons not entitled, by Tribunal — Later Tribunal asking them to redeposit the amount and ordering petitioner, the rightful claimant, to recover the same — Petitioner filing petition under S. 151, Civil P. C. to direct respondents to redeposit — Limitation — Whether Art. 181 applies

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—Art. 182 and Preamble — Madras Estates Abolition and Conversion into Ryotwari Act (26 of 1948), S. 41 — Compensation paid to persons not entitled, by Tribunal — Later Tribunal asking them to redeposit the amount and ordering petitioner, the rightful claimant, to recover the same — Petitioner filing petition under S. 151 Civil P. C. to direct respondents to redeposit — Limitation — Whether Art. 182 applies

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—Art. 182 — Tribunals adjudicating disputes under Madras Act 26 of 1948 are not "Court" within meaning of Art. 182 — See Tenancy Laws — Madras Estates Abolition and Conversion into Ryotwari Act (26 of 1948), S. 2(14)

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—S. 29(2) — Suits instituted under Portuguese Civil Procedure Code — Re-

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medy of appeal and Limitation governed by that code only — Extension of Indian Civil Procedure Code to the Union Territory during pendency of suits, notwithstanding — S. 29(2) of Limitation Act (1963) does not repeal provisions under the Portuguese Code — Repeal of Portuguese Code did not affect rights and remedies accrued — See Goa, Daman and Diu Civil Courts Act (1965), S. 35

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—Art. 137 — Not applicable to application under S. 33-C (2) of Industrial Disputes Act, 1947 — See Industrial Disputes Act (1947), S. 33-C (2)

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—Sch. 1, Art. 116 — Suits instituted under Portuguese Civil Procedure Code— Remedy of appeal and limitation governed by that code only — Extension of Indian Civil Procedure Code to the Union Territory during pendency of suits, notwithstanding — S. 29(2) of Limitation Act (1963) does not repeal provisions under the Portuguese Code — Repeal of Portuguese Code did not affect rights and remedies accrued — See Goa, Daman and Diu Civil Courts Act (1965), S. 35

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See under Municipalities

M. P. Co-operative Societies Act 1960 (17 of 1961)

See under Co-operative Societies

Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules 1960

See under Civil Services

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Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Adhiniyam (29 of 1964)

—S. 5 — Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Niyamawali (1965), Rule 9 — Constitutional validity — Act creating State monopoly in trade of tendu leaves — Transport of leaves does not form integral part of trade — Restrictions imposed on transport affect fundamental rights under Article 19 (1) (f) and (g) and have to satisfy tests of reasonableness under Article 19, Clause (5) and first part of Clause (6) and also Article 304(b) — Section 5 and Rule 9 as also order dated 4-6-1965 cannot be held unreasonable except to the extent of its requiring a permit for distribution by sattedars to mazdoors and cannot be challenged — Order dated 12-10-1965 being a mere cancellation of concession is not a restriction —

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—S. 5 (2) (b)—Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Niyamawali (1965), Rules 4 to 9 — Provisions fere intended to restrict not only movement of

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tendu leaves from purchasing units to place of storage but also their subsequent movement SC 129 A (C N 30)

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—Rr. 4 to 9 — Provisions were intended to restrict movement of tendu leaves not only from purchasing units to place of storage but also their subsequent movement — See M. P. Tendu Patta Vyapar (Viniyaman Adhiniyam) (29 of 1964), S. 5 SC 129 A (C N 30)

—R. 9 — Rule requiring transport permit for tendu leaves is not unreasonable restriction on rights under Art. 19 (1) (f) and (g) of the Constitution — See M. P. Tendu Patta Vyapar (Viniyaman Adhiniyam) (29 of 1964), S. 5 SC 129 B (C N 30)

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—S. 1 — Act relating to taxation on lands and buildings — Competency of State Legislature to enact — Madras Urban Land Tax Act 12 of 1966 is not beyond competence of State Legislature — W. P. No. 387 of 1968 etc., D/- 10-4-1968 (Mad), Reversed SC 169 A (C N 39)
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—S. 6 — Validity — Section 6 does not violate Article 14 or 19 (1) — W. P. No. 387 of 1968 etc., D/- 10-4-1968 (Mad), Reversed SC 169 C (C N 39)

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—S. 64 — Proceeding under S. 60 — Recording of evidence of witnesses — Necessary in view of appeal provided under S. 64 — See Motor Vehicles Act (1939), S. 60 Raj 48 (C N 8)

—S. 110-D — Judgment — Award of Motor Accidents Claims Tribunal — Appeal against — Decision of single Judge is judgment — Nature of jurisdiction of Claims Tribunal and of High Court explained — See Letters Patent (Cal), Cl. 10 Delhi 37 (C N 7) (FB)

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—**Bombay Municipal Boroughs Act (18 of 1925)**

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—Ss. 114 (2) (g) and (3) and 144—Nagpur Municipal Corporation Theatre Tax Rules, R. 3 — S. 114 (2)(g) which authorises Corporation to impose any other tax which the State Legislature has power to impose in the State under the Constitution is not invalid on the ground of excessive delegation of legislative power — Provisions in Act are adequate to indicate legislative policy and limits within which tax can be imposed — Imposition of theatre tax under R. 3 framed in pursuance of such power is also not invalid Bom 59 (C N 8)

—S. 144 — S. 114 (2)(g) authorising Corporation to impose any other tax is not invalid for excessive delegation of power — Provisions in Act are adequate to indicate legislative policy and limits within which tax can be imposed — See Municipalities — City of Nagpur Corporation Act 1948 (2 of 1950), S. 114 (2)(g) and (3) Bom 59 (C N 8)

—**Gujarat Imposition of Taxes by Municipalities (Validation) Act 1963 (2 of 1964)**

—S. 3 — Rates imposed and collected on lands and buildings by Rules under Section 73 of Bombay Municipal Boroughs Act (18 of 1925) — Validation of by State legislature — Competency — Section 3 of 1964 Act is validly enacted

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—S. 64 — Property tax under — Tax same as one under S. 81 of the Madras District Municipalities Act — See Constitution of India, Art. 285(2) Mys 37 B (C N 8)

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—Mysore City Municipalities Act (7 of 1933)
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—Natural Justice — Rules of — Scope and object of — Applicability to administrative inquiry — Change in concept of natural justice in recent years indicated — Since aim of both quasi-judicial as well as administrative inquiries is to arrive at a just decision these rules should apply to both — What particular rule will apply in a given case will depend upon various factors — See Constitution of India, Art. 226 SC 150 C (C N 35)

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—S. 16—Election Tribunal can enquire into age qualification of candidate despite fact that his name appears in electoral roll, as a voter — See Panchayats — Andhra Pradesh Gram Panchayat Act (2 of 1964), S. 14 Andh Pra 56 (C N 8) (FB)

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—S. 217 (2) (i) — Rules under, Rule 8 — R. 8 is not only consistent but also in conformity with the provisions of R. 16— See Panchayats — Andhra Pradesh Panchayat Act (2 of 1964), S. 14 Andh Pra 56 (C N 8) (FB)

—Rules under, R. 16 — Rule 8 is not only consistent but also in conformity with the provisions of R. 16 — See Panchayats — Andhra Pradesh Panchayat Act (2 of 1964), S. 14 Andh Pra 56 (C N 8) (FB)

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—Ss. 53, 89, 2 — Expression 'Criminal Case' in S. 89 — Connotation — Not restricted in its meaning to definition given in S. 2 — It includes proceeding under S. 53 also All 115 (C N 11)

—S. 89 — Expression 'Criminal Case' in S. 89 — Connotation — Not restricted in its meaning to definition given in S. 2 — It includes proceeding under S. 53 also — See Panchayats — U. P. Panchayat Raj Act (26 of 1947), S. 53 All 115 (C N 11)

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— Ss. 14 and 55 — "Goodwill" — Meaning of — It represents business reputation of a going concern and is treated as part of assets of firm

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— S. 55 — Word "goodwill" — Meaning of — See Partnership Act (1932), S. 14

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— S. 40 — Mens rea — When not essential for conviction

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— S. 430 — Offence under read with Jammu and Kashmir Village Panchayat Act (23 of 1958), S. 72 — Imposition of recurring fine is illegal — Proper course in case of continuing breach is to issue notice to accused for days during which breach continued, afford opportunity to defend himself and in case offence is proved, punish him according to law

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— S. 499, Exception 9 — Judicial proceedings — Privilege of witness — Witness, on instructions of client, asked in cross-examination whether he was doing opium smuggling business, whether he was involved in opium smuggling case in a particular year, whether he was doing cloth smuggling trade and whether he came away from Rajasthan to Bangalore because of a warrant against him — Imputation conveyed by those questions is per se defamatory — See Evidence Act (1872), S. 126

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— S. 499, Exception 9 — Burden of proof — Accused relying upon Exception 9 — Therefore it is for him to prove that his case falls under that exception — (Evidence Act (1872), S. 105)

Mys 34 B (C N 7)

— Ss. 499 and 500 — Conviction and sentence — Questions per se defamatory put by lawyer to witness in cross-examination on instructions of his client — No reasonable basis available for putting them — It cannot be said that the client can be convicted only as abettor and not as principal offender

Mys 34 C (C N 7)

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— S. 500 — Witness, on instructions of client, asked in cross-examination whether he was doing opium smuggling business, whether he was involved in opium smuggling case in a particular year, whether he was doing cloth smuggling trade and whether he came away from Rajasthan to Bangalore because of a warrant against him — Imputation conveyed by those questions is per se defamatory — Hence client is liable under S. 500, I. P. C. — See Evidence Act (1872), S. 126

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— S. 500 — Questions per se defamatory put by lawyer to witness in cross-examination on instructions of his client — No reasonable basis available for putting them — It cannot be said that the client can be convicted only as abettor and not as principal offender — See Penal Code (1860), S. 499

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— S. 4 — Order refusing to grant pension on extraneous or irrelevant grounds — High Court should normally interfere and set aside order — AIR 1959 All 769, Diss.—See Constitution of India, Art. 226

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— S. 7 — Punjab Police Rules (1934), Chapter XVI, R. 16.1 (2) — Expressions "District Superintendent of Police" in Act and "Superintendent of Police" in Rules — Both refer to same authority — No incongruity between Act and Rules — Superintendent of Police though not designated as District S. P. can dismiss a Sub-Inspector working under him. L.P.A. No. 36-D of 1963 D/- 11-4-1963 (Punj), Reversed

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— S. 53 — Small Cause Court at Ahmedabad exercising jurisdiction under Bombay Act (57 of 1947) — Can issue distress warrant under S. 53 read with R. 5 of Bombay Rules — See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947), S. 28

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Prevention of Food Adulteration Act (37 of 1954)

— S. 13 — Sample of cow's milk — Schedule of time for deterioration — Sample kept according to Rules — Sample retains its character and is capable of analysis for 10 months — Prosecution before 10 months — Accused held not deprived of benefit of Section 13 — 1968 All LJ 916, held, not correctly decided

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—S. 13(5) — Report of Public Analyst — No evidence of requirements of Rr. 7 and 18 being duly complied with — Report is not rendered inadmissible — Cr. A. No. 180 of 1966, D/- 25-8-66 (MP) and 1967 Cr LJ 1723 (MP), **Overruled**, AIR 1964 Guj 136, AIR 1966 Mys 244, AIR 1967 Raj. 237 and AIR 1968 Mys. 196, **Dissented from** — See Evidence Act (1872), S. 114 (e) Madh Pra 29 (C N 8) (FB)

—S. 23 — Rules under — Prevention of Food Adulteration Rules (1955), R. 20 — Rule is mandatory — See Prevention of Food Adulteration Rules (1955), R. 20 All 122 B (C N 13)

Prevention of Food Adulteration Rules (1955)

—R. 7 — Report of Public Analyst — No evidence of requirements of Rr. 7 and 18 of Prevention of Food Adulteration Rules (1955) being duly complied with — Report is not rendered inadmissible — Cr. A. No. 180 of 1966, D/- 25-8-1966 (MP) and 1967 Cri LJ 1723 (MP), **Overruled**, AIR 1964 Guj 136, AIR 1966 Mys 244, AIR 1967 Raj 237 and AIR 1968 Mys 196, **Dissented from** — See Evidence Act (1872), S. 114 (e) Madh Pra 29 (C N 8) (FB)

—R. 18 — Report of Public Analyst — No evidence of requirements of Rr. 7 and 18 being duly complied with — Report is not rendered inadmissible — Cr. A. No. 180 of 1966, D/- 25-8-1966 (M.P.) and 1967 Cri LJ 1723 (MP), **Overruled**, AIR 1964 Guj 136, AIR 1966 Mys 244, AIR 1967 Raj. 237 and AIR 1968 Mys. 196, **Dissented from** — See Evidence Act (1872), S. 114 (e) Madh Pra 29 (C N 8) (FB)

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—Ss. 4 and 53 — Transfer by insolvent only voidable — Transferee has full rights in respect of property till transfer in his favour is annulled — Court can, under S. 4 consider whether transfer by transferee from insolvent was valid

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—Ss. 4 and 53 — Scope

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—S. 53 — Transfer by insolvent under the section is only voidable and not void — See Provincial Insolvency Act (1920), S. 4 Andh Pra 38 A (C N 5)

—S. 53 — Provision compared with S. 55 of the Presidency Towns Insolvency Act Andh Pra 38 B (C N 5)

—S. 53 — Scope — See Provincial Insolvency Act (1920), S. 4

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—S. 53 — Transfer in favour of wife — House gifted to wife — Gift deed with wife — Husband living with wife in same

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house after gift — Mere non-mutation of name of donee does not militate against genuineness of gift

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—S. 7 — Obligation under, is distinct from that under Ss. 8 and 9 — Representation to Government made after case of detainee is referred to Advisory Board — Government not relieved from obligation to consider representation — See Constitution of India, Art. 22(4)

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—S. 8 — Obligation under, is distinct from that under S. 7 — See Constitution of India, Art. 22 (4) SC 97 (C N 22)

—S. 9 — Obligation under, is distinct from that under S. 7 — See Constitution of India, Art. 22 (4) SC 97 (C N 22)

—S. 13 — Order by Govt. under, cannot be passed without considering representation referred to it under S. 7 — See Constitution of India, Art. 22 (4)

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—S. 70 — Punjab State Government has no power to remove or appoint member of Judicial Commission under S. 79 — See Punjab Sikh Gurudwaras Act (1925), S. 79 Punj 40 B (C N 8) (FB)

—Ss. 79 and 70 — State Government — Powers of — Punjab State Government has no power to remove or appoint member of Judicial Commission under S. 79 Punj 40 B (C N 8) (FB)

—S. 79(iv) — Validity — Power under S. 79 (iv) is arbitrary and unguided and hence violative of Art. 14 of Constitution Punj 40 A (C N 8) (FB)

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—S. 135 — Pre-Constitution tax paid by Union at commencement of Constitution — Nature of the tax, no change in — Fresh notification, not a condition precedent for demand — See Constitution of India, Art. 285(2) Mys 37 B (C N 8)

Railways (Local Authorities Taxation) Act (25 of 1941)

—S. 3 (1) — Pre-Constitution tax paid by Union at commencement of Constitution — Nature of the tax, no change in — Fresh notification, not a condition precedent for demand — See Constitution of India, Art. 285 (2) Mys 37 B (C N 8)

Rajasthan Armed Constabulary Act (12 of 1950)

—S. 4 — Section is mandatory — See Rajasthan Armed Constabulary Act (12 of 1950), S. 6 (e) Raj 32 (C N 6)

—Ss. 6 (e), 4 and Schedule — Scope — S. 4 is mandatory — Statement under

Rajasthan Armed Constabulary Act (contd.)

S. 4 signed by constable of Rajasthan Armed Constabulary — Constable not knowing English — Statement neither explained to him nor attested by person of requisite rank — Constable committed to trial on charge under S. 6 (e) — Commencement illegal

Raj 32 (C N 6)

—Schedule — Statement under S. 4 signed by constable not knowing English — Statement neither explained to him nor attested by person of requisite rank — Committal to trial of constable on charge under S. 6 (e) is illegal — See Rajasthan Armed Constabulary Act (12 of 1950), S. 6 (e)

Raj 32 (C N 6)

Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950, as amended by Act 12 of 1965)

See under Houses and Rents

Registration Act (16 of 1908)

—S. 1 — Scope — Object of the Act

Orissa 22 B (C N 9)

—Ss. 17 (2) (vi) and 49 — Expressions "subject-matter of previous suit" in S. 17 (2) (vi) and "so far as it relates to the suit" in O. 23, R. 3, Civil P. C. — Distinction — Compromise decree in respect of immovable property not the subject-matter of suit — Non-registration — Effect — Decree not enforceable though the decree would be evidence of the contract between parties

Orissa 22 A (C N 9)

—S. 49 — Compromise decree in respect of immovable property not the subject-matter of suit — Non-registration — Effect — Decree not enforceable though decree would be evidence of contract between parties — See Registration Act (1908), S. 17 (2) (vi)

Orissa 22 A (C N 9)

—S. 49 — Admissibility in evidence of a duly registered 'kabuliyat' — Held though document was not one creating a valid lease it was at any rate relevant for purpose of showing nature of defendant's possession, that it was permissive

Raj 17 A (C N 3)

Representation of the People Act (43 of 1950)

—S. 19—Election Tribunal can enquire into age, qualification of candidate despite fact that his name appears in electoral roll, as a voter — See Panchayats — Andhra Pradesh Gram Panchayat Act (2 of 1964), S. 14

Andh Pra 56 (C N 8) (FB)

—S. 62(1) — Election Tribunal can enquire into age, qualification of candidate despite fact that his name appears in electoral roll, as a voter — See Panchayats — Andhra Pradesh Gram Panchayat Act (2 of 1964), S. 14

Andh Pra 56 (C N 8) (FB)

—S. 100 — Election Tribunal can enquire into age, qualification of candi-

Representation of the People Act (1950) (contd.)

date despite fact that his name appears in electoral roll, as a voter — See Panchayats — Andhra Pradesh Gram Panchayat Act (2 of 1964), S. 14

Andh Pra 56 (C N 8) (FB)

Representation of the People Act (43 of 1951)

—S. 2 (1) — 'Sign' — Meaning of — Person unable to write his name— Should put his mark or thumb impression as prescribed by Rule 2 (2), Conduct of Election Rules, 1961

SC 110 B (C N 26)

—Ss. 33 (1) and 36 — Requirement of signature of candidate and proposer on nomination paper is mandatory — Nomination paper bearing thumb impression of proposer but not attested as required by law filed on last date for receiving nomination paper — Defect is substantial within Section 36 (4) and cannot be remedied at the time of scrutiny — Nomination has to be rejected

SC 110 C (C N 26)

—S. 36 — Requirement of signature of candidate and proposer on nomination paper is mandatory — Nomination paper bearing thumb impression of proposer but not attested as required by law filed on last date for receiving nomination paper — Defect is substantial within S. 36 (4) and cannot be remedied at the time of scrutiny — Nomination has to be rejected — See Representation of the People Act (1951), S. 33(1)

SC 110 C (C N 26)

—Ss. 77 (1) and 123 (6) — Corrupt practice — Return of expenses must include only the expenditure incurred or authorised by candidate himself or his election agent — Expense incurred by any other agent without anything more need not be included

SC 110 E (C N 26)

—S. 90 — Election petition — Amendment of — Application to amend seeking to introduce new ground for setting aside election filed after bar of limitation prescribed under Section 81 (1) — Amendment cannot be allowed. AIR 1957 SC 444, Applied

SC 110 A (C N 26)

—S. 116-A — Election petition by voter — High Court refusing to set aside election of successful candidate but recording an order of disqualification against C on account of his corrupt practice — Appeal by voter against order of High Court refusing to set aside election impleading C as respondent — Held that in absence of appeal by C against order passed against him, scope of appeal could not be expanded by permitting C to plead that he had not committed any act amounting to corrupt practice

SC 110 D (C N 26)

—S. 123 (6) — Incurring or authorising of expenditure in contravention of S. 77 (1) is corrupt practice — See Representation of the People Act (1951), S. 77 (1)

SC 110 E (C N 26)

Representation of the People (Conduct of Elections) Rules (1961)

—R. 2 (2) — Person unable to write his name — Should put his mark or thumb impression as prescribed by R. 2 (2), Conduct of Election Rules, 1961. — See Representation of the People Act (1951), S. 2 (1) SC 110 B (C N 26)

Resettlement of Displaced Persons (Land Acquisition) Act (60 of 1948)

—S. 7 — Award of compensation by arbitrator under provisions of Central Act 60 of 1948 — Award is not an 'Order' — Appeal against 'award' attracts fixed court-fee under Art. 11 of Sch. II of the Court-fees Act — Ad. valorem court-fee on basis of S. 8 not payable, AIR 1946 Cal. 524; AIR 1959 Cal. 609 and AIR 1968 A. P. 348, Diss. — See Court-fees Act (1870), S. 3 Delhi 44 A (C N 8)

—S. 7 (1) (e) Provisos — Constitution of India, Arts. 366(10), 31(5) & (6), 31-A, 31-B and Sch. IX — Provision in a pre-Constitution Act void ab initio is not 'existing law' — Provision does not attract Art. 31(5) or 31-A, inclusion of the Act (Resettlement of Displaced Persons (Land Acquisition) Act, (1948) in Sch. IX of Constitution notwithstanding — (Resettlement of Displaced Persons (Land Acquisition) Act (1948), S. 7 (1) (e) Provisos — Provisos ultra vires S. 299 (2) of the Government of India Act, 1935 — Hence ignored — Provisos not 'existing law' under Art. 366(10) of Constitution — See Constitution of India, Art. 366(10) Delhi 44 B (C N 8)

Rice (Eastern Zone) Movement Control Order (1959)

—S. 4 — Transport of rice from place in border area to place in Eastern Zone outside border area is not prohibited under S. 4 of 1959 Order — See Essential Commodities Act (1955), S. 7 (1) (a) (ii) Cal 88 A (C N 11)

Sale of Goods Act (3 of 1930)

—S. 2 (7) — 'Goods' — Meaning of — It includes 'electricity' — See Calcutta City Civil Court Act (21 of 1953), Sch. I, Cl. 4 (iv) Cal 75 (C N 8)

SALES TAX**—Bihar Sales Tax Act (19 of 1959)**

—Ss. 3-A, 5-A, 42 and 46 (1) (ii) — Bihar Sales Tax Rules (1959), Rr. 31-B and 8-C — Constitution of India, Arts. 301, 304 (b) Proviso and 245 — Central Sales Tax Act (1956), S. 15 — Sections 3-A and 5-A do not contravene Art. 301 of Constitution or Section 15 of Central Act — Sections 42 and 46 not invalid on ground of excessive delegation of legislative functions — Rr. 31-B and 8-C are reasonable and valid — Fresh assent of President not necessary merely because Sections 42 and 46 have been used for new purpose Pat 59 (C N 8)

Sales Tax — Bihar Sales Tax Act (contd.)

—S. 5-A — Sections 3-A and 5-A do not contravene Art. 301 of Constitution or S. 15 of Central Sales Tax Act — See Sales Tax — Bihar Sales Tax Act (19 of 1959), S. 3-A Pat 59 (C N 8)

—S. 42 — Sections 42 and 46 not invalid on ground of excessive delegation of legislative functions — Fresh assent of President not necessary merely because Sections 42 and 46 have been used for new purpose — See Sales Tax — Bihar Sales Tax Act (19 of 1959), S. 3-A Pat 59 (C N 8)

—S. 46 (1) (ii) — Sections 42 and 46 not invalid on ground of excessive delegation of legislative functions — Fresh assent of President not necessary merely because Sections 42 and 46 have been used for new purpose — See Sales Tax — Bihar Sales Tax Act (19 of 1959), S. 3-A Pat 59 (C N 8)

—Bihar Sales Tax Rules (1959)

—R. 8-C — Rr. 31-B and 8-C are reasonable and valid — Sales Tax — Bihar Sales Tax Act (19 of 1959), S. 3-A Pat 59 (C N 8)

—R. 31-B — Rr. 31-B & 8-C are reasonable and valid — Sales Tax — Bihar Sales Tax Act (19 of 1959), S. 3-A Pat 59 (C N 8)

—Central Sales Tax Act (74 of 1956)

—S. 5 (2) — Expression "customs frontiers of India" in Section 5 — Construction of — Arrival of imported goods in Indian harbours — Its sale long thereafter by transfer of documents of title — Sale is not in course of import and is liable to Sales Tax under Madras General Sales Tax Act — Tax Cases Nos. 29, 47, 132 and 160 of 1961 (Revn. Nos. 16, 28, 81 and 98 of 1961), D/- 17-7-1963 (Mad), Reversed SC 165 (C N 38)

—S. 15 — Sections 3-A and 5-A of Bihar Sales Tax Act do not contravene Art. 301 of Constitution or Sec. 15 — See Sales Tax — Bihar Sales Tax Act (19 of 1959), Section 3-A Pat 59 (C N 8)

—Madras General Sales Tax Act (1 of 1959)

—S. 3 — Arrival of imported goods in Indian harbours — Its sales long thereafter by transfer of documents of title — Sale, not being in course of import, is liable to tax—Revn. Nos. 16, 28, 81 & 98 of 1961, D/- 17-7-1963 (Mad), Reversed — See Central Sales Tax Act (1956), S. 5 (2) SC 165 (C N 38)

Saurashtra Covenanted State Services (Superannuation Age) Rules (1955)
See under Civil Services.**Sea Customs Act (8 of 1878)**

—S. 3-A — Notification under D/- 6-8-1955 read with Proclamation of President of India, D/- 22-3-1956 — Expression "Customs frontiers" in Section 5 of Central Sales Tax Act (1956) does not mean

Sea Customs Act (contd.)

customs barriers—Rev. Nos. 16, 28, 81 and 98 of 1961, D/-17-7-1963 (Mad), Reversed — See Central Sales Tax Act (1956), S. 5 (2) SC 165 (C N 38)

Stamp Act (2 of 1899)

See under Stamp Duty.

STAMP DUTY

—Indore Stamp Act (2 of 1907)

—S. 2 (9), Sch. I, Arts. 17 and 47- A — Document merely declaring existence of trust coupled with transfer of its management — Does not fall within definition of term "conveyance" — Stamp duty leviable thereon will be governed by Article 47-A and not under Art. 17

Madh Pra 33 (C N 9) (SB)

—Sch. 1, Art. 17 — Document merely declaring existence of trust coupled with transfer of its management — Does not fall within definition of term 'conveyance' — Stamp duty leviable thereon will be governed by Art. 47-A and not under Art. 17 — See Stamp Duty — Indore Stamp Act (2 of 1907), S. 2 (9)

Madh Pra 23 B (C N 6) (FB)

—Sch. I, Art. 47-A — Document merely declaring existence of trust coupled with transfer of its management — Does not fall within definition of term 'conveyance' — Stamp duty leviable thereon will be governed by Art. 47-A and not under Art. 17 — See Stamp Duty — Indore Stamp Act (2 of 1907), S. 2 (9)

Madh Pra 23 B (C N 6) (FB)

—Stamp Act (2 of 1899)

—S. 2 (15) and Section 2 (24) (b) — Division of joint family property by Karta — It is partition and not settlement

Madh Pra 33 (C N 9) (FB)

States Reorganisation Act (37 of 1956)

—S. 72 — Judicial Commission under Punjab Sikh Gurdwaras Act is not now in consequence of provisions of Reorganisation Act — See Punjab Sikh Gurdwaras Act (8 of 1925), S. 79

Punj 40 B (C N 8) (FB)

—S. 89 — Judicial Commission under Punjab Sikh Gurdwaras Act is not now in consequence of provisions of Reorganisation Act — See Punjab Sikh Gurdwaras Act (8 of 1925), S. 79

Punj 40 B (C N 8) (FB)

—S. 115 (7) Proviso — Public servant governed by Saurashtra Rules (1955)—His compulsory retirement under Bombay Civil Service Rules, 1959, R. 161 before attaining age of 55 years, after State re-organisation — Amounts to variation in his condition of service — Spl. C. A. 827 of 1961, D/- 5/11 July 1963 (Guj), Reversed — See Civil Services — Saurashtra Covenanted State

States Reorganisation Act (contd.)

Services (Superannuation Age) Rules (1955), R. 3 (i) SC 143 (C N 33)

Succession Act (39 of 1925)

—S. 57 — Notification under S. 300 (2) not necessary when will is under Sec. 57 (a) and (b) — See Succession Act (1925), S. 300 (2) Cal 85 B (C N 10)

—S. 74 — Unnatural provision in will — It is relevant factor in considering validity or execution of will or in determining testamentary capacity of testator where undue influence is alleged or due execution of will is challenged Cal 85 A (C N 10)

—Ss. 224 and 311 — Testatrix appointing all partners of a Solicitor firm as executors of her will — Application by only one partner for grant of probate — Probate cannot be granted — All partners have to take out probate as joint grantees or other partners should stand out and renounce their executorship

Mys 46 (C N 10)

—S. 227 — Effect of Probate of will

Orissa 28 B (C N 12)

—Ss. 300 (2), 57 — Notification under when necessary Cal 85 B (C N 10)

—S. 311 — Testatrix appointing all partners of a solicitor firm as executors of her will — Application by only one partner for grant of probate — Probate cannot be granted — All partners have to take out probate as joint grantees or other partners should stand out and renounce their executorship — See Succession Act (1925), S. 224

Mys 46 (C N 10)

TENANCY LAWS

—Hyderabad Tenancy and Agricultural Lands Act (21 of 1950) (as amended by Act 3 of 1954)

—S. 38-E — Act with amendments repealed and re-enacted by Maharashtra State by enacting Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and further Amendment) Act (Maharashtra Act 45 of 1962) — State of Maharashtra can enquire under Sec. 38-E of the Hyderabad Act 21 of 1950 — See Tenancy Laws — Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and further Amendment) Act (Maharashtra Act (45 of 1961), S. 2

SC 126 A (C N 29)

—Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and further Amendment) Act (Maharashtra Act 45 of 1961)

—S. 2 — Repeal and re-enactment of Hyderabad Act 21 of 1950 and its Amending Acts — Effect — Government can enquire under Section 38-E of the 1950 Act — Maharashtra Act 45 of 1961 and Hyderabad Act 21 of 1950 together with Hyderabad Act 3 of 1954 do not contravene Arts. 19 and 31 and are protected by Art. 31-B of the Constitution

SC 126 A (C N 29)

Tenancy Laws (contd.)

—Madras Estates Abolition and Conversion into Ryotwari Act (26 of 1948)

—S. 2 (14) — Tribunals adjudicating disputes under Act are not 'Court' within meaning of Art. 182

Andh Pra 43 B (C N 6)

—S. 43 — Order under — Petition under Section 151, Civil P. C. to implement the order — Limitation — See Limitation Act (9 of 1908), Art. 181

Andh Pra 43 C (C N 6)

—S. 67 — Rules under — Civil P. C. (1908), Ss. 48, 114 and 151 — Provisions of Civil P. C. can be applied to proceedings before Tribunal under R. 2 — Application for execution of order of Tribunal within 12 years is within time

Andh Pra 43 D (C N 6)

Trade and Merchandise Marks Act (43 of 1958)

—S. 12 (1) — Registration of trade mark — Likelihood of deception with existing trade mark — Criteria to decide — Striking phonetic resemblance between distinctive words of existing and proposed trade marks — Proposed trade mark cannot be registered SC 146 A (C N 34)

—S. 12 (1) — Registration of trade mark — Similarity with the existing trade mark — Registrar's opinion that there was no deceptive similarity between two marks — Having an expert knowledge in the matter his opinion should not be lightly disturbed — Where, however there is concurrent finding of two Courts below that there was deceptive similarity, the finding is binding in appeal under Art. 136 of the Constitution — Onus is on appellant to prove that finding is erroneous — He must satisfy that conditions of S. 12 (1) are satisfied SC 146 B (C N 34)

Transfer of Property Act (4 of 1882)

—S. 8 — Interpretation of deeds — Harmonious construction — Meaning of words — True or literal meaning

Madh Pra 23 A (C N 6) (FB)

—S. 96 — Mortgage by deposit of title deeds — Debt neither illegal nor immoral — Joint family estate in hands of sons held liable for payment of same — See Hindu Law — Debt — Joint family property Punj 67 (C N 11) (FB)

—S. 105 — Lease or licence — It is to be decided on basis of real intention of the parties — See Easements Act (1882), S. 52 Raj 17 C (C N 3)

—S. 105 — Lease for certain period — Lease deed entitling lessor to have house vacated and rent realised on failure of tenant to pay rent in time—Held provision related to term or the period of lease and had effect of reducing it, and being an integral part of the term, or the period, it could not be separated from it — It was

Transfer of Property Act (contd.)

not a clause regarding period of notice or mode of termination of lease

Raj 17 F (C N 3)

—Ss. 106, 116 — Lease deed containing undertaking by tenant to surrender building on expiry of lease period — Corresponding undertaking by landlord to return advance amount without interest at that time — Tenant continuing in possession after expiry of lease period — Suit for eviction held not maintainable, unless lease was determined by notice under S. 106

Ker 40 (C N 9)

—S. 106 — Duration of tenancy — Fact that defendant was in permissible possession of residential premises and that he paid rent admitted — Presumption can be drawn that it was tenancy from month to month Raj 17 B (C N 3)

—S. 106 — Tenancy at will — Permissive possession under invalid or void lease — Tenancy at will arises but it comes to end when rent is paid and accepted — It then becomes monthly or yearly lease according to purpose for which it was taken. AIR 1936 Oudh 102 and AIR 1946 Oudh 144, Dissent. from Raj 17 E (C N 3)

—S. 108 (j) — Eviction on ground of subletting — Tenant of a house subletting premises without permission of landlord — Rent Control Act prohibiting such subletting coming into force later — Tenant can be evicted notwithstanding the fact that the Act prohibiting such subletting was not in force when the premises were sublet Punj 60 B (C N 9) (FB)

—S. 114 — Provision in lease as to forfeiture, has to be strictly construed

Raj 17 G (C N 3)

—S. 116 — Lease deed containing undertaking by tenant to surrender building on expiry of lease period — Corresponding undertaking by landlord to return advance amount without interest at that time — Tenant continuing in possession after expiry of lease period — Eviction suit not maintainable unless lease is determined by notice under Section 106 — See Transfer of Property Act, S. 106 Ker 40 (C N 9)

—S. 123 — Mere non-mutation of name of donee does not militate against genuineness of gift — See Provincial Insolvency Act (1920), S. 53 Orissa 25 (C N 10) Travancore Chitties Act (26 of 1120)

—S. 38 (2) — Default in conducting chitty by foreman bank due to orders of moratorium made by Central Government under Section 45 (2) and (10) of Banking Companies Act — Suit for amount subscribed by plaintiff on ground of default — Held that orders were beyond scope of powers conferred on Central Government under Section 45 (10) — See Banking Companies Act (1949), S. 45 (10) Ker 43 A (C N 10)

—S. 39 (2) — Default in conducting chitty by foreman bank due to orders of

Travancore Chitties Act (contd.)

moratorium made by Central Government under Section 45 (2) and (10) of Banking Companies Act — Suit for amount subscribed by plaintiff on ground of default — Held that orders were beyond scope of powers conferred on Central Government under Section 45 (10)—See Banking Companies Act (1949), S. 45 (10)

Ker 43 A (C N 10)

—S. 41 — Default in conducting chitty by foreman bank due to orders of moratorium made by Central Government under Section 45 (2) and (10) of Banking Companies Act — Suit for amount subscribed by plaintiff on ground of default — Held, orders were beyond the scope of power conferred on Central Government under S. 45 (10) — See Banking Companies Act (1949), S. 45 (10)

Ker 43 A (C N 10)

Travancore Land Acquisition Act (11 of 1989)

—S. 18 — Decision of Subordinate Judge in Land Acquisition proceedings — Appeal lies to High Court irrespective of value of subject-matter and even if decision is under Section 18 or Section 30 of Land Acquisition Act — See Land Acquisition Act (1894), S. 54

Ker 30 A (C N 7) (FB)

—S. 27 — Decision of Subordinate Judge in Land Acquisition proceedings — Appeal lies to High Court irrespective of value of subject-matter and even if decision is under Section 18 or Section 30 of Land Acquisition Act — See Land Acquisition Act (1894), S. 54

Ker 30 A (C N 7) (FB)

Travancore Service Regulations

See under Civil Services.

U. P. Panchayat Raj Act (26 of 1947)

See under Panchayats.

U. P. Temporary Control of Rent and Eviction Act (3 of 1947)

See under Houses and Rents.

Words and Phrases

—“Appeal” — See Houses and Rents — Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950) (as amended by Act 12 of 1965), S. 13-A

Raj 26 (C N 5)

—Word ‘collusion’ — Meaning of All 108 C (C N 10)

—‘Conveyance’ — See Stamp Duty — Indore Stamp Act (2 of 1907), S. 2 (9)

Madh Pra 23 B (C N 6) (FB)

—“Court” — Tribunals under Madras Act (20 of 1948) are not Court—See Tenancy Laws — Madras Estates Abolition and Conversion into Ryotwari Act (1948), S. 2 (14)

Andh Pra 43 B (C N 6)

—“Customs frontiers” does not mean customs barriers — Revn. Nos. 16, 28, 81 and 98 of 1961, D/- 17-7-1963 (Mad), Reversed — See Sales Tax — Central Sales Tax Act (1956), S. 5 (2)

SC 165 (C N 38)

—‘Good will’ — See Partnership Act (1932), S. 14

Raj 36 B (C N 7)

—“Gross negligence”—Gross negligence means some culpable default, not arising merely from want of foresight or mistake of judgment — See Co-operative Societies — M. P. Co-operative Societies Act 1960 (1 of 1961), S. 63 (1)

Madh Pra 39 B (C N 12)

—“Law” — Meaning of — See Constitution of India, Art. 13 (3) (a)

Raj 36 E (C N 7)

—“Nomination” — Word synonymous with naming, proposing or recommending

Mad 63 F (C N 19)

—“Sign” — Meaning of—See Representation of the People Act (1951), S. 2 (1)

SC 110 B (C N 26)

—“Under the authority of” — Meaning —Involves relationship of agent and principal — See Industrial Disputes Act (1947), S. 2 (a)

SC 82 B (C N 19)

SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC. IN A. I. R. 1970 FEBRUARY

DISS.=Dissented from in; Not F.=Not followed in; OVER.= Overruled in; REVERS.=Reversed in

Arbitration Act (10 of 1940)

—S. 14 (2) — AIR 1949 Nag 349 — Diss. AIR 1970 Raj 22 B (C N 4).

—S. 31 (4) — (‘65) F. A. O. No. 82-D of 1963, D/- 11-1-1965 (Punj at D) — Revers. AIR 1970 SC 189 A (C N 41)

—S. 34 — (‘65) F. A. O. No. 82-D of 1963, D/- 11-1-1965 (Punj. at D) — Revers. AIR 1970 SC 189 A (C N 41).

Cantonments Act (2 of 1924)

—S. 185 (1) — S. A. No. 2097 of 1958 D/- 2-2-1965 (All) — Revers. AIR 1970 SC 105 A (C N 24).

Cantonments Act (contd.)

—S. 187 (1) — S. A. No. 2097 of 1958, D/- 2-2-1965 (All) — Revers. AIR 1970 SC 105 A (C N 24).

Civil Procedure Code (5 of 1908)

—Pre. — AIR 1968 Andh Pra 348 — Diss. AIR 1970 Delhi 44 A (C N 8).

—Pre. — AIR 1946 Cal 524 — Diss. AIR 1970 Delhi 44 A (C N 8).

—Pre. — AIR 1959 Cal 609 — Diss. AIR 1970 Delhi 44 A (C N 8).

—S. 2 (2) & (14) — AIR 1968 Andh Pra 348—Diss. AIR 1970 Delhi 44 A (C N 8).

Civil P. C. (contd.)

- S. 2 (2) & (14) — AIR 1946 Cal 524—
Diss. AIR 1970 Delhi 44 A (C N 8).
- S. 2 (2) & (14) — AIR 1959 Cal 609 —
Diss. AIR 1970 Delhi 44 A (C N 8).
- S. 96 — (1901) ILR 24 Mad 350—**Held
Overruled by (1906) ILR 29 Mad 333 (FB)**
as Interpreted AIR 1970 Mad 76 C
(C N 20).
- O. 6, R. 17 — (1958) 2 Mad LJ 540 —
Not F. AIR 1970 Mad 81 (C N 21).
- O. 21, R. 2 — Observations in AIR 1935
All 513 — Not Approved. AIR 1970 SC
118 (C N 27).
- O. 21, R. 2 — Observations in AIR
1937 Cal 211—Not Approved. AIR 1970 SC
118 (C N 27).
- O. 21, R. 2 — Appeals Nos. 199 and 200
of 1962, D/- 22-1-1964 (Cal) — **Revers.**
AIR 1970 SC 118 (C N 27).
- O. 41, R. 4 — F. A. No. 16 of 1953, D/-
10-7-1963 (All) — **Revers.** AIR 1970 SC
108 (C N 25).

CIVIL SERVICES

- Bombay Civil Services Rules (1959)**
- R. 161(c) (2) (ii) (1) — Spl. C. A. No.
827 of 1961, D/- 11-7-1963 (Guj) — **Revers.**
AIR 1970 SC 143 (C N 33).
- Punjab Police Rules (1934)**
- Chap. XVI, R. 16.1 (2) — L. P. A. No.
36-D of 1963, D/- 11-4-1963 (Punj) —
Revers. AIR 1970 SC 122 A (C N 28).
- Chap. XVI, R. 16.24 (1) — L. P. A. No.
36-D of 1963, D/- 11-4-1963 (Punj) —
Revers. AIR 1970 SC 122 B (C N 28).
- Saurashtra Covenantee State Services
(Superannuation Age) Rules (1955)**
- R. 3(i) — Spl. Civ. Appln. No. 827 of
1961, D/- 11-7-1963 (Guj) — **Revers.** AIR
1970 SC 143 (C N 33).

Constitution of India

- Art. 31 (3) — AIR 1961 Andh Pra 523
— **Over.** AIR 1970 SC 126 B (C N 29).
- Art. 226 — AIR 1959 All 769 — Diss.
AIR 1970 Punj 75 A (C N 12).
- Art. 226 — AIR 1952 Pat 309 (FB) —
Diss. AIR 1970 Ker 27 A (C N 6) (FB).
- Art. 226 — AIR 1957 Trav-Co. 176 —
Over. AIR 1970 Ker 27 A (C N 6) (FB)
- Art. 286(1) — ('63) Revn. Nos. 16, 28,
81 and 98, D/- 17-7-1963 (Mad) — **Revers.**
AIR 1970 SC 165 (C N 38).

COURT-FEES AND SUITS VALUATIONS

- Court Fees Act (7 of 1870)**
- S. 3 — AIR 1968 Andh Pra 348 —
Diss. AIR 1970 Delhi 44 A (C N 8).
- S. 3 — AIR 1946 Cal 524 — Diss.
AIR 1970 Delhi 44 A (C N 8).
- S. 3 — AIR 1959 Cal 609 — Diss. AIR
1970 Delhi 44 A (C N 8).
- S. 4 — AIR 1968 Andh Pra 348 — Diss.
AIR 1970 Delhi 44 A (C N 8).
- S. 4 — AIR 1946 Cal 524 — Diss. AIR
1970 Delhi 44 A (C N 8).

**Court Fees and Suits Valuations — Court
Fees Act (contd.)**

- S. 4 — AIR 1959 Cal 609 — Diss. AIR
1970 Delhi 44 A (C N 8).
- S. 7 — AIR 1968 Andh Pra 348 —
Diss. AIR 1970 Delhi 44 A (C N 8).
- S. 7 — AIR 1946 Cal 524 — Diss. AIR
1970 Delhi 44 A (C N 8).
- S. 7 — AIR 1959 Cal 609 — Diss. AIR
1970 Delhi 44 A (C N 8).
- S. 8 — AIR 1968 Andh Pra 348 —Diss.
AIR 1970 Delhi 44 A (C N 8).
- S. 8 — AIR 1946 Cal 524 — Diss. AIR
1970 Delhi 44 A (C N 8).
- S. 8 — AIR 1959 Cal 609 — Diss. AIR
1970 Delhi 44 A (C N 8).
- Sch. 1 Art. 1 — AIR 1968 Andh Pra
348 — Diss. AIR 1970 Delhi 44 A (C N 8)
- Sch. I Art. 1 — AIR 1946 Cal 524 —
Diss. AIR 1970 Delhi 44 A (C N 8).
- Sch. 1 Art. 1 — AIR 1959 Cal 609 —
Diss. AIR 1970 Delhi 44 A (C N 8).
- Sch. II Art. 11 — AIR 1968 Andh Pra
348 — Diss. AIR 1970 Delhi 44 A (C N 8)
- Sch. II Art. 11 — AIR 1946 Cal 524 —
Diss. AIR 1970 Delhi 44 A (C N 8).
- Sch. II Art. 11 — AIR 1959 Cal 609 —
Diss. AIR 1970 Delhi 44 A (C N 8).

Criminal Procedure Code (5 of 1898)

- S. 145(4), First Proviso — AIR 1959
All 763 — Diss. AIR 1970 J. & K. 21
(C N 6).
- S. 145 (4), First Proviso — AIR 1958
Orissa 79 — Diss. AIR 1970 J. & K. 21
(C N 6).
- S. 145 (4), First Proviso — AIR 1966
Orissa 170 — Diss. AIR 1970 J. & K. 21
(C N 6).
- S. 145 (4), First Proviso — AIR 1961
Punj 187 — Diss. AIR 1970 J. & K. 21
(C N 6).
- S. 146 (1-B) — AIR 1963 Pat 243 (FB)
— **Held Impliedly Overruled by AIR 1966
SC 1888** As interpreted AIR 1970 All
119 C (C N 12).
- S. 439 — AIR 1963 Pat 243 (FB) —
**Held Impliedly Overruled by AIR 1966
SC 1888** as interpreted AIR 1970 All
119 C (C N 12).

Evidence Act (1 of 1872)

- S. 73 — AIR 1962 Pat 255 (FB)—Diss.
AIR 1970 Mad 85 C (C N 23).
- S. 73 — AIR 1962 Pat 255 (FB)—Diss.
AIR 1970 Mad 85 E (C N 23).
- S. 114 (e) — AIR 1964 Guj 136 — Diss.
AIR 1970 Madh Pra 29 (C N 8) (FB).
- S. 114 (e) — ('66) Cr. A. No. 180 of
1966, D/- 25-8-1966, (MP) — **Over.**
AIR 1970 Madh Pra 29 (C N 8) (FB).
- S. 114 (e) — 1967 Cri LJ 1723 (M.P.)
—**Over.** AIR 1970 Madh Pra 29 (C N 8)
(FB).

Evidence Act (contd.)

—S. 114 (e) — AIR 1966 Mys 244—Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

—S. 114 (e) — AIR 1968 Mys 196—Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

—S. 114 (e) — AIR 1967 Raj 237 — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

—S. 126 — 1935 Mad W. N. 460 — Diss. AIR 1970 Mys 34 A (C N 7).

Government Land Assignment Regulation (3 of 1957 ME)

—S. 7 (1), Cl. (f) — O. P. No. 337 of 1957 (Ker)—Over. AIR 1970 Ker 21 A (C N 5) (FB).

—S. 7 (1), Cl. (f) — A. S. No. 550 of 1962 (Ker) — Over. AIR 1970 Ker 21 A (C N 5) (FB).

HIGH COURT RULES & ORDERS

—Madras High Court Criminal Rules of Practice and Circular Orders, 1958

—R. 45 — ('68) Order in W. P. No. 436 of 1968, (Mad) by Kailasam J. — Revers. AIR 1970 Mad 63 B (C N 19).

Hindu Law

—Joint family — AIR 1947 Nag 178 — Held Overruled by AIR 1966 SC 24. As interpreted AIR 1970 Orissa 32 B (C N 14)

—Maintenance — AIR 1944 Bom 235 (2) — Diss. AIR 1970 Andh Pra 33 B (C N 4).

Hindu Marriage Act (25 of 1955)

—S. 10 — AIR 1959 Andh Pra 547 (FB)

—Diss. AIR 1970 All 102 (C N 9).

—S. 10 — AIR 1963 Andh Pra 323 — Diss. AIR 1970 All 102 (C N 9).

—S. 10 — AIR 1965 Mys 299 — Diss. AIR 1970 All 102 (C N 9).

HOUSES AND RENTS

— East Punjab Urban Rent Restriction Act (3 of 1949)

—S. 13 — C. R. No. 675 of 1963, D/- 13-11-1964 (Punj) — Over. AIR 1970 Punj 60 A (C N 9) (FB).

—S. 13—C. R. No. 222 of 1964, D/- 21-5-1965 (Punj) — Over. AIR 1970 Punj 60 A (C N 9) (FB).

—S. 13 — C. R. No. 231 of 1965, D/- 17-12-1965 (Punj) — Over. AIR 1970 Punj 60 A (C N 9) (FB).

—S. 13 — C. R. No. 295 of 1965, D/- 21-5-1965 (Punj) — Over. AIR 1970 Punj 60 A (C N 9) (FB).

— Jammu and Kashmir Houses and Shops Rent Control Act (14 of 2009)

—S. 8 — AIR 1956 Punj 95 — Diss. AIR 1970 J. & K. 26 (C N 7) (FB).

— U. P. Temporary Control of Rent and Eviction Act (3 of 1947)

—S. 3 — AIR 1965 All 498 (FB) — Held Overruled by (1968) All W. R. (H. C.) 713 (SC) as interpreted AIR 1970 All 125 A (C N 14).

Houses and Rents — U. P. Temporary Control of Rent and Eviction Act (contd.)

—S. 3 (3) — (1968) 22 S. T. C. 26 (All)—Diss. AIR 1970 All 125 D (C N 14).

Land Acquisition Act (1 of 1894)

—S. 18 — 1965 Ker LT 616 — Partly Overruled. AIR 1970 Ker 30 A (C N 7) (FB).

—S. 30 — 1965 Ker LT 616 — Partly Overruled. AIR 1970 Ker 30 A (C N 7) (FB).

—S. 54 — 1965 Ker LT 616 — Partly Overruled. AIR 1970 Ker 30 A (C N 7) (FB).

Letters Patent (Cal)

—Cl. 10 — AIR 1968 Punj & Har 277 — Diss. AIR 1970 Delhi 37 (C N 7) (FB).

Limitation Act (9 of 1908)

—S. 14 — AIR 1965 Andh Pra 388 (FB)

— Diss. AIR 1970 Pat 50 A (C N 7).

—S. 14 — AIR 1963 Pat 62 — Held to be not good law in view of AIR 1958 SC 827 as interpreted AIR 1970 Pat 50 A (C N 7).

Madras Urban Land Tax Act (12 of 1966)

—S. 1 — ('68) W. P. No. 387 of 1968 etc. D/- 10-4-1968 (Mad) — Revers. AIR 1970 SC 169 A (C N 39).

—S. 5 — ('68) W. P. No. 387 of 1968 etc. D/- 10-4-1968 (Mad)—Revers. AIR 1970 SC 169 D (C N 39).

—S. 6 — ('68) W. P. No. 387 of 1968 etc. D/- 10-4-1968 (Mad) — Revers. AIR 1970 SC 169 C (C N 39).

Motor Vehicles Act (4 of 1939)

—S. 60 — AIR 1959 Mad 531 — Diss. AIR 1970 Raj 48 (C N 8).

—S. 64 — AIR 1959 Mad 531 — Diss. AIR 1970 Raj 48 (C N 8).

Pensions Act (23 of 1871)

—S. 4 — AIR 1959 All 769 — Diss. AIR 1970 Punj 75 A (C N 12).

Police Act (5 of 1861)

—S. 7 — L. P. A. No. 36-D of 1963, D/- 11-4-1963 (Punj) — Revers. AIR 1970 SC 122 A (C N 28).

Prevention of Food Adulteration Act (37 of 1954)

—S. 13 — 1968 All LJ 916 — Held Not correctly Decided. AIR 1970 All 122 A (C N 13).

—S. 13 (5) — AIR 1964 Guj 136 — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

—S. 13 (5) — ('66) Cri. A. No. 180 of 1966, D/- 25-8-1966 (MP) — Over. AIR 1970 Madh Pra 29 (C N 8) (FB).

—S. 13 (5) — 1967 Cri. L.J. 1723 (M.P.) — Over. AIR 1970 Madh Pra 29 (C N 8) (FB).

—S. 13 (5) — AIR 1966 Mys 244 — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

—S. 13 (5) — AIR 1968 Mys 196 — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

Prevention of Food Adulteration Act (contd.)

—S. 13 (5) — AIR 1967 Raj 237 — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

Prevention of Food Adulteration Rules (1955)

—R. 7 — AIR 1964 Guj 136 — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

—R. 7 — ('66) Cri. A. No. 180 of 1966, D/- 25-8-1966 (M. P.) — Over. AIR 1970 Madh Pra 29 (C N 8) (FB).

—R. 7 — 1967 Cri. LJ 1723 (M. P.) — Over. AIR 1970 Madh Pra 29 (C N 8) (FB).

—R. 7 — AIR 1966 Mys 244 — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

—R. 7 — AIR 1968 Mys 196 — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

—R. 7 — AIR 1967 Raj 237 — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

—R. 18 — AIR 1964 Guj 136 — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

—R. 18 — ('66) Cri. A. No. 180 of 1966, D/- 25-8-1966 (M. P.) — Over. AIR 1970 Madh Pra 29 (C N 8) (FB).

—R. 18 — 1967 Cri. LJ 1723 (M. P.) — Over. AIR 1970 Madh Pra 29 (C N 8) (FB).

—R. 18 — AIR 1966 Mys 244 — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

—R. 18 — AIR 1968 Mys 196 — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

—R. 18 — AIR 1967 Raj 237 — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

Resettlement of Displaced Persons (Land Acquisition) Act (60 of 1948)

—S. 7 — AIR 1968 A. P. 348 — Diss. AIR 1970 Delhi 44 A (C N 8).

Resettlement of Displaced Persons (Land Acquisition) Act (contd.)

—S. 7 — AIR 1946 Cal 524 — Diss. AIR 1970 Delhi 44 A (C N 8).

—S. 7 — AIR 1959 Cal 609 — Diss. AIR 1970 Delhi 44 A (C N 8).

SALES TAX**— Central Sales Tax Act (74 of 1956)**

—S. 5 (2) — ('63) Tax Cases Nos. 29, 47, 132 and 160 of 1961 (Revn. Nos. 16, 28, 81 and 98 of 1961, D/- 17-7-1963 (Mad) — Revers. AIR 1970 SC 165 (C N 38).

— Madras General Sales Tax Act (1 of 1959)

—S. 3 — ('63) Revn. Nos. 16, 28, 81 and 98 of 1961, D/- 17-7-1963, (Mad)—Revers. AIR 1970 SC 165 (C N 38).

Sea Customs Act (8 of 1878)

—S. 3A — ('63) Revn. Nos. 16, 28, 81 & 98 of 1961, D/- 17-7-1963 (Mad) — Revers. AIR 1970 SC 165 (C N 38).

States Reorganisation Act (37 of 1956)

—S. 115(7), Proviso—Spl. C. A. No. 827 of 1961 D/- 11-7-1963 (Guj) — Revers. AIR 1970 SC 143 (C N 33).

Transfer of Property Act (4 of 1882)

—S. 106 — AIR 1936 Oudh 102 — Diss. AIR 1970 Raj 17 E (C N 3).

—S. 106 — AIR 1946 Oudh 144 — Diss. AIR 1970 Raj 17 E (C N 3).

Words and Phrases

—"Customs frontiers" — ('63) Revn. Nos. 16, 28, 81 & 98 of 1961, D/- 17-7-1963 (Mad) — Revers. AIR 1970 SC 165 (C N 38).

COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM ETC. IN A. I. R. 1970 FEBRUARY

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in;
REVERS.=Reversed in

ALLAHABAD

Observations in AIR 1935 All 513 =1935 All LJ 543, A. P. Bagchi v. Mrs. F. Morgan — Not Approved. AIR 1970 SC 118 (C N 27).

AIR 1936 Oudh 102 = 1935 Oudh WN 1236, Janki v. Kanhaiyalal — Diss. AIR 1970 Raj 17 E (C N 3).

AIR 1946 Oudh 144 = ILR 21 Luck 292. Gur Prasad v. Hansraj — Diss. AIR 1970 Raj 17 E (C N 3).

AIR 1959 All 763 = 1959 Cri. LJ 1384, Bhagwat v. State — Diss. AIR 1970 J. & K. 21 (C N 6).

AIR 1959 All 769=1959 All LJ 855, Shaukat Hussain Beg Mirza v. State of U. P. — Diss. AIR 1970 Punj 75 A (C N 12).

(1963) F. A. No. 16 of 1953, D/- 10-7-1963 (All) — Revers. AIR 1970 SC 108 (C N 25).

Allahabad (contd.)

AIR 1965 All 498 = 1964 All W. R. (H.C.) 617 (FB), Bashi Ram v. Mantri Lal

—Held Overruled by 1968 All W. R. (HC) 713 (SC) as interpreted AIR 1970 All 125 A (C N 14).

(1965) S. A. No. 2097 of 1958, D/- 2-2-1965 (All) — Revers. AIR 1970 SC 105 A (C N 24).

1968 All LJ 916=1969 All Cri R. 172. Net Ram v. State — Held Not Correctly Decided & Not Foll. AIR 1970 All 122 A (C N 13).

(1968) 22 S. T. C. 26 (All), Commr. of Sales Tax, U. P. v. Ujjal Singh Autar Singh — Diss. AIR 1970 All 125 D (C N 14).

ANDHRA PRADESH

AIR 1959 Andh Pra 547 = 1959 Andh L. T. 634 (FB), Thenku Verriah v.

Andhra Pradesh (contd.)

Tamisetti Nagiah — Diss. AIR 1970 All 102 (C N 9).

AIR 1961 Andh Pra 523 = 1961 Andh LT 580, Inamdars of Sulhanagar Colony v. Govt. of Andhra Pradesh—Over. AIR 1970 SC 126 B (C N 29).

AIR 1963 Andh Pra 323 = (1962) 2 Andh W. R. 452, S. Puttaiah v. Rushingamma — Diss. AIR 1970 All 102 (C N 9)

AIR 1965 Andh Pra 388 = (1965) 2 Andh LT 62 (FB), Tirumareddi Rajarao v. State of Andhra Pradesh — Diss. AIR 1970 Pat 50 A (C N 7).

AIR 1968 Andh Pra 348 = (1968) 1 Andh WR 298, Srunguri Lakshminarayana v. Revenue Divl. Officer, Kakinada — Diss. AIR 1970 Delhi 44 A (C N 8).

BOMBAY

AIR 1944 Bom 235 (2)=46 Bom LR 411, Laxmi Bai v. Radha Bai — Diss. AIR 1970 Andh Pra 33 B (C N 4).

AIR 1947 Nag 178 = ILR (1947) Nag 299, Pandurang Vithoba v. Pandurang Ramchandra — Held Overruled by AIR 1966 SC 24 as interpreted AIR 1970 Orissa 32 B (C N 14).

AIR 1949 Nag 349 = ILR (1949) Nag 272, R. K. Misra v. Kundanlal Sahni — Diss. AIR 1970 Raj 22 B (C N 4).

CALCUTTA

Observations in AIR 1937 Cal 211 = ILR (1937) 1 Cal 781, Mahiganj Loan Office Ltd. v. Beharilal Chaki — Not Approved. AIR 1970 SC 118 (C N 27).

AIR 1946 Cal 524 = 50 Cal WN 820, Sohanlal Bahety v. Province of Bengal — Diss. AIR 1970 Delhi 44 A (C N 8).

AIR 1959 Cal 609 = 63 Cal WN 325, Satya Charan Sur v. State of W. B. — Diss. AIR 1970 Delhi 44 A (C N 8)

(1964) Appeals Nos. 199 and 200 of 1962, D/- 22-1-1964 (Cal) — Revers. AIR 1970 SC 118 (C N 27).

GUJARAT

(1963) Spl. Civil Appln. No. 827 of 1961, D/- 11-7-1963 (Guj) — Revers. AIR 1970 SC 143 (C N 33).

AIR 1964 Guj 136=1964 (2) Cri LJ 32, State of Gujarat v. Shantaben—Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

KERALA

AIR 1957 Trav-Co. 176=1955 Ker LT 813, Saina Bhai v. State — Over. AIR 1970 Ker 27 A (C N 6) (FB).

O. P. No. 337 of 1957 (Ker) — Over. AIR 1970 Ker 21 A (C N 5) (FB).

A. S. No. 550 of 1962 (Ker) — Over. AIR 1970 Ker 21 A (C N 5) (FB).

Kerala (contd.)

1965 Ker LT 616 = ILR (1965) 2 Ker 159, Thomas v. Viswanathan Pillai—Partly Overruled. AIR 1970 Ker 30 A (C N 7) (FB).

MADHYA PRADESH

(1966) Cri Appeal No. 180 of 1966, D/- 25-8-1966 (M. P.), State of Madhya Pradesh v. Shankarlal — Over. AIR 1970 Madh Pra 29 (C N 8) (FB).

1967 Cri LJ 1723 = 1967 MPLJ 872, State of Madhya Pradesh v. Abbasbhai — Over. AIR 1970 Madh Pra 29 (C N 8) (FB).

MADRAS

(1901) ILR 24 Mad 350, Gururajammah v. Vankatakrishnamma Chetti — Held Overruled by (1906) ILR 29 Mad 333 (FB) as interpreted AIR 1970 Mad 76 C (C N 20).

1935 Mad WN 460, Palaniappa Chettiar v. Emperor—Diss. AIR 1970 Mys 34 A (C N 7).

(1958) 2 Mad LJ 540, Ayyaperumal Chettiar v. Palaniandi Chettiar — Not. F. AIR 1970 Mad 81 (C N 21)

AIR 1959 Mad 531=1959 Cri LJ 1443, Dhanmull v. Regional Transport Authority, Salem — Diss. AIR 1970 Raj 48 (C N 8).

(63) Tax Cases Nos. 29, 47, 132 and 160 of 1961 (Revn. Nos. 16, 28, 81 and 98 of 1961), D/- 17-7-1963 (Mad) — Revers. AIR 1970 SC 165 (C N 38).

(68) Writ Petns. Nos. 387 of 1968 etc; D/- 10-4-1968 (Mad) — Revers. AIR 1970 SC 169 A, C, D (C N 39).

(1968) order in W. P. No. 436 of 1968 (Mad) by Kailasam J. — Revers. AIR 1970 Mad 63 B (C N 19).

MYSORE

AIR 1965 Mys 299, K. Siddegowda v. Parvathamma — Diss. AIR 1970 All 102 (C N 9).

AIR 1966 Mys 244=1966 Cri LJ 1036, Mary Lazrado v. State of Mysore — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

AIR 1968 Mys 196=1968 Cri LJ 952, Belgaum Borough Municipality v. Shridhar Shankar — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

ORISSA

AIR 1968 Orissa 79=1968 Cri LJ 650, Keshab v. Somenath—Diss. AIR 1970 J. & K. 21 (C N 6).

AIR 1966 Orissa 170=1966 Cri LJ 935, Ragunath v. Purnachandra — Diss. AIR 1970 J. & K. 21 (C N 6)

PATNA

AIR 1952 Pat 309=ILR 30 Pat 405 (FB), In re Babulal Chandra — Diss. AIR 1970 Ker 27 A (C N 6) (FB).

AIR 1962 Pat 255=1962 (2) Cri LJ 84 (FB), Gulzar Khan v. State — Diss. AIR 1970 Mad 85 C, E (C N 23).

Patna (contd.)

- AIR 1963 Pat 62, Mt. Bibi Aziman v. Mt. Saleha — Held to be not good law in view of AIR 1958 SC 827 As interpreted AIR 1970 Pat 50 A (C N 7)
- AIR 1963 Pat 243=(1963) 2 Cri LJ 25 (FB), Raja Singh v. Mahendra Singh — Held impliedly Overruled by AIR 1966 SC 1888 as interpreted AIR 1970 All 119 C (C N 12).

PUNJAB

- AIR 1956 Punj 95=ILR (1956) Punj 211, Niranjan Singh v. Bhagwan Ram — Diss. AIR 1970 J. & K. 26 (C N 7) (FB).
- AIR 1961 Punj 187=(1961) 1 Cri LJ 708, Jodh Singh v. Bhagambar Das — Diss. AIR 1970 J. & K. 21 (C N 6).
- (1963) L. P. A. No. 36-D of 1963, D/- 11-4-1963 (Punj) — Revers. AIR 1970 SC 122 A, B (C N 28).
- (1964) C. R. No. 675 of 1963, D/- 13-11-1964 (Punj), Gopi Nath Aggarwal v. Siri Krishan Chopra — Over. AIR 1970 Punj 60 A (C N 9) (FB).

Punjab (contd.)

- (65) F. A. O. No. 82-D of 1963, D/- 11-1-1965 (Punj) — Revers. AIR 1970 SC 139 A (C N 41).
- (1965) C. R. No. 222 of 1964, D/- 21-5-1965 (Punj), Smt. Mahadevi v. Darshan Singh — Over. AIR 1970 Punj 60 A (C N 9) (FB).
- (1965) C. R. No. 231 of 1965, D/- 17-12-1965 (Punj), Kharaitilal v. Charanjilal — Over. AIR 1970 Punj 60 A (C N 9) (FB).
- (1965) C. R. No. 295 of 1965, D/- 21-5-1965 (Punj), Badri Das v. Premchand Puri — Over. AIR 1970 Punj 60 A (C N 9) (FB).
- AIR 1968 Punj & Har 277=ILR (1968) 1 Punj 625, F. Dabwali Transport Co. v. Madan Lal — Diss. AIR 1970 Delhi 37 (C N 7) (FB).

RAJASTHAN

- AIR 1967 Raj 237=1967 Cri LJ 1374, State of Rajasthan v. Kapoor Chand — Diss. AIR 1970 Madh Pra 29 (C N 8) (FB).

COMPARATIVE TABLE

(10-1-1970)

A. I. R. 1970 February = Other Journals

AIR 1970 Supreme Court	AIR 1970 Supreme Court	AIR 1970 Supreme Court	AIR 1970 Allahabad
AIR 82	AIR 118	AIR 158	AIR 108
Other Journals	Other Journals	Other Journals	Other Journals
(1969) 1 S C O 765	(1969) 1 S C O 858	(1969) 1 S C W R	(1968) 2 Com L J
19 Fac L R 27	74 I T R 459	1115	352
(1969) 2 Lab L J	122 1969 Cur L J 438	1969 Serv L R 429	39 Com Cas 10
549	1969 Serv L R 356	(1969) 2 S C O 240	115 1968 All L J 977
39 Com Cas 905	(1969) 2 S C O 108	1969 M P L J 706	1968 All Cri R 578
(1969) 2 Com L J	(1969) 2 S C O 81	1969 Jab L J 865	1968 All W R (HO) 878
273	126 1969 Maha L J 643	(1969) 2 S C O 274	
(1969) 1 S C W R	(1969) 2 S C W R	181 1969 Maha L J 776	119 ...
451	595	1969 M P L J 793	122 1969 All L J 309
(1969) 1 S C O 266	129 (1969) 2 S C O 248	(1969) 2 S C W R	199 All W R (H J) 314
18 Fac L R 308	137 (1969) 2 S C O 279	248	1969 All Cri R 198
(1969) 2 S C J 818	(1969) 2 S C A 90	169 24 S T O 481	125 1969 All W R (HO) 162
(1969) 1 S C O 853	(1969) 2 S C W R	169 1969 S C O 55	
1969 Jab L J 818	563	(1969) 2 S C A 26	
1969 M P L J 874	140 1969 S C D 1110	(1969) 1 S C O 844	
1969 Maha L J 950	(1969) 1 S C O 825	(1969) 2 S C W R	
(1969) 1 S C W R	1969 All W R (HO) 511	831	AIR 1970 Andhra Pradesh
1235	1969 All Cri R 339	1969 S C D 1131	AIR 33
1969 S C D 944	(1969) 2 S C O 120	(1969) 2 S C O 211	Other Journals
(1969) 1 S C W R	143 1969 Ser L R 572	1969 S C D 937	38 ...
861	(1969) 2 S C O 131	(1969) 2 S C W R	43 (1969) 1 Andh W R 48
(1969) 1 S C O 884	(1969) 2 S C W R	865	(1969) 1 Andh L T 56
1969 Rene CR 370	146 600	192 (1969) 2 S C O 283	
(1969) 2 S C O 125	150 1969 S C D 1048	196 19 Fac L R 117	
(1969) 1 S C W R	(1969) 1 S C W R	(1969) 2 S C O 491	
878	1122	36 F J R 286	
(1969) 2 S C O 70	1969 Serv L R 445		47 ...
1969 S C D 1039	(1969) 1 S C A 605	AIR 1970 Allahabad	56FB (1969) 1 Andh W R 52
(1969) 2 S C O 218	(1969) 2 S C O 262	AIR 102	(1969) 1 Andh L T 78
118 (1969) 1 S C W R		Other Journals	
1047		1969 All L J 9	

AIR 1970 Assam		AIR 1970 J & K		AIR 1970 Madh Pra		AIR 1970 Orissa	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
26	Assam L R (1969) Assam 141	26FB	1969 Kash L J 238 1969 Renc CR 649	36	1969 Jab L J 188 1969 M P W R 238 1969 M P L J 361	19	35 Cut L T 1209
32	---	31	1969 Kash L J 290	39	1969 M P L J 341 1969 Jab L J 385 1969 M P W R 381	22	35 Cut L T 939
AIR 1970 Bombay		AIR 1970 Kerala		1969 M P W R 671		25	35 Cut L T 1010
AIR	Other Journals	AIR	Other Journals	40		27	---
48	1969 Maha L J 58 ILR (1969) Bom 145	21FB	1969 Ker L T 378 1969 Ker L R 617	1969 Jab L J 580 1969 M P L J 442		28	35 Cut L T 1132
71	Bom L R 420	27FB	ILR (1969) 2 Ker 1 1969 Ker L T 444 1969 Ser L R 514	1969 M P W R 671		31	35 Cut L T 1058
59	1969 Maha L J 234	1969 Ker L R 869 1969 Ker L J 555		AIR 1970 Madras		32	---
71	Bom L R 253	30FB		AIR		AIR 1970 Patna	
ILR (1970) Bom 68		ILR (1969) 1 Ker 227		Other Journals		50	
AIR 1970 Calcutta		1969 Ker L R 397		63		59	
AIR	Other Journals	1969 Ker L J 301		(1969) 1 Mad L J		1969 B L J R 749	
75	73 Cal W N 701	1969 Ker L T 275		261		---	
81	---	36	1969 Ker L J 90 1969 Ker L R 40 72 I T R 572	1969 M L J (Ori)		AIR 1970 Punjab	
85	---	40		76		AIR	
88	73 Cal W N 651	1968 Ker L T 865 1969 Ker L J 67		(1969) 1 Mad L J		Other Journals	
90	---	1969 Ker L R 156 (1969) 2 Com L J		81		40FB	
AIR 1970 Delhi		53		82		ILR (1968) 2 Punj	
AIR	Other Journals	AIR 1970 Madhya Pradesh		82		1	
37FB	(1969) 71 Pun L R (D) 318	AIR		19 Fac L R 306		60FB	
44	---	Other Journals		85		1969 Cur L J 503	
AIR 1970 Goa		23FB		91SB		71 Pun L R 802	
AIR	Other Journals	1969 M P W R 716 1969 M P L J 747 1969 Jab L J 935		(1969) 2 Mad L J		1969 Renc CR 422	
23	---	26FB		214		ILR (1969) 2 Punj	
28	---	1969 M P W R 751 1969 Jab L J 918		1969 M L J (Ori)		543	
32	---	29FB		82		66FB	
AIR 1970 Gujarat		1969 M P W R 755 1969 Jab L J 876		82		67FB	
AIR	Other Journals	33SB		82		1969 Cur L J 607	
37	---	1969 M P W R 714 1969 Jab L J 933		(1969) 2 Mad L J		ILR (1969) 2 Punj	
43	10 Guj L R 661	34		171		589	
AIR 1970 Jammu & Kashmir		1969 M P L J 808 1969 M P W R 149 1969 M P L J 256		AIR 1970 Mysore		71 Pun L R 1053	
AIR	Other Journals	1969 Jab L J 467		AIR		---	
19	1969 Kash L J 90			34		75	
21	1969 Kash L J 300			18 Law Rep 235 (1969) 1 Mys L J		AIR 1970 Rajasthan	
				606		AIR	
				1969 Mad L J (Cri)		Other Journals	
				504		17	
				37		---	
				18 Law Rep 438 (1969) 2 Mys L J		22	
				167		1969 Raj L W 363	
				45		26	
				18 Law Rep 453 (1969) 2 Mys L J		1969 Raj L W 336	
				284		1969 Renc CR 922	
				46		ILR (1969) 19 Raj	
				187		327	
						32	
						1969 Raj L W 455	
						36	
						ILR (1969) 19 Raj	
						340	
						1969 Raj L W 473	
						48	
						1969 Raj L W 528	

CORRECTION

AIR 1970 S C 61 (V 57 C 15) (Jan)

In the short note of Pt. (B) Col. 2, Line 5 — Add the word “not” between the words “could” and “have”

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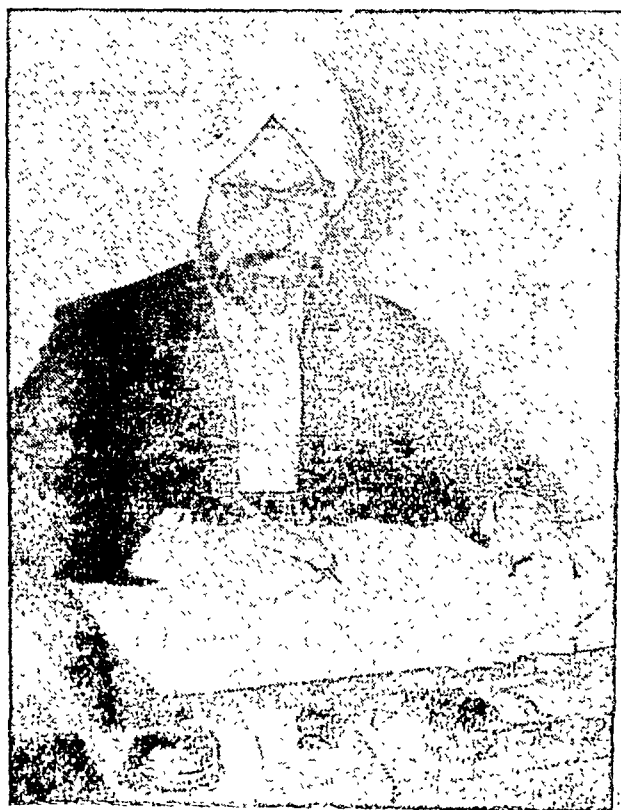
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JOURNAL SECTION

1970 FEBRUARY

SECTION 12 (2) OF THE LIMITATION ACT—AN INTERPRETATION

(By BALMOKAND VOHRA, *Advocate, 1848, Sector 22B, Chandigarh.*)

In the State of U. P. v. Maharaja Narain, AIR 1968 S C 960 : 1968 Cri L J 1132, the Supreme Court has had the opportunity to consider the scope of the words "time requisite for obtaining a copy of the decree" used in Section 12 (2) of the Indian Limitation Act, 1908 (now 1963) which reads as under :

"12 (2). In computing the period of limitation prescribed for an appeal, . . . the date on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from . . . shall be excluded."

2. In this case the respondents before the Supreme Court had been acquitted by the trial Court. The judgment was announced on 10-11-1962. The State of U. P. filed a memorandum of appeal in the High Court of Allahabad on 29-3-1963 (i. e. 139 days after the date of order), claiming exclusion of the period from 15-11-1962 to 3-1-1963 (50 days) under Section 12 (2) of the Indian Limitation Act on the ground that this was the time requisite for obtaining the copy of the judgment filed with the memorandum of appeal. Item 157 of the first schedule to the Indian Limitation Act, 1908 (now item No. 114 of the Schedule to the Indian Limitation Act, 1963) prescribes that the period of limitation for an appeal under the Code of Criminal Procedure, 1898 from an order of acquittal is three months from the date of the order appealed from.

3. According to the information contained in the copy of the order produced along with the memorandum, the appeal was within time. It showed that that copy was applied for on 15-11-1962, and the same was ready on 3-1-1963. Evidence was, however, brought on record showing that, in addition to the copy of the order filed with the memorandum of appeal, the appellant had made two applications for copies of the order appealed from on 3-12-1962 and 21-12-62. These were made ready for delivery on 20-12-1962 and 21-12-1962 respectively. It was not disputed that if the period of limitation was computed on the basis of those copies, the appeal was barred by limitation.

4. The main question before the High Court of Allahabad (and subsequently before the Supreme Court) was whether, in determining the time requisite for obtaining a copy of the order appealed from, it was open or not to the Court to take into consideration the result of subsequent applications for which copies were made ready for delivery on 20-12-1962 and 21-12-1962.

5. The High Court of Allahabad decided that it had to consider the result of subsequent applications also and held that the only period which could be excluded under Section 12 (2) of the Indian Limitation Act as time requisite for obtaining a copy of the order appealed from, in this case, was the period between 15-11-1962 (the date of the first application) and 20-12-1962 (the date on which the first copy was made available.) Accordingly the appeal was dismissed as time-barred. A I R 1965 All 443 : 1965 (2) Cri L J 338.

6. The Supreme Court, however, on appeal, overruled the decision of the High Court and held that in Section 12 (2) of the Indian Limitation Act, the words 'time requisite for obtaining a copy of the decree' mean the time beyond the party's control occupied in obtaining the copy which is filed with the memorandum of appeal. Hence the obtaining of other copies had no relevance in the matter of computing the period of limitation in this case and the appeal was within time.

7. In his article in A I R 1969 Journal Section at page 101, Dr. Moti Babu has criticized the judgment of the Supreme Court. The questions raised by him are discussed below :

8. *Question* : How the interpretation of the Supreme Court will be applied to a case where it is not necessary under the rules of the Court to file a copy of the judgment appealed from ?

COMMENTS : There can be no difficulty in the application because if the appellant claims any exclusion of period under Section 12 (2) of the Limitation Act, he will have to file a copy of the order appealed from in support of his claim even in a case where he is not re-

quired to file any such copy under the rules of the Court.

9. *Questions* : (i) why the words 'a copy of the decree' used in the section should be read as the copy of the decree filed with the memorandum of appeal ?

(ii) (the word 'requisite' in the section refers only to the time properly required The time from the date of application for copy to the date on which it is notified to be ready as noted on the copy will be the prima facie evidence of the requisite time But when the appellant has already obtained a copy of the decree, can we reasonably say that the time needed for obtaining a copy extends beyond that ?

COMMENTS :—

(i) & (ii) What is deductible under section 12 (2) of the Indian Limitation Act is not the minimum time within which a copy of the order appealed against could have been obtained. It must be remembered that sub-section (2) of Section 12 enlarges the period of limitation prescribed under entry 157 of Schedule 1. That section permits the appellant to deduct from the time taken for filing the appeal, the time required for obtaining the copy of the order appealed from and not any lesser period which might have been occupied if the application for copy had been filed at some other date. That section lays no obligation on the appellant to be prompt in his application for a copy of the order. A plain reading of Section 12 (2) of the Act shows that in computing the period of limitation prescribed for an appeal, the day on which the judgment or order complained of was pronounced and the time taken by the Court to make available the copy applied for, have to be excluded. There is no justification for restricting the scope of that provision AIR 1968 S C 960 = 1968 Cri L J 1132,

10. *Questions*

The Supreme Court has observed that if the question of time taken by the appellant in obtaining other copies of the decrees is gone into, then it would lead to a great deal of confusion and enquiries

into the alleged latches or dialatoriness in respect not of copies produced with the memorandum of appeal but about other copies which he might have got and used for other purposes, with which the Court has nothing to do. That itself raises two questions viz: (i) Will the Court not enquire into the delays intentionally caused by the appellant in obtaining the copy filed with the memorandum of appeal, even when there is evidence to indicate such delay? and (ii) can the difficulties of enquiry change the interpretation of the provision?

COMMENTS :

(i) According to the Supreme Court's interpretation only the time beyond the party's control occupied in obtaining the copy which is filed with the memorandum of appeal can be excluded. If any delay is not beyond the control of the appellant, it will not be excluded. The time taken by the copying Department in making the copy ready for delivery is evidently beyond the control of the appellant. There can be no question of any default if the steps taken by the appellant are according to law.

(ii) A careful reading of the Supreme Court's judgment will show that it is the irrelevancy and not the difficulties of such enquiries, which induced that Court to overrule the High Court's decision. Hence the question does not arise.

11. In the end I may submit that the Supreme Court's interpretation is also in accordance with the rules of Construction of Statutes of limitation. In *Sethmal v. Amba Singh*, AIR 1955 Raj 97 (FB) it has been held that where two interpretations are found to be equally possible, the Court must impute a reasonable intention to the Legislature and hold the suit not to be falling within a shorter period of limitation. The same view was taken in *P. Venkata Subbareddi v. D. Pappireddy*, AIR 1957 Andh-Pra 406 = 1957 Cri L J 923. On analogy we can also say that if the appellant is able to prove a fact which brings the appeal within limitation the evidence of other facts produced by the respondents to prove the time-bar may be disregarded as being irrelevant.

EVOLUTION OF THE INDIAN LEGAL SYSTEM AND THE ADMINISTRATION OF RULE OF LAW IN INDIA

(Being a lecture delivered at the Settlement Training Camp at Belpahari
in the District of Midnapore on 27-7-69

by SHRI MANOTOSH ROY, *District & Sessions Judge, Midnapore*).

I. Introduction.

The subject I have chosen for you for discussion to-day may be somewhat technical, but I shall try to make it interesting to you as far as practicable. I shall first of all trace the evolution of the Indian legal system, that is, the establishment of Indian Courts as we know to-day since the seventeenth and the eighteenth centuries within a very short compass so as to present a brief idea as to their functioning and then examine their approach to the problems of modern society.

2. In the Vedic age and in the subsequent Hindu period, law was generally combined with morality and religion. In the subsequent period, that is, during the Muslim rule before the coming of the British in India, the Shariat law was based strictly on Islamic injunctions. But one redeeming feature of the indigenous legal system prevalent since the ancient times was that the village society was controlled to some extent by the participation of elected people. In the Vedic Age, we hear of Sabha and Samity, that is, a larger committee and a smaller committee dealing with social problems of the then society. These committees also associated themselves with the administration of law whenever it was necessary. In the Vedic age, it was ruled that the majority opinion of these committees will ultimately prevail in case of any dispute between the people. The students of English Constitutional history, amongst you, well know the ancient Anglo-Saxon institutions called Witanagamot and Curia Regis which ultimately evolved themselves into the modern English Parliament and the English High Court of Justice respectively. But in ancient India, we had no such institution which could correspond to the modern Law Courts. Modern Indian legal system which peacefully and still effectively functions throughout India to-day is essentially a contribution of the British. The principal purpose of such system is to administer civil and criminal justice based on rule of law. Law divorced completely from theology, religion or morality, that is secular law as it is known in modern India, came to be administered for the first time after the introduction of British Rule.

II. Modern historical background and its chronology.

I shall presently furnish the modern historical background of Indian Courts and its

chronology for two centuries roughly between 1600 and 1800.

2. By the Elizabethan Charter of 1600, the East India Company which was initially formed for opening up trade in the East Indies, was empowered to make laws, orders, ordinances, constitutions and imprisonments, not repugnant to the laws and customs of the Queen's Realm. The above Charter lent somewhat anomalous position to the Company's factories and settlements in India because it invested the Company with the authority to administer justice within the imperial authority of Moghuls as though an imperium in imperio, that is, a State within State. In 1618, Sir Thomas Roe, Ambassador of James I of England in the Court of Jehangir, obtained a treaty from the Moghul authority which gave to the Company a privilege to decide disputes between the English within their factory at Surat: In 1661 by the Charter of Charles II, judicial power was vested in the executive Government which dispensed justice by the law then in force in England. In 1668 and 1669, Charles II obtained the Island of Bombay, that is, the present Bombay harbour and its environs from the Portuguese as his marriage dowry and the English King leased out the city and the harbour to the East India Company at an annual rent of ten pounds. Between 1686 and 1694, the Company purchased several villages in Bengal from the Nawab by which it became the Zamindar in these villages exercising civil and criminal jurisdictions. By the Charter of 1726, the Presidency towns of Calcutta, Bombay and Madras were established and the civil jurisdiction was vested in the Mayor's Courts except cases of high treason by the Letters Patent applying the common law of England. By the Charter of 1753, the Mayor's Court was divested of its jurisdiction unless the natives wilfully submitted to it. The Regulating Act of 1773 ultimately abolished the Mayor's Courts and provided for the establishment of Supreme Courts for the three Presidency towns in India. In actual fact, the Supreme Court of Calcutta was established in 1774, that of Madras in 1801 and Bombay in 1823. These Supreme Courts were very like the King's Bench Division Courts of England administering both law and equity. When the technicalities of common law became crude and rigid, equity intervened in the interests of substantial justice overriding the rigidity of the law. The Act of Settlement, 1781 recom-

mended the establishment of Dewani and Nizamat Adalats exercising civil and criminal jurisdictions independent of the Supreme Courts. These Adalats may be properly termed the provincial Courts administering the personal laws of the Hindus and the Mahomedans or of the other native communities and they acted quite independently beyond the jurisdiction of the Presidency Supreme Courts. Regulation III of 1793 brought the Executive Officers of the Company within the above Courts' jurisdiction when they transgressed the law. Regulation II of 1801 established the Sadar Dewani and Sadar Nizamat Adalats, that is, the Appeal Courts in civil and criminal matters with one Chief Justice assisted by puisne Judges independent of executive and legislative authorities. This Regulation was responsible for the foundation of Judiciary in India as it is known to-day. This Regulation supplied the origin of the present High Court at Calcutta. Thus you see the establishment of these Civil and Criminal Courts in India gradually throughout the seventeenth and eighteenth centuries.

III. Movement for uniformity of Indian laws.

The nineteenth century Indian renaissance or flowering of culture was also reflected in the domain of law and its administration. It may be termed the general movement for achieving the uniformity of Indian laws. Those were the golden days of Vidyasagar and Lord William Bentinck and the second half of the nineteenth century may be called the annus mirabilis of social reform in India. The Indian genius had combined with the English enlightenment. The Charter Act of 1833 appointed the first Indian Law Commission to bring about a uniformity of Indian laws. This Commission largely probed into the socio-economic conditions of Indian Society and supplied the very useful ground for the Second Law Commission to work for the actual legislations. The Charter Act, 1857 appointed the Second Law Commission and under its auspices the first Civil Procedure Code and the first Limitation Act were enacted in 1859. The Indian Penal Code under the leadership of Macaulay set down a uniform law of reformatory, retributive and deterrent punishments in a comprehensive manner in 1860. The first Criminal Procedure Code was enacted in 1861 under the auspices of the same Commission. Before that Commission concluded its session, it recommended the amalgamation of the Supreme Courts exercising original jurisdiction and the Sadar Dewani and Nizamat Adalats (Courts of appeal) of the Presidency towns. Such recommendation was accepted by the Government leading ultimately to the establishment of

three High Courts of the three Presidency towns as the Highest Courts of appeal and also at the same time exercising original civil and criminal jurisdiction. The Third Law Commission was appointed in 1861. No less important were the important legislations taking place under its auspices. Regulation II of 1872 declared that in suits regarding inheritance, marriage, castes, religious usages and institutions, the Indian people will be governed by their own personal laws and that in their absence the Courts will follow the principles of justice, equity and good conscience according to the merits of a particular case. Keeping in view the purport of the above Regulation, the Indian Succession Act, the Indian Contract Act and Indian Evidence Act, the three monumental statutes which still govern the destiny of the litigants today were passed, all in the year 1872. The Specific Relief Act was passed in 1877. The process was completed by the Fourth Law Commission in the same trend. That Commission was appointed in 1879. Under its auspices, the Negotiable Instruments Act, 1881, Trusts Act, 1882, Transfer of Property Act, 1882 and the Easements Act, 1882, were passed.

2. The work of the Fourth Law Commission in the nineteenth century thus achieved its mission of uniformity for all practical purposes in the shape of enactments of various general laws affecting the Indian people.

IV. Establishment of High Courts and the formative stage of Rule of Law in India (1862-1935).

The High Courts Act, 1861, established the three High Courts at Calcutta, Bombay and Madras. The Letters Patent were issued in this connection by the British Crown in 1862. These legislations brought about a fusion of Sadar Courts and Supreme Courts. The new High Courts thus came to exercise both the appellate and original jurisdiction. The High Court of Calcutta was established in 1862. The Madras and Bombay High Courts came into existence some time later. In its appellate jurisdiction, the High Court of Calcutta heard civil and criminal appeals from the districts, whereas in its original jurisdiction, it heard the original civil suits and cases and criminal sessions within the town of Calcutta surrounded by the Circular Road. Calcutta thus became the premier High Court and took the lead in the formative stage of the administration of rule of law in India. The mantle of Sir Elijah Impey, the first Chief Justice of the Supreme Court of Calcutta thus fell upon Sir Barnes Peacock, the last Chief Justice of the same Supreme Court and the first Chief Justice of the Calcutta High Court, to carry on the legal tradition which gradually evolved

the concept of rule of the law in India. Some of the outstanding features of the new legal tradition which became the permanent feature of the Indian legal system may be noticed in this connection. In the first place, the jury system and the criminal practice. The jurors became the Judges of facts in a sessions trial and the Judge addressed the Jury during the summing up of the evidence. The Judge's directions on questions of law became binding upon the Jury but his address on questions of fact was not so. The rule of criminal law was that every accused brought before a Court was presumed to be innocent unless his guilt was proved beyond all reasonable doubt. The entire burden of proof of guilt was upon the prosecution. The Courts followed the English principle that it was better to let off a hundred guilty persons rather than imprison one innocent man. Secondly, the concept of habeas corpus; by this rule jurisdiction was given to the High Court to order the executive and the police to have the body of a prisoner produced before the Court if he was arrested without a warrant and without reasonable cause. This rule gradually checked the high-handed and arbitrary acts of the executive. The third feature may be called the adversary system of trial. It took the form of eliciting truth by cross-examination of witnesses by each side. Both parties were equally entitled to place their case so that the Judge was enabled to decide impartially according to his judicial discretion. I may recall in this connection the system of ready-made and summary justice that prevailed in India before the introduction of this new practice. I hope you all know the proverbial example of a Kazi in the days of Murshidkuli Khan, the Nawab of Bengal, dispensing justice in a case to the two litigants each of whom claimed a baby as hers and the Kazi ruled that the baby be cut into two pieces in his presence in order to enable him to find out the genuine owner. The real mother withdrew from the Court pleading before the Kazi that her child might be spared the life for the sake of affection of a mother. The real mother was thus found out thanks to the presence of mind of the Kazi who administered substantial justice quite accidentally in this particular case but at the same time, I hope, you will appreciate the dangers inherent in such a system where the Judge took sides with the litigants like a prosecutor as also a defender to a cause. The old system was thus completely forgotten yielding place to a more healthy and scientific system of eliciting truth by cross-examination.

2. In the next place, I may mention the rule of precedents or judge made law setting down the standard of decision in different cases. The later Judges frequently referred

to these decisions when like questions of fact and law were involved. This added to the prestige for the Judges who decided those cases without affection or ill-will, fear or favour.

3. It will not be out of place here to recall some interesting examples of great personal integrity of Indian Judges who build up the legal traditions. Sir Ramesh Chandra Mitter adorned the High Court Bench at Calcutta between 1874 and 1890. The circumstances in which he invited his own retirement at the age of 50 evokes nostalgic memories even to-day. The Judge made an appointment to hear some of the junior Advocates at ten O'clock in the morning as they were facing difficulties earlier in the matter of audience before the Judge by the rule of seniority of Counsels. But he forgot the appointment and took his seat for judicial work at 10.30 a.m. as usual on the following morning. As he was hearing the cases for the day, suddenly he remembered the fact of previous appointment which was then too late to be implemented and the Judge became morose. After the Judge finished his judicial work, he sent in his resignation letter to the Chief Justice Rankin. The Chief Justice was taken by complete surprise but Ramesh Chandra could not be persuaded to withdraw his resignation as he argued that a Judge should not continue in office when his memory failed. So the Judge surrendered his ten years of service with pleasure and a serene satisfaction. In those days a High Court Judge retired at the age of 60 and drew a salary of Rs. 4,000/- per month.

4. A modern parallel of almost the same incident can be found in the case of Lord Chief Justice Goddard of England who resigned from his post the other day. As you know Judges in England hold their offices during the Queen's pleasure. As such, they have no ascertained period of retirement at a particular age. Lord Justice Goddard had a sharp memory even in his old age and he dispensed justice with great efficiency and alertness at the age of 77. But one day while delivering a judgment in Court, he failed to recall a document which was admitted in evidence. The Lord Justice immediately decided to step down and sent in his letter of resignation to the Queen on the ground of loss of memory. The incident gained wide publicity in the world press in recent days and some of you might remember the incident as it happened a few years ago.

5. I would, therefore, impress upon you, while remembering some of the shining examples of personal integrity of the High Court Judges of those days that the country ulti-

mately benefited by the great legal traditions which were built step by step by the great Judges of the Calcutta High Court. Sir Barnes Peacock, Sir Lawrence Jenkins and Sir George Rankin are some of the eminent English Chief Justices and Sir Dwarka Nath Mitter, Sir Ramesh Chandra Mitter, Sir Gooroodas Banerji and Sir Ashutosh Mukherjee are some of the great Indian Judges of the Calcutta High Court, to name only a few in the formative period of the administration of rule of law in India.

6. As a logical consequence to the above rule of precedents of the judge-made law, there developed a system of law reporting known at that time as Bengal Sadar Dewani reports and subsequently Indian Law Report series. Sambhu Nath Pandit became the first *Indian Reporter of Bengal Sadar Dewani Reports* and he was later elevated to the Calcutta High Court Bench as the first Indian puisne Judge. Michael Madhusudan Dutt was the first Indian to be appointed a reporter of the Indian Law Report series and though he acquitted himself creditably of the charge, he later withdrew from the world of law and confined himself mostly to literature.

7. The substance of these healthy practices was to put justice before truth. It was ruled that in a civil or criminal trial matters extraneous to legal evidence would be excluded. But where in criminal trials, the burden was upon the prosecution to prove the guilt of the alleged offender, a rather country rule was laid down in case of a civil action where the burden generally rested upon the plaintiff to prove his case. Section 105 of the Indian Evidence Act had of course ruled that any special plea taken by a litigant had to be proved by him alone.

8. From what I have stated just now, certain corollaries followed: (1) Judges must be independent; (2) there should be no promotion for Judges because their judicial integrity is same always; (3) no man should be a Judge in his own cause; (4) a Judge must hear two sides and (5) justice must be seen to be done. In fact these great Judges of the formative period conformed to the concept of the Socrates' dictum of ideal Judges—"To hear courteously, to answer wisely, to consider soberly and to decide impartially."

9. To illustrate how the concept of rule of law came to be administered in India in the formative period, I would better now refer to three celebrated cases decided by the Calcutta High Court and conclude this aspect of my discussion. The first such case took place in 1869 in re William Taylor reported in A I R 1918 Cal 719. It illustrated the principle that law was no respecter of person. The judgment

was delivered by Sir Barnes Peacock who agreed with the view expressed by the other member of the Division Bench Mr. Justice Dwarkanath Mitter. Mr. W. Taylor, an English man who formerly belonged to the Indian Civil Service and some time Commissioner of Patna, was enrolled as a Vakil of the Calcutta High Court. He also served as the Law Agent in Patna. He had an alternative lucrative retainer from the Ranee of Ticaree. He was eventually dismissed from such employment. Mr. Taylor filed a suit for recovery of about Rs. 30,000 against the Ranee while the Ranee filed a cross-suit against him for recovery of money received on her account. Mr. Taylor's suit was dismissed with costs and a sum of Rs. 6,000 and odd was decreed in favour of the Ranee in her suit. In execution of such decree, *some property belonging to Mr. Taylor in Bihar* was attached. Subsequently, that property sold by Mr. Taylor to one Mt. Zuhuroon for Rs. 55,000. The above attachment was concealed from the purchaser by Mr. Taylor. With a view to saving the property, Mt. Zuhuroon was compelled to pay the claim of the Ranee. Thereafter Mt. Zuhuroon filed a suit against Taylor for the recovery of the sum she was obliged to pay to the Ranee. When the matter came up before the Calcutta High Court on appeal, it was heard by Peacock C. J. and Mitter J. It was held unanimously that Mt. Zuhuroon was entitled to recover the amount she claimed from Mr. Taylor. Mitter J. made a further finding that a fraud was perpetrated against Mt. Zuhuroon by Mr. Taylor in concealing from her the fact that the estate sold by him to her was under attachment in execution of a decree of Court.

Mr. Taylor became furious at such a finding of fraud made by an Indian Judge against an Englishman. Instead of preferring an appeal to the Privy Council, he made scathing criticisms against Mitter J. by appealing to the members of the public through the press. Three letters were actually published in the 'Englishman' in April, 1869.

The Chief Justice decided to vindicate the honour of Mr. Mitter J. and the dignity of the Court. The task was a delicate one because Mr. Taylor was a friend of his. The Chief Justice discussed the matter with Mitter J. and after persuading Mitter J. to issue a writ of attachment against Mr. Taylor, the Chief Justice issued the process through the Sheriff of Calcutta declaring why Mr. Taylor should not be committed to prison for contempt of Court. Mr. Mitter was then the only Indian Judge of the Calcutta High Court. The Sheriff's officer proceeded to Garden Reach and went on board the vessel Candia which was just about to sail. Mr. Taylor was to leave for England by that vessel and thereby escape

the hand of justice. Mr. Taylor knowing the medicament fled to another ship but the Sheriff's officer pursued him like fate. But Mr. Taylor finally managed to seek refuge in the home of a friend of his at Theatre Road. The Sheriff's Officer arrested him there and brought him to Court to answer the Contempt rule. Mr. Taylor was sentenced to imprisonment for one month and a fine of Rs. 500 and further imprisonment till the fine was paid.

10. The next celebrated case took place in 1870 in the matter of Ameer Khan concerning the liberty of a subject when the High Court issued a rule in habeas corpus (6 Bengal Law Reports 892). The above merchant was arrested from his house in Calcutta and taken to Gaya where he was confined in Jail. Thereafter he was removed to Alipur Jail where he was detained at the time of the proceeding. On his behalf, an application for a writ of habeas corpus was addressed to the High Court for production of his body, as the applicant complained that he was not told on what charge he was arrested nor any warrant produced or shown to him indicating the reasons for his detention. Justice Norman who heard the case, decided that the High Court had authority to issue a writ of habeas corpus in the Muffassils. He further decided that when a person was illegally deprived of his liberty; he had three remedies: first by civil action, second by indictment and thirdly, by a writ of habeas corpus. It was decided that as no civil action or criminal charge could be maintained in the Courts of this country against the Governor-General for an illegal imprisonment, the only remedy for the wrong in such cases was that afforded by the writ of habeas corpus.

11. The third and last of such celebrated cases was *Clarke v. Brojendra Kishore Roy Choudhury* which took place in 1907 before Mr. Justice Fletcher of Calcutta High Court (ILR 36 Cal 433). Brojendra Kishore was a well-known Zamindar of Mymensingh who filed a suit for recovery of Rs. 10,000 and odd as damages alleged to have been caused to him by wrongful trespass of Mr. Clarke, the District Magistrate of Mymensingh, in searching the plaintiff's kutchery at Jamalpur. It was alleged that certain Hindus, at the instigation of the Hindu servants of Brojendra Kishore and other Zamindars, tried to prevent the sale of foreign goods at the annual fair or mela at Jamalpur in furtherance of the Boycott Movement of the time. The Mahomedans resented the movement and communal disturbances were apprehended. A Mahomedan was shot with a revolver. Suspicion was aroused in the official community by the information that persons connected with the shooting were certain Hindus who had taken refuge in the Zamindar's kutchery. The District Magistrate

and his officers entered the kutchery premises and arrested four Hindu servants of the Zamindar on suspicion. The English Officers tried to force open a Hindu temple which was then locked up as the information went round that arms and explosives were concealed in it. Four shots were alleged to have been fired from inside the temple and a Mahomedan was wounded.

The District Magistrate Mr. Clarke on being informed that the police had reason to believe that four bombs were concealed in the kutchery of Brojendra Kishore decided to search the premises. Without making any record of the reasons for his conduct, the District Magistrate accompanied by the Superintendent of Police and the Subdivisional Officer proceeded to search the kutcheries of Brojendra Kishore and of other Zamindars. All the kutchery buildings and boxes inside them were found locked. No responsible officer of Brojendra Kishore or of other Zamindars could be found to deliver the keys. The padlocks were then forced open. The boxes in the kutcheries were also broken open and their contents including the Zamindari papers were taken out in pursuit of the search for arms. This trespass was complained of in Brojendra Kishore's suit against the District Magistrate.

Justice Fletcher found that although the District Magistrate had acted bona fide, the search of the premises was not warranted by law and Mr. Clarke's entry constituted an actionable trespass. He passed a decree against the District Magistrate for Rs. 500 as damages and directed him to pay the costs of the suit to Brojendra Kishore. The High Court overruled the plea of the District Magistrate that he was performing a judicial duty under the protection of Judicial Officers Act (Act XVIII of 1850). The conduct of Mr. Clarke was also held to be unjustified even under the Indian Arms Act, 1878, as he did not record the grounds of his belief before causing the search to be made. The decree granted by Mr. Justice Fletcher was also affirmed by High Court in appeal.

V. Fruition of Rule of Law in India.

The period 1935-1950 may be called the period of gradual fulfilment of the concept of rule of law in India. The Government of India Act, 1935, provided that the laws declared by Federal Court and the Privy Council would be binding on all Courts in India. Sir Maurice Gwyer was the first Chief Justice of the Federal Court of India. The Federal Court was the precursor of the present Supreme Court of India. Lord Macnaghten of the Judicial Committee of the Privy Council contributed much to the trend

and practices of rule of law in India. The Constitution of 1950 declared in its Art. 141 that the law declared by the Supreme Court is binding on all Courts of India. The result is that the Privy Council decisions became no longer binding on Indian Courts, although they were entitled to great respect, having decided the course of law in this country for more than a century and a half.

VI. General perspective of the concept of rule of law in modern society.

In what I have stated so far, the origin of the concept should not be lost sight of. The genesis of the concept was, of course, the Magna Carta when King John of England tried to exert his absolutism against his Peers. The Peers assembled at Runnymede and passed a unanimous resolution that no Peer shall be tried except by a Council of Peers. This resolution unfolded itself gradually into three well-defined connotations of the rule of law: (1) supremacy of law; (2) equality of all persons in the eye of law; (3) law is no respecter of persons. Dicey, the great English Constitutional lawyer of the 19th Century, developed the principle as absolute Supremacy of law as opposed to arbitrary power. In course of time in this country as also in other fast developing democratic countries in the earlier periods, the problems for preserving the concept took the form of keeping the Executive Government within the bounds of the law. This was necessitated in the background of the growing powers of the Executive in modern and complex societies. The emergency legislation had to fortify the Executive with various powers in the shape of fighting great wars to control civil population, governing the currency and trade in a competitive world by strict control over exchange, exports and imports, ensuring the distribution of necessities by rationing and finally necessitating nationalisation of essential industries. But the High Courts and the Supreme Court even then came inevitably as interpreters of the above extraordinary powers of the Executive Government so that the latter did not transgress the emergency legislation within the limits of their respective definitions. The Supreme Court under Art. 32 and the High Courts in India under Art. 226 were thus given the right to declare any law ultra vires the Constitution if it violated the Fundamental Rights of the Citizens.

VII. Conclusion.

I have now almost come to the end of my discussions. You will see that the concept of the rule of law which originally served as a check to the English King from destroying the liberty of the subject, came to be applicable to India

through a gradual process of evolution through the High Courts in India. In England, the characteristic feature of its unwritten Constitution is Parliamentary sovereignty. This means that the Courts in England cannot strike down any law passed by Parliament as unconstitutional. In the United States of America, the fundamental feature of its written constitution is judicial supremacy. Such supremacy was established by the 14th Amendment of the U. S. Constitution which provides that no State shall deprive any person of life, liberty or property without due process of law. The U. S. Supreme Court declared many laws as unconstitutional owing to unreasonable use of police powers of the State. The U. S. Supreme Court therefore can decide not only what the law actually is but at the same time it can direct what it should be and thus can set the norm or the standard for legislation. In India, we tried to strike a balance between the two ideals laid down by the English and the U. S. Constitutions. The Supreme Court of India acts as the interpreter of the Constitution and tells us what the law actually is on the basis of the above constitution but it cannot direct, unlike the U. S. Supreme Court, what the law should be. Such power was not given to the Judiciary in India on the ground that it might enable the Judges to interfere with social legislation. It was decided that the sphere of social legislation would be the exclusive preserve of the Indian Parliament. Sir Allahadi Krishnaswami Aiyer made his impressive debut in the Constituent Assembly of India when the draft Constitution was discussed on such subject.

2. The concept of rule of law had its first repercussions against the theory of divine right of Kings when James I of England expounded the theory that the King could do no wrong and Sir Edward Coke took up the cause of the Judges against the King. The King's party was earlier championed by Sir Francis Bacon who propounded the theory of Judges being "Lions under the Throne." Against this theory, Sir Edward Coke quoted Bracton to say that "King is under no man, save under God and the Law." To this, James I angrily replied "Hath not the King reason?" To this, the great Judge enjoined, "True, your Majesty has reason, but your Majesty will allow me to say, with all reverence, that you are not learned in the laws of this your Realm of England which is an art which required long study and experience before a man can attain to the cognisance of it. The law is the golden met-wand and measure to try the causes of your Majesty's subjects, and it is by that law that your Majesty is protected in safety and peace."

3. The English King did not forgive such impudence and actually dismissed the great Judge. Thereafter King James I himself tried one cause. After he heard both sides, the King said "I could do quite well after hearing one side only, but upon my word, after hearing both sides, I know not in what way to decide." In course of two revolutions fought in England, the King's party was ultimately defeated and the concept of rule of law in England was firmly established. The concept at once became the beacon light to subsequent democratic movements throughout the world. The Judges in India on the application of this concept are only under the law and the Constitution. When they take office they have to swear allegiance to the Constitution which upholds the rule of equality before the law and equal protection of the laws within the territory of India as one of our Fundamental Rights under Art. 14. I would venture to say that the concept by now has securely established itself in this country through various judicial pronouncements of the Supreme Court and the High Courts of India whenever occasion arose since the promulgation of the Constitution. As I was coming along after Court hours yesterday and your Settlement Officer Shri Das Gupta invited me to board a Government car which would take me to this place, my Court peon delivered the day's mail. As I was perusing them inside the moving car, I noticed a very recent decision of the Supreme Court reported in 1969 (I) Supreme Court Appeals 579 (Debesh Chandra Das v. Union of India) which illustrates in a way the triumph of rule of law in India. I may tell you the short facts involved in this case. Shri Debesh Das is a member of the Indian Civil Service and at the relevant time he was serving as a Secretary of the Social Welfare Department of the Government of India. Shri Das was serving in five years' tenure post in the Central Government having been originally drafted from the Assam Cadre of the Civil Service. His tenure was due to expire on July 29, 1969. But on June 20, 1966, he received a letter of the Cabinet Secretary asking him to revert to his old post at Assam or to proceed on leave preparatory to retirement or to accept some post lower than that of the Secretary of the Government of India. I feel tempted to read before you the sort of letter he received as follows :—

"My Dear Debesh :

For some time, the Government has been examining the question of building up a higher level of administrative efficiency. This is much more important in the context of the recent developments in the country. The future is also likely to be full of problems. In

this connection, the Government examined the names of those who are at present occupying top level administrative posts with a view to ascertaining whether they were fully capable of meeting the new challenges or whether they should make room for younger people. As a result of this examination, it has been decided that you should be asked either to revert to your parent State or to proceed on leave preparatory to retirement or to accept some post lower than that of Secretary of Government. I would be glad if you please let me know immediately as to what you propose to do, so that further action in the matter may be taken.

* * * *

Your sincerely,

Sd/- (Dharma Vira)."

Shri Das made verbal and written representations to the Cabinet Secretary and the Prime Minister against the above decision of the Government. But these were of no avail. Accordingly, he filed a writ petition in the Calcutta High Court for quashing the above decision of the Central Cabinet. According to Mr. Das, the order amounted to a reduction in rank since the pay of a Secretary of the Government of India (I.C.S.) is Rs. 4,000/- and the highest pay in Assam (I.C.S.) is Rs. 3,500/-. There being no equal post in the Government of Assam, his reversion to the Assam Service meant a reduction not only in his emoluments but also in his rank. He also contended that his tenure was prematurely and wrongly terminated before the expiry of five years. He also alleged that there was a stigma attached to his reversion. He further contended that the procedure under Art. 311 (2) of the Constitution ought to have been followed and as he was not given any reasonable opportunity to show cause, the order of reversion passed against him by the Government was not sustainable in law. When Shri Das filed the writ petition initially at the Calcutta High Court, claiming relief under Art. 226 of the Constitution, he was appointed as a Special Secretary but under one of his juniors. At the relevant time, Shri Das was next only to the Cabinet Secretary in the matter of seniority. The Union of India contended that Shri Das was merely on deputation and that his reversion to his parent State did not mean any reduction or penalty. The Calcutta High Court rejected the writ petition of Shri Das. Against that order of rejection Shri Das preferred an appeal to the Supreme Court. The Supreme Court allowed the appeal of Shri Das and quashed the order passed by the Government of India holding that in the instant case, the reversion was accompanied by a stigma and

also a case of reduction in rank with a distinct stigma upon the Officer. The Supreme Court further held that as the Government did not take any action in accordance with Art. 311 (2) of the Constitution the order of reversion could not be sustained.

3. Gentlemen, before I conclude,⁵I hope, you have been able to appreciate how the principle of the rule of law has been made applicable to this interesting case where a highly placed Executive Officer of the Government was complaining to Court against the arbitrariness of the highest Executive Authority and the Court thought it to be a just case where it should interfere in accordance with the rights and obligations laid down in the

Constitution and the Officer concerned obtained relief against such arbitrariness. This illustrates once again the majesty of the law still now prevalent in democratic India. When you go back to your respective departments after finishing your training in this Camp, you will do well to remember this majesty of the law which will ultimately protect you and all the citizens of India alike against the pitfalls whenever occasions will arise.

4. I must thank you for your rapt attention to these discussions. I must also thank your Settlement Officer Mr. Das Gupta but for whose resourcefulness and courtesy I would not have been here.

Thank you.

REVIEWS

THE CONSTITUTION OF INDIA by C. C. Anajwala, Publishers—C. Jamnadas & Co., Princess Street, Bombay (First Edition), Price Rs. 10.

The book under review has been written mostly for the use of students of Constitutional Law. In the preface the learned Author has explained the nature of the Constitution and how it was drafted being based on various other Constitutions. The learned Author has further made a note about the decision of the Supreme Court in *Golaknath v. State of Punjab* wherein the restriction on the power of the Parliament to amend the Constitution under the existing Art. 368 is spelt out.

Presentation of the subject is reasonably well. The learned Author instead of commenting about *Golaknath's* case in the notes under Art. 35 at the end of Part III would have done well to mention the case under different provisions viz., Articles 18 (2), 368 and other concerned provisions. But for such a note the students who are supposed to make use of the book would find it difficult to understand the exact scope of concerned provisions. It should have been better also, had the learned Author given a list of cases as is customary with the standard works. G.G.M.

RESTATEMENT OF AFRICAN LAW, KENYA. Volume 1. THE LAWS OF MARRIAGE AND DIVORCE. By Eugene Cotran, LL.B., LL.M., Dip. I.L. (Cantab); of Lincoln's Inn, Barrister at Law; Lecturer in African Law, School of Oriental and African Studies, University of London; Member and Secretary of Kenya Commission on the Law

of Marriage and Divorce; and lately Customary Law Commissioner, Kenya Under the General Editorship of Antony N. Allott, Professor of African Law, University of London. Published by Sweet & Maxwell Ltd. 11, New Fetter Lane, London, 1968. Sole Agents in India, N. M. Tripathi, Private Ltd, Princess street, Bombay 2, Pages 212.

One of the greatest problems that has faced the smooth administration of justice in Kenya and indeed in most parts of Africa, for a long time has been the fact that customary law of the various peoples there had been unwritten. This was a problem not only to the judges but also to advocates in advising their clients. Moreover, this was one of the greatest stumbling blocks to law reform since it was hardly possible to initiate reforms without a complete knowledge and understanding of these different customary laws. Besides lack of certainty in the customary law, the other difficulty was the multiplicity of customary laws. It was for these reasons that on the eve of independence a project for ascertainment and complete recording of various Kenya customary laws was initiated. The London School of Oriental and African Studies initiated its own comprehensive research scheme, the Restatement of African Law Project, 1959. The Restatement of African Customary Legal System, by its very nature, was a laborious undertaking. It involved years of patient investigation into Court records and observations of legal behaviour. The record in this series is the contemporary customary law so far as its principles can be ascertained. Due regard has been paid to recent changes in the law, and to the import of statutory law and judicial decisions on the customary law. The present volume contains restatement of Law of Mar-

riage and Divorce in Kenya. The restatement is designed to be authoritative, in the sense that it has been prefaced by persons or bodies whose reputation and methods guarantee the authenticity of the statements which they produced. The restatement however, is not a Code and to legislate the restatements would entirely alter their nature and value. The restatements have been prepared for practical use, so that their arrangement and language are sufficiently simple and direct for such use. At the the same time they satisfy scientific criteria, so far as is possible within their limited scope.

Although this work is a restatement of the customary marriage laws of Kenya in Chapter I, by way of introduction, is given a brief outline of other systems of marriage and divorce recognised by Kenya Law and relationship between them. The topic is discussed according to tribes and sub-tribes under common headings, the first being "capacity and consents." This again is sub-divided into sub-headings. Personal capacity, Consent, Prohibited degrees and other bars to marriage; the second heading is "the Formation of Marriage". This is again sub-divided into four subtitles, Marriage negotiations, Betrothal, Marriage ceremonies and formalities and Special types of marriage. The third topic deals with "Marriage Consideration". "Matrimonial rights and duties" form the subject-matter of the fifth heading. Topic VI is that of Matrimonial and cognate offences. The subject-matter of heading VII is 'Divorce'. The effect of death of parties to marriage on marriage is discussed under the last heading. In Appendix A, is given case law on customary marriage. At the beginning is given a glossary of vernacular terms, used in the restatement.

Till recently the personal and customary law of majority of the Indian citizens governed the institution of marriage and divorce. The lawyers here, therefore will find the restatement of the law in Kenya very interesting and enlightening. The book will fill in the void in African legal literature. This work is particularly valuable because, unlike previous works on customary law by anthropologists, it is an orderly and precise Restatement in language intended for use by lawyers.

R.G.D.

LECTURES ON COMPANY LAW.—By Shantilal Mohanlal Shah, of Lincoln's Inn, Barrister-at-Law, Senior Advocate, Supreme Court of India; Former Judge at High Court of Judicature at Bombay. Fifteenth Edition. Published by N. M. Tripathi Private Ltd., Princess Street, Bombay 2, 1968. Pages 395 and Text of

Companies Act (App.F) CCCIII. Price Rs. 20.00.

We have had an occasion to review the last edition of this work. (See AIR 1967 Jour 95), and there we had mentioned as one of the reasons for that edition was the important amendments made in the Companies Act by Acts 53 of 1963 and 31 of 1965. It has become almost usual for our Parliament not to leave the Companies Act untouched in any year. Even after last edition was published the Act underwent three amendments, twice in December 1966 and the third time in June 1967. These constant amendments are much to the chagrin of those who have to deal with the Act from day to day. The first of the two Amendment Acts passed in December 1966, being Act 34 of 1966 amended only S. 370 of the Act by adding another Explanation to sub-s. (1). The second of these Acts, being Act 37 of 1966, substituted new sub-sections for the existing sub-sections (1A) to (1C) of S. 108. This Act also repealed the Companies Amendment Ordinance, 1966. The third time the Act was amended was in 1967 not by any Companies (Amendment) Act but by the Companies Tribunal (Abolition) Act 17 of 1967. Apart from these, there was also a notification of the Central Government under S. 324, declaring that the term of office of a managing agent of a Company engaged in Cotton Textiles, Cement, Paper, Sugar or Jute industry shall expire at the end of three years from the 2nd of April 1967. Moreover, when the present edition was under preparation, yet another amendment was in the offing. A Bill, being the Companies (Amendment) Bill, No. 53 of 1968, was pending the consideration of the Parliament. This later on became the Companies (Amendment) Act 17 of 1969, which abolished the managing agencies, Secretaries and treasurers, by introduction of S. 324A in the principal Act, from the appointed day that is from the 3rd day of 1970. The Amendment Act also amended Clause (c) of S. 365 of the principal Act. All these amendments have been noted in appropriate places in this edition. The text of the Bill is given in the Addendum.

Some of the topics of the lectures have been regrouped and brought into more cogent and convenient order. The number of lectures have been increased by three, by assigning each to "Appointments of Staff, Arbitration and Compromise", "Investigations and Prevention of Oppression and Mismanagement" and "Liquidators". In the earlier editions, the first two were dealt with and discussed along with "Accounts and Audit" and the third had formed a part of the lecture on "Consequences of winding up".

Besides these structural changes, many por-

tions in the book have been re-written and recast in the process of more critical and objective appraisal and in view of new case law. The book contains useful appendices which include the text of the Companies Act, 1956.

This is the fifteenth edition brought out within a period of two years. The book has been popular amongst students of the Companies Act and the learned Author must be congratulated on his successfully maintaining the popularity by keeping the book up to date, to meet the requirements of the students. Businessmen and Company managers will find all the information and guidance required by them in their everyday affair, in these lectures. The approach of the Author is practical. The style and language is easy. The case law is brought down to September 1968. R.G.D.

COPYRIGHT IN INDUSTRIAL DESIGNS, By A. D. Russell-Clarke, of the Inner Temples Bar-at-law, Fourth Edition, Published by Sweet and Maxwell Ltd., 11 New Fetter Lane, London. 1968. Sole Agents in India, N. M. Tripathi Private Ltd., Princess Street, Bombay 2. Pages 237. Price in India Rs. 75.60.

Industrial design as a form of endeavour and as part and parcel of the business of manufacture, is something which has existed ever since the production of useful articles engaged the attention of man. Thought and effort have continually been devoted to the outline and the ornamentation of the articles produced. The designer alone is within certain limits responsible for the final appearance of the article. It is only in comparatively recent years that its importance as an adjunct to the sale of articles created in the mass has been fully appreciated in industry and Government. This appreciation has led to the development of industrial design as a career. In England it has also led to the setting up of the Council of Industrial Design. This body is formed to foster good design in industry and has done valuable work in raising the standard of design of British goods. But if a good design is to be encouraged those responsible for producing designs must be protected against the promiscuous taking by others of the fruits of their labour. To this end, industrial designs have been safeguarded by legislation. The method chosen has been to confer copyright in their works upon the owners of such design. Since this is a branch of copyright law and is to a certain extent bound up with the law of copyright in artistic works generally, it is necessary for a proper

understanding of the law relating to industrial designs to refer to the way in which the copyright law in general has developed. This is briefly done in the opening chapter of the book. The next chapter deals with the nature of a design. Chapter three is titled: "Novelty and Originality". In this chapter the author gives the position before the Registered Designs Act, 1949 and the effects of the Act. Chapter 4 deals with publication. The next chapter deals with the procedure for registration and dealings under registration. Chapter 6 gives the procedure for correction and rectification of the Register. Topic of infringement is dealt with in the next chapter and the action for infringement in Chapter 9. In Chapter 8, the author has indicated the overlapping between the Copyright Acts and the Designs Act. Then in Chapter 10, the author indicates what action can be taken in case of threats. The last chapter indicates restrictions on registration of designs. In the Appendices are given texts of the Registered Designs Act, 1949, the Copyright Act, 1950, Defence Contracts Act, 1950, the Patents and Designs (Renewals, Extensions and Fees) Act, 1961, the Design Rules, 1949, the Registered Designs Appeal Tribunal Rules, 1950, the Patents and Registered Designs Appeal Tribunal Fees Order, 1956, the Designs (Amendment) Rules, 1955, the Copyright (Industrial Designs) Rules, 1957 and the Rules of the Supreme Court.

Besides many detailed suggestions for improvements the Departmental Committee on Industrial Designs appointed by the President of the Board of Trade, in its report of August 1962, had recommended a far-reaching alteration in the law by inaugurating an additional form of protection which would be akin to artistic copyright, in that it would be based on originality as opposed to novelty and would be infringed only if actual copying was proved. The suggestion was that this should be available as an optional alternative to the existing system of registration which is based upon novelty. Unfortunately, the Government has not so far introduced the necessary legislation to implement these recommendations.

For industrialists in India, the book will be welcome inasmuch as, in it they will know the modern thought in the matter of registration of industrial designs and how far the Indian Patents and Designs Act needs change.

R.G.D.

"CHITTY ON CONTRACTS" VOLS. I AND II. — Twenty-third Edition. General Editor A. G. Guest, M. A., of Gray's Inn, Barrister-at-Law, Reader in Common Law to Council of Legal Education, Published as Numbers 1 and 2

in the Common Law Library Series, by Sweet & Maxwell Ltd. 11, New Fetter Lane, London, 1968. Sole Agents in India, N. M. Tripathi Private Ltd., Princess Street, Bombay 2. Pages Volume 1—894, Volume 2—835. Price in India Rs. 283.50 per set.

We have had occasion to review the last edition of this work—(A. I. R. 1962 Journal 71). This is one of those works on the common law of England which has maintained its authority since it was first published in 1826. The last edition of this work was virtually a new book on the law of contracts, the original "Chitty" having practically disappeared in the process of successive editions. In the present edition, however, no change has been made in the general arrangement of Volume I. Nevertheless in this volume over one-half of the chapters underwent extensive revision. This was necessary, in view of the new case law and considerable number of new statutes and statutory instruments, during the period of eight years, which elapsed since the last edition. Arrangement in Volume II has been changed. The subject matter of the single chapter which had embraced Loan and Interest, Guarantees and Indemnities, has now been split up into two chapters. Previous chapter on "Master and Servant Contracts" has been restyled "Employment". Considerable changes have been made in nearly every chapter of Volume II. In the last edition the practice was initiated of circulating each chapter for criticism and comment by other editors. This increased the accuracy and precision of statement. This practice was adopted in the preparation of this edition also.

Volume I contains the general principles of the law of contract and Volume II deals with the specific contracts. The topical arrangement of the first Volume almost follows the topical arrangement of the Indian Contract Act. There is very much in common in the law of contract as administered in England and as enacted in the Indian Contract Act. "Chitty on Contracts" is essentially a lawyers' book. To Indian practitioners and Judges, the book will be found very useful in not only interpreting the provisions of the Indian Contract Act but in finding out the first principles on which these provisions are based. R.G.D.

LAW OF INSOLVENCY IN INDIA
(The Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920). By J. D. Gangal, B. Sc., LL. B., Insolvency Registrar, High Court, Bombay. Foreword by the Hon'ble Mr. Justice D. P. Madan, Judge,

High Court, Bombay, Published by, New Literature Publishing Company, 65 Mahatma Gandhi Road, Bombay 1. Pages 390 + 160 + XX. Price Rs. 22.50.

There are two insolvency statutes in force in India, the Presidency Towns Insolvency Act, 1909 which applies to the cities of Bombay, Calcutta and Madras, and the Provincial Insolvency Act, 1920, which applies to the rest of India. Though Mulla's work on the subject is a standard work, yet for a busy practitioner, a good and reliable small section-wise commentary on the law of Insolvency was badly in demand. Shri Gangal's attempt in presenting such a handy commentary has been more than a success. It is exhaustive and yet concise. It is reliable. The commentary has been written after a deep study of case law. Administration of the insolvency law involves not only the Judicial Process but also the administrative process of the Courts. Shri Gangal is admirably qualified to write upon this subject. Since out of two decades that he has worked in the Bombay High Court in various capacities, for the last four years he has been the Insolvency Registrar. In that capacity he became familiar not only with the Judicial Process but also the administrative process involved in the administration of the Insolvency law.

The author has done well in giving corresponding provisions of Provincial Insolvency Act, just below each section of the Presidency Towns Insolvency Act. Similarly under each section of the Provincial Insolvency Act, corresponding section of the Presidency Towns Insolvency Act is given. This immediately enables a lawyer to know the corresponding Provisions and the cases on them.

At the end of the book, are given the Rules and Forms of the Bombay High Court under the Presidency Insolvency Act, 1909, with short notes. This will be found very useful to practitioners in Bombay.

We unhesitatingly recommend the book to the legal profession. R.G.D.

THE INDIAN ADMINISTRATIVE LAW. By Mangal Chandra Jain Kagzi, Second Edition, 1960, Published by Metropolitan Book Co. (Pvt.) Ltd. 1 Faiz Bazar, Delhi 6. (Price Rs. 30/-).

We had occasion to review the first edition of this book. The Second Edition follows the first edition after about 6 years. During these interregnum much water has flown. The report of the Administrative Reforms Commission appointed in 1966 has recommended the changes in administrative processes and procedure,

adoption of the effective methods of control of administrative action consistent with demands of administrative efficiency and more efficient means of investigation into and prevention of administrative corruption, and appointment of the ombudsman-type parliamentary commissioners both at the Union and the State levels. The emergency further resulted in increased administrative discretion conferred under security legislation.

The book under review faithfully traces the development of administrative law in all the spheres including judicial control. Presentation of subject is lucid and exhaustive. There is a very useful index. G.G.M.

SEX IN PRISON (THE MISSISSIPPI EXPERIMENT IN CONJUGAL VISITING) By Columbus B. Hopper, M. A. Ph. D., Louisiana State University Press, Baton Range 70803, U.S.A., Pp. 160 Illustrated. Price \$ 5.95.

The satisfaction of the sex needs of prisoners in jail poses a problem of some importance. Conjugal association in prisons is possible either through visits or furloughs. The practice varies in different countries, some allowing both, others permitting conjugal visits, and still others furloughs. In India selected prisoners are allowed to live with their families in a colony near Bombay. They are generally said to be prisoners sentenced for life who have earned their way to the colony by good behaviour in other prisons.

Professor Columbus B. Hopper, Professor of Sociology at the University of Mississippi, deals in this book with the concept of conjugal visiting, which has become a significant part of American penology, and tries to arrive at at least a partial solution of the sexual problems of American Prisons. Several authorities have praised conjugal visits and believe that the practice keeps the rate of homosexuality in prisons low. Prof. Hopper surveys the practice of conjugal visiting throughout the world but focuses his study on the evolution and effects of a pioneer programme at the Mississippi State Penitentiary at Parchman, which is said to be the only penal institution in America which permits conjugal visits for all married prisoners.

Prof. Hopper has spent some years making

a comprehensive analysis of the various aspects of the programme and has studied more than 1600 inmates to study its total impact. He traces the development of conjugal visiting at Parchman to its present status, examines its influence on prisoners and their families, and makes a comparison between prisoners who receive conjugal visits and those who do not. At Parchman the system has been integrated into a programme in which not only wives but also children are allowed to visit. The purpose of this book is to present the findings of Mr. Hopper's study of the programme as it has been practised for a number of years in Mississippi. With an elaborate bibliography and useful index the volume should be of value to sociologists, penologists, and prison administration. R.S.S.

ADMINISTRATIVE LAW (Origin, development, progress, powers, procedure, justice and tribunals) by V. G. Ramchandran, with a foreword by Hon'ble Mr. Justice S. M. Sikri, published by Eastern Book Company. Price Rs. 35.00.

Mr. Ramchandran hardly needs any introduction, his 'Fundamental Rights and Constitutional Remedies' being a monumental work to his credit. After the Constitution of India came into force in 1950 the pace of progress has been marked in the rapid changes towards achievement of an ideal Welfare State. The problems of the government being to ensure the freedom of the individual, to secure economic and social justices and withal to see that respect for authority of State is always kept in view, the responsibility on the Government cannot be belittled.

The book under review elaborately discusses the problems dealing with all the branches of Administrative Law. The book will be useful to all people at the Bar as well as those who are concerned with the discharge of the Administrative Functions.

The Appendices at the end of the book give an account of the Administrative Tribunals in India under various Central Statutes and also an extract from the Attorney General's Committee Report (U. S. A.). There is a very useful general Index at the end and also the title of cases. G.G.M.

BOOKS RECEIVED

THE BENGAL MONEY-LENDERS ACT, WITH RULES & FORMS, By B. N. Banerjee and Samar Banerjee, Published by Eastern Law House, Calcutta, Price Rs. 8/-.

HIGH COURT OF JAMMU & KASHMIR, Souvenir of the Legal Seminar held on 5th and 6th October 1968. Inaugurated by Hon. Mr. M. Hidayatullah, Chief Justice of India.

Central Government and the Assam Government. The arrangement allowed an officer to go from one post to another whether under the Centre or the State but not to a lower post unless the exigency of the case so demanded. The posts in the Government of India were held in the ordinary course and were not deputation posts. They were not as a part of the deputation reserves.

9. Under Article 312, these services must be considered common to the Union and the State. Under Section 4 of the All India Services Act, 1951 all rules in force immediately before the commencement of the Act and applicable to an All India Service were continued, thus the Indian Civil Administrative (Cadre) Rules, 1950 continued to remain in force.

10. The position that emerges is that the cadres for the Indian Administrative Services are to be found in the States only. There is no cadre in the Government of India. A few of these persons are, however, intended to serve at the Centre. When they do so they enjoy better emoluments and status. They rank higher in the service and even in the Warrant of Precedence of the President. In the States they cannot get the same salary in any post as Secretaries are entitled to in the Centre. The appointments to the Centre are not in any sense a deputation. They mean promotion to a higher post. The only safeguard is that many of the posts at the Centre are tenure posts. Those of Secretaries and equivalent posts are for five years and for lower posts the duration of tenure is four years.

11. Now Das held one of the tenure posts. His tenure ordinarily was five years in the post. He got his secretaryship on July 30, 1964 and was expected to continue in that post for five years, that is, till 29th July, 1969. The short question in this case is whether his reversion to the Assam State before the expiry of the period of his tenure to a post carrying a smaller salary amounts to reduction in rank and involves a stigma upon him.

12. Reversion to a lower post does not per se amount to a stigma. But we have here evidence that the reversion is accompanied by a stigma. In the first letter issued to him on June 20, 1969 by Mr. Dharma Vira (Cabinet Secretary) it was said that Government was considering whether the persons at top level administrative posts were capable of meeting the new challenges or must make room for younger men. The letter goes on to say

that he may choose one of three alternatives: accept a lower post at the Centre, go back to a post carrying lower salary in Assam or take leave preparatory to retirement. The offer of a lower post in Delhi is a clear pointer to the fact of his demotion. It clearly tells him that his reversion is not due to any exigency of service but because he is found wanting. The three alternatives speak volumes. This was not a case of reverting him to Assam at the end of a deputation or tenure. He can be retained in the Central Services provided he accepts a lower post, and the final alternative that he may retire clearly shows that the Government is bent upon removing him from his present post. In the next letter this fact is recognised because on September 7, 1966 he is offered only two alternatives. The alternative of a lower post is advisedly dropped because it discloses too clearly a stigma. If any doubt remained it is cleared by the affidavit which is now filed. Paragraphs 7 and 10 of the affidavit read as follows:

"7. With reference to the allegations made in paragraphs 13 to 23 of the said application, I make no admission in respect thereof except what appears from relevant records. I further say that the performance of the petitioner did not come to the standard expected of a Secretary to the Government of India."

"10. The allegations made in paragraph 26 of the said application are correct. I further say that the said representation was rejected by the Prime Minister in view of the standard of performance of the petitioner."

13. Now it has been ruled again and again in this Court that reduction in rank accompanied by a stigma must follow the procedure of Article 311 (2) of the Constitution. It is manifest that if this was a reduction in rank, it was accompanied by a stigma. We are satisfied that there was a stigma attaching to the reversion and that it was not a pure accident of service.

14. It remains to see whether there was a reduction in rank. There is no definition of reduction in rank in the Constitution. But we get some assistance from Rule 3 of the All India Services (Discipline and Appeal) Rules, which provides:

"3. Penalties.—The following penalties may, for good and sufficient reasons, and as hereinafter provided, be imposed on a member of the Service, namely:—

* * * * *

(iii) reduction in rank including reduction to a lower post or time-scale, or to a lower stage in a time-scale;

We have shown above that he was holding a tenure post. Nothing turns upon the words of the notification 'until further orders' because all appointments to tenure posts have the same kind of order. By an amendment of F.R.9 (30) in 1967, a form was prescribed and that form was used in his case. These notifications also do not indicate that this was a deputation which could be terminated at any time. The notifications involving deputation always clearly so state the fact. Many notifications were brought to our notice during the argument which bear out this fact and none to the contrary was shown. Das thus held a tenure post which was to last till July 29, 1969. A few months alone remained and he was not so desperately required in Assam that he could not continue here for the full duration. The fact that it was found necessary to break into his tenure period close to its end must be read in conjunction with the three alternatives and they clearly demonstrate that the intention was to reduce him in rank by sheer pressure of denying him a secretaryship. No Secretary, we were told, has so far been sent back in this manner and this emphasises the element of penalty. His retention in Government of India on a lower post thus was a reduction in rank.

15. Finally we have to consider whether his reversion to Assam means a reduction in rank. It has been noticed above that no State Service (the highest being Chief Secretary's) carries the emoluments which Das was drawing as a Secretary for years. His reversion would have meant a big drop in his emoluments. Das was prepared to go to Assam provided he got his salary of Rs. 4,000 per month but it was stated before us that that was not possible. Das was prepared to serve at the Centre in any capacity which brought him the same salary. This too was said to be not possible. This case was adjourned several times to enable Government to consider the proposal but ultimately it was turned down. All that was said was that he could only be kept in a lower post. If this is not reduction in rank we do not see what else it is. To give him a Hobson's choice of choosing between reversion to a post carrying a lower salary or staying here on a lower

salaried post, is to indirectly reduce him in rank.

16. Therefore, we are satisfied that Das was being reduced in rank with a stigma upon his work without following the procedure laid down in Article 311(2). We say nothing about a genuine case of accident of service in which a person drafted from a State has to go back for any reason not connected with his work or conduct. Cases must obviously arise when a person taken from the State may have to go back for reasons unconnected with his work or conduct. Those cases are different and we are not expressing any opinion about them. But this case is clearly one of reduction in rank with a distinct stigma upon the man. This requires action in accordance with Article 311 (2) of the Constitution and since none was taken, the order of reversion cannot be sustained. We quash it and order the retention of Das in a post comparable to the post of a Secretary in emoluments till such time as his present tenure lasts or there is an inquiry against him as contemplated by the Constitution.

17. Before we leave this case we are constrained to say that the attitude in respect of this case was not very happy. Das offered to take leave preparatory to retirement on the 29th July, 1969 if he was retained in Delhi on this or other post. This coincided with his present tenure. But vast as the Delhi Secretariat is, no job was found for him. This confirms us in our view of the matter that he was being sent away not because of exigency of service but definitely because he was not required for reasons connected with his work and conduct.

18. The appeal is thus allowed with costs here and in the High Court.

Appeal allowed.

AIR 1970 SUPREME COURT 82
(V 57 C 19)

(From Patna: AIR 1968 Pat 175)

J. M. SHELAT AND V. BHARGAVA, JJ.
Heavy Engineering Mazdoor Union,
Appellant v. State of Bihar and others,
Respondents.

Civil Appeal No. 1463 of 1968, D/- 12-3-1969.

(A) Industrial Disputes Act (1947), S. 2
(a) — Industry carried on by a corporation

JM/JM/B776/69/DRR/D

incorporated under Companies Act and not directly by Central Government or any of its departments — Industry is not one carried by Central Government though all the shares are owned by President of India and some officials. (Point conceded). (Para 4)

(B) Industrial Disputes Act (1947), Ss. 2 (a), 2 (g) and 10 — “Under the authority of” — Meaning of — Corporation incorporated under Companies Act — When an agent of the State-Undertaking carried by Heavy Engineering Corporation Ltd., though controlled wholly or partially by Government department not an industry carried on under the authority of Central Government — (Companies Act (1956), S. 34 (2)) — (Words and Phrases — “Under the authority of”).

There being nothing in S. 2 (a) to the contrary, the word ‘authority’ must be construed according to its ordinary meaning and therefore must mean a legal power given by one person to another to do an act. A person is said to be authorised or to have an authority when he is in such a position that he can act in a certain manner without incurring liability, to which he would be exposed but for the authority, or, so as to produce the same effect as if the person granting the authority had for himself done the act. There clearly arises in such a case the relationship of a principal and an agent. The words ‘under the authority of’ mean pursuant to the authority, such as where an agent or a servant acts under or pursuant to the authority of his principal or master. (Para 4)

The question whether a corporation is an agent of the State must depend on the facts of each case. Where a statute setting up a corporation so provides, such a corporation can easily be identified as the agent of the State. In the absence of a statutory provision, however, a commercial corporation acting on its own behalf, even though it is controlled wholly or partially by a Government department, will be ordinarily presumed not to be a servant or agent of the State. The fact that a minister appoints the members or directors of a corporation and he is entitled to call for information, to give directions, which are binding on the directors and to supervise over the conduct of the business of the corporation does not render the corporation an agent of the Government. (1902) AC 484 & 1901 (2) KB 781 & AIR 1963 SC 1811 & (1950) 1 KB 18, Ref. to. (Para 5)

*An inference that the corporation is the agent of the Government may be drawn where it is performing in substance governmental and not commercial functions. (1948) 2 All ER 432, Ref. to. (Para 5)

The definition of ‘Employer’ in S. 2 (g) of the Industrial Disputes Act also suggests that an industry carried on by or under the authority of the Government means either the industry carried on directly by a department of the Government, such as the posts and telegraphs or the railways, or one carried by such department through the instrumentality of an agent. Case law referred to. (Para 6)

Held that the industrial dispute concerning the industry carried on by the Heavy Engineering Corporation Ltd., Ranchi, was not one concerning an industry carried on by or under the authority of the Central Government and that, therefore, the appropriate Government for making the reference under Sec. 10 was the State Government and not the Central Government. (Para 6)

(C) Industrial Disputes Act (1947), S. 10 — Question referred to Industrial Tribunal regulated by company’s standing orders — Application for modifying standing order actually pending before the certifying officer under the Industrial Employees (Standing Orders) Act, 1946 — Reference under S. 10 not precluded and is valid. AIR 1968 SC 585 & AIR 1969 SC 513, Rel. on. (Para 7)

(D) Companies Act (1956), Ss. 34 (2), 617 — Company incorporated under the Act — Is an entity distinct from its shareholders — Shares owned by President of India and some officials — Does not make a company agent of Central Government — (Industrial Disputes Act (1947), Sec. 2 (a)).

An incorporated company, as is well known, has a separate existence and the law recognises it as a juristic person separate and distinct from its members. This new personality emerges from the moment of its incorporation and its rights and obligations are different from those of its shareholders. Action taken against it does not directly affect its share-holders. The company in holding its property and carrying on its business is not the agent of its shareholders. (Para 4)

The liability of an individual member is not increased by the fact that he is the sole person beneficially interested in the property of the corporation and that the other members have become members merely for the purpose of enabling the corporation to become incorporated and

possess only a nominal interest in its property or hold it in trust for him. (Para 4)

Held that the mere fact that the entire share capital of the Heavy Engineering Corporation Ltd., Ranchi, was contributed by the Central Government and the fact that all its shares are held by the President and certain officers of the Central Government does not make any difference. The company and the share-holders being, distinct entities, this fact does not make the company an agent either of the President or the Central Government.

(Para 4)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 513 (V 56)=
C. A. No. 27 of 1968, D/- 18-9-1968, Management of Shahdara (Delhi) Saharanpur Light Rly Co., Ltd. v. S. S. Railway Workers Union
- (1968) AIR 1968 SC 585 (V 55)=
1968-1 SCR 581, Management of Bangalore Woollen, Cotton and Silk Mills Co., Ltd. v. Workmen
- (1963) AIR 1963 SC 1811 (V 50)=
1964-4 SCR 99, State Trading Corporation of India Ltd. v. Commercial Tax Officer, Visakhapatnam
- (1963) AIR 1963 Bom 267 (V 50)=
65 Bom LR 20, Abdul Rehaman Abdul Gafur v. Mrs. E. Paul
- (1961) AIR 1961 Punj 416 (V 48)=
1961-1 Lab LJ 734, Cantonment Board, Ambala v. State of Punjab
- (1955) 1955-1 QB 515=1955-2 WLR 82, Kuenigl v. Donnersmarck
- (1952) 1952-1 Lab LJ 488 (Cal),
Carlsbad Mineral Water Mfg. Co. v. P. K. Sarkar
- (1950) 1950-1 KB 18=65 LJQB 423,
Tamlin v. Hannaford
- (1948) 1948-2 All ER 432=1949-1 KB 35, London County Territorial and Auxiliary Forces Association v. Nichols
- (1902) 1902 AC 484=71 LJKB 857,
Janson v. Driefontain Consolidated Mines Ltd.
- (1901) 1901-2 KB 781=70 LJKB 860,
Graham v. Public Works Commissioners
- (1897) 1897 AC 22=66 LJ Ch 35,
Salomon v. Salomon and Co.
- M/s. A. K. Nag, Jai Kishan and Ranen Roy, Advocates, for Appellant; Mr. U. P. Singh, Advocate, for Respondent No. 1; Mr. B. P. Singh, Advocate, for Respondent No. 2.

SHELAT, J.: The Heavy Engineering Corporation Ltd., Ranchi is a company incorporated under the Companies Act, 1956. Its entire share capital is contributed by the Central Government and all its shares have been registered in the name of the President of India and certain officers of the Central Government. It is, therefore, a Government company within the meaning of Section 617 of the Companies Act. The Memorandum of Association and the Articles of Association of the company confer large powers on the Central Government including the power to give directions as regards the functioning of the company. The wages and salaries of its employees are also determined in accordance with the said directions. The directors of the company are appointed by the President. In its standing orders, the company is described as a Government undertaking. The workmen employed by the company have two unions, the Heavy Engineering Mazdoor Union and the Hatia Project Workers Union.

2. Certain disputes having arisen between the company and its workmen, into which it is not necessary for the purposes of this judgment to go, the State Government of Bihar by its notification dated November 15, 1966 referred two questions to the Industrial Tribunal for its adjudication: firstly, as regards the number of festival holidays and secondly, whether the second Saturday in a month should be an off-day. The Mazdoor Union thereupon filed a writ petition under Arts. 226 and 227 of the Constitution in the High Court of Patna disputing the validity of the said reference on two grounds: (1) that the appropriate Government to make the said reference under Section 10 of the Industrial Disputes Act, 1947 was the Central Government and not the State Government and (2) that the questions referred to were at the time actually pending before the certifying authority under the Industrial Employment (Standing Orders) Act, 1946 on an application for modification of the company's standing orders and that therefore the said questions would not be industrial disputes which could be validly referred for adjudication. Before the High Court it was conceded that the company was not an industry carried on by the Central Government but the contention was that considering the fact that the entire share capital was contributed by the Central Government and extensive powers were

The following Judgment of the Court delivered by

conferred on it, the company must be regarded as an industry carried on under the authority of the Central Government and that therefore it was that Government which was the appropriate Government which could make the said reference. On the second question, the contention was that the Industrial Employment (Standing Orders) Act was a self-contained code, that once a question relating to conditions of service was before the certifying authority constituted under that Act and was pending before him, the said question could not be an industrial dispute which could be referred for adjudication under Section 10 of the Industrial Disputes Act. It was urged that consequently the reference on both the grounds was invalid. The High Court negatived both the contentions and upheld the validity of the reference. The Mazdoor Union obtained a certificate under Article 133 (1) (c) and filed this appeal impugning the correctness of that decision.

3. Under Section 2 (a) 'appropriate Government' (leaving aside the words which are not relevant for our purposes) means (i) in relation to any industrial dispute concerning an industry carried on by or under the authority of the Central Government, the Central Government, and (ii) in relation to any other industrial dispute the State Government. As was done before the High Court, Mr. Nag, appearing for the appellant-union, conceded that he would not contend that the company is an industry carried on by the Central Government but argued that it is an industry carried on under the authority of the Central Government and therefore it is that Government and not the State Government which is the appropriate Government for making a reference under Section 10 of the Act. The first question raised by the appellant-union, therefore, turns solely upon the construction of the words "carried on under the authority of the Central Government." The contention was primarily grounded on the fact that the entire share capital of the company has been contributed by the Central Government, all its shares are held by the President and certain officers of the Central Government presumably its nominees and extensive control is vested in the Central Government.

4. Before considering the authorities cited by counsel before us, we proceed first to examine the meaning of the words

used by Parliament in the definition clause of 'appropriate Government'. It is an undisputed fact that the company was incorporated under the Companies Act and it is the company so incorporated which carries on the undertaking. The undertaking, therefore, is not one carried on directly by the Central Government or by any one of its departments as in the case of posts and telegraphs or the railways. It was, therefore, rightly conceded both in the High Court as also before us that it is not an industry carried on by the Central Government. That being the position, the question then is, is the undertaking carried on under the authority of the Central Government? There being nothing in Section 2 (a) to the contrary, the word 'authority' must be construed according to its ordinary meaning and therefore must mean a legal power given by one person to another to do an act. A person is said to be authorised or to have an authority when he is in such a position that he can act in a certain manner without incurring liability, to which he would be exposed but for the authority, or, so as to produce the same effect as if the person granting the authority had for himself done the act. For instance, if A authorises B to sell certain goods for and on his behalf and B does so, B incurs no liability for so doing in respect of such goods and confers a good title on the purchaser. There clearly arises in such a case the relationship of a principal and an agent. The words "under the authority of" mean pursuant to the authority, such as where an agent or a servant acts under or pursuant to the authority of his principal or master. Can the respondent-company, therefore, be said to be carrying on its business pursuant to the authority of the Central Government? That obviously cannot be said of a company incorporated under the Companies Act whose constitution, powers and functions are provided for and regulated by its memorandum of association and the articles of association. An incorporated company, as is well known, has a separate existence and the law recognises it as a juristic person separate and distinct from its members. This new personality emerges from the moment of its incorporation and from that date the persons subscribing to its memorandum of association and others joining it as members are regarded as a body incorporate or a corporation aggregate and the new person begins to function as an entity. [cf. *Saloman v. Saloman and Co.*,

1897 AC 22]. Its rights and obligations are different from those of its shareholders. Action taken against it does not directly affect its shareholders. The company in holding its property and carrying on its business is not the agent of its shareholders. An infringement of its rights does not give a cause of action to its shareholders. Consequently, it has been said that if a man trusts a corporation he trusts that legal persona and must look to its assets for payment; he can call upon the individual shareholders to contribute only if the Act or charter creating the corporation so provides. The liability of an individual member is not increased by the fact that he is the sole person beneficially interested in the property of the corporation and that the other members have become members merely for the purpose of enabling the corporation to become incorporated and possess only a nominal interest in its property or hold it in trust for him. (cf. Halsbury's Laws of England, 3rd Ed. Vol. 9, p. 9). Such a company even possesses the nationality of the country under the laws of which it is incorporated, irrespective of the nationality of its members and does not cease to have that nationality even if in times of war it falls under enemy control. (cf. *Janson v. Driefontain Consolidated Mines*, 1902 AC 484 and *Kuenigl v. Donnersmarck*, 1955-1 QB 515.) The company so incorporated derives its powers and functions from and by virtue of its memorandum of association and its articles of association. Therefore, the mere fact that the entire share capital of the respondent-company was contributed by the Central Government and the fact that all its shares are held by the President and certain officers of the Central Government does not make any difference. The company and the shareholders being, as aforesaid, distinct entities the fact that the President of India and certain officers hold all its shares does not make the company an agent either of the President or the Central Government. A notice to the President of India and the said officers of the Central Government, who hold between them all the shares of the company would not be a notice to the company; nor can a suit maintainable by and in the name of the company be sustained by or in the name of the President and the said officers.

5. It is true that besides the Central Government having contributed the entire share capital, extensive powers are

conferred on it, including the power to give directions as to how the company should function, the power to appoint directors and even the power to determine the wages and salaries payable by the company to its employees. But these powers are derived from the company's memorandum of association and the articles of association and not by reason of the company being the agent of the Central Government. The question whether a corporation is an agent of the State must depend on the facts of each case. Where a statute setting up a corporation so provides such a corporation can easily be identified as the agent of the State as in *Graham v. Public Works Commissioners*, 1901-2 KB 781 where Phillimore, J. said that the Crown does in certain cases establish with the consent of Parliament certain officials or bodies who are to be treated as agents of the Crown even though they have the power of contracting as principals. In the absence of a statutory provision, however, a commercial corporation acting on its own behalf even though it is controlled wholly or partially by a Government department will be ordinarily presumed not to be a servant or agent of the State. The fact that a minister appoints the members or directors of a corporation and he is entitled to call for information, to give directions which are binding on the directors and to supervise over the conduct of the business of the corporation does not render the corporation an agent of the Government. [See *State Trading Corporation of India Ltd. v. Commercial Tax Officer, Visakhapatnam*, 1964 (4) SCR 99 at p. 188=(AIR 1963 SC 1811 at p. 1849) per Shah, J. and *Tamlin v. Hannaford*, 1950-1 KB 18 at pp. 25, 26] Such an inference that the corporation is the agent of the Government may be drawn where it is performing in substance governmental and not commercial functions. [Cf. *London County Territorial and Auxiliary Force Association v. Nichols*, 1948-2 All ER 432.]

6. In this connection the meaning of the word 'employer' as given in Section 2 (g) of the Act may be looked at with some profit as the legislature there has used identical words while defining 'an employer'. An employer under Clause (g) means, in relation to an industry carried on by or under the authority of any department of the Central Government or a State Government the authority prescribed in that behalf or where

no such authority is prescribed, the head of the department. No such authority has been prescribed in regard to the business carried on by the respondent company. But that does not mean that the head of the department which gives the directions as aforesaid or which supervises over the functioning of the company is the employer within the meaning of Section 2 (g). The definition of the employer, on the contrary, suggests that an industry carried on by or under the authority of the Government means either the industry carried on directly by a department of the Government, such as the posts and telegraphs or the railways, or one carried on by such department through the instrumentality of an agent. We find that the view which we are inclined to take on the interpretation of S. 2 (a) is also taken by the High Courts of Calcutta, Punjab and Bombay. [See Carlsbad Mineral Water Mfg. Co. v. P. K. Sarkar, 1952-1 Lab LJ 488 (Cal); Cantonment Board Ambala v. State of Punjab, 1961-1 Lab LJ 734= (AIR 1961 Punj 416) and Abdul Rehaman Abdul Gafur v. Mrs. E. Paul, AIR 1963 Bom 267]. In our view the contention that the appropriate Government to make the aforesaid reference was the State Government and not the Central Government has no merit and cannot be sustained.

7. The second contention that the questions referred to were regulated by the company's standing orders and an application for a modification of the said standing orders relating to those questions was actually pending before the certifying authority under the Industrial Employees (Standing Orders) Act precluded a reference thereof under Section 10 of the Act requires no discussion as it is covered by the decision in Management of Bangalore Woollen, Cotton and Silk Mills Co. Ltd. v. Workmen, 1968-1 SCR 581= (AIR 1968 SC 585) and Management of Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. v. S. S. Railway Workers Union C. A. No. 27 of 1968 D/- 18-9-1968 = (AIR 1969 SC 513).

8. Thus neither of the two contentions can be upheld. In the result the appeal is dismissed but there will be no order as to costs.

Appeal dismissed

AIR 1970 SUPREME COURT 87 (V 57 C 20)

(From Industrial Tribunal Gujarat)*

J. M. SHELAT, V. BHARGAVA
AND C. A. VAIDIALINGAM, JJ.

Workmen of the Gujarat Electricity Board, Baroda, Appellants v. Gujarat Electricity Board, Baroda, Respondent.

Civil Appeal No. 2431 of 1966, D/- 19-12-1968.

Industrial Disputes Act (1947), Sch. 3, Items 2, 5 — Payment of minimum wages by Electricity Board to its employees — Demand for fair or living wage — Grant of depends on capacity of employer to meet expenditure — Capacity to pay — Factors to be considered.

If the claim be for a minimum wage, the employer must pay that wage in order to be allowed to continue the industry, and, in such a case, the capacity of the industry to pay is irrelevant. However, if the industry is already paying the minimum wage, and the claim is for fair wage or living wage, the capacity of the industry to pay is a very important factor and the burden above the minimum wage can only be justifiably imposed if the industry is capable of meeting that extra burden. AIR 1967 SC 948 and AIR 1963 SC 1332, Foll.

(Para 4)

Where the Electricity Board constituted under the Electricity (Supply) Act (1948) is already paying minimum wages to its employees, their additional demand cannot be considered when the Board is running in heavy loss and has no capacity to meet additional expenditure.

(Para 4)

It cannot be said that the financial capacity of the Board should be judged only on the basis of its commercial undertakings, excluding the activities of the Board which were in the nature of national duties. As the Board is constituted under the Electricity (Supply) Act, its capacity to bear the burden of paying wages to its employees has to be worked out after taking into account all the activities which the Statute requires it to carry on. The running of Power Houses is only one branch of those activities. The profit that the Board can be held to have earned can only be worked out after including in the accounts all the expenditure incurred by

* (Reference (IT) No. 88 of 1962, Guj.)

it on all its scheme for distribution of electricity to licensees or to consumers, whether in urban areas or in rural areas. It is true that the fact that the Board is an industry in the public sector does not exempt it from application of principles which apply to an industry in private sector, and the Board must also be made to pay wages on the same basis as private sector employers. However, the demand for additional wages cannot be granted when the Board does not have capacity to pay and is incurring heavy losses. (Paras 3, 7)

Secondly the deficit inherited by the Board from its predecessor is really a capital loss but even this loss cannot be completely ignored, because the paying capacity of an employer has to take into account even capital losses. (Para 6)

Moreover, while considering the question of wage fixation, wages paid in comparable concerns on industry-cum-region basis can only be compared. (1962) 1 Lab LJ 302 (SC), Foll.

(Para 8)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 948 (V 54)=

1967-1 SCR 652, Hindusthan Antibiotics Ltd. v. The Workmen 4, 7

(1963) AIR 1963 SC 1332 (V 50)=

1964-1 SCR 234, Hindusthan Times Ltd. New Delhi v. Their Workmen 4

(1962) 1962-1 Lab LJ 302=1962 (4)

Fac LR 515 (SC), Williamsons (India) Private Ltd. v. Its Workmen 8

M/s. A. S. R. Chari and M. K. Ramamurthi, Senior Advocates (Mrs. Shyamla Pappu, M/s. Vineet Kumar, P. S. Khara and Miss Bindra Thakur, Advocates with them), for Appellants; Mr. I. N. Shroff, Advocate, for Respondent.

The following Judgment of the Court was delivered by

BHARGAVA, J.:— This appeal, by special leave, is directed against an Award of the Industrial Tribunal, Gujarat in an industrial dispute referred to it by the Government of Gujarat at the instance of the appellants who are 466 workmen of the Gujarat Electricity Board, Baroda (hereinafter referred to as "the Board") represented by the Saurashtra Vidyut Kamdar Sangh (hereinafter referred to as "the Sangh"). The dispute referred to related to two matters. One was the demand made in respect of rates of dearness allowance to be paid to the workmen. The second demand was that

those of the workmen, to whom Contributory Provident Fund or Employees Provident Fund Scheme was applicable, should be granted gratuity equal to 15 days wages for every year of service in addition to the provident fund benefits, while those workmen, who were entitled to pension according to the pensionary scheme in force, should have their pension calculated after adding 50 per cent of the dearness allowance to the basic pay.

2. The facts needed to explain the second demand may first be stated. The supply of electricity in the State of Saurashtra, prior to the year 1954, was being carried out departmentally by the Government of Saurashtra and the workmen employed in the power houses were consequently Government servants. On 1st July, 1954, a Saurashtra Electricity Board was constituted to run the power houses and the employees of the Electricity Department of the Government were sent to work with the Saurashtra Electricity Board on deputation. On 1st November, 1956, Saurashtra became a part of the Bombay State, whereafter the Saurashtra Electricity Board was dissolved with effect from 1st April, 1957 and its assets, liabilities, and employees were taken over by the Bombay State Electricity Board. The employees, who were originally in the service of the Saurashtra State Government were entitled to the pensionary scheme of the Saurashtra Government, while the Bombay State Electricity Board had a Provident Fund Scheme. The Saurashtra State Government servants, on being taken over by the Bombay State Electricity Board, were given the option of either continuing in their pensionary scheme, or of joining the Provident Fund Scheme of the Bombay State Electricity Board in which case the gratuity already accrued to them and the equivalent of pensionary benefits were credited to their accounts. Some of the employees opted for the Provident Fund Scheme, while others continued under the pensionary scheme. Thereafter, on 1st May, 1960, the State of Bombay was bifurcated and a separate State of Gujarat was constituted; and, with effect from the same date, the Board came into existence. The Board took over all the Electricity, power-houses and electricity schemes in the State of Gujarat from the Bombay State Electricity Board including the workmen who are the appellants in this appeal. The assets and liabilities

of the Bombay State Electricity Board were divided between the Board, and the Maharashtra Electricity Board which was constituted for the State of Maharashtra which came into existence on bifurcation of the Bombay State. The Board continued both the Pensionary Scheme as well as the Provident Fund Scheme for the employees in the manner they were in force when the employees were working under the Bombay State Electricity Board. The employees, who were originally servants of the State Government, had ceased to be government servants with effect from 1st April, 1957 and later on 1st May, 1960, became the employees of the Board, so that they were no longer entitled to the rights which the State Government might subsequently grant in respect of pension under the rules applicable to the government servants. The result was that even improvements granted in the pensionary scheme by the State Government to its employees did not enure to the benefit of the appellants. In these circumstances the Sangh put forward the claim that the pension of employees, who were governed by the pensionary scheme, should be calculated not on the basis of basic salary, but after adding 50 per cent of the dearness allowance to it. In respect of employees, who were governed by the Provident Fund Scheme, a second benefit of gratuity was claimed.

3. The demand for dearness allowance was that it should be linked with the scale prescribed for the Ahmedabad Mill-owners' Association. The workmen demanded that employees, drawing up to Rs. 50 as basic pay, should be given dearness allowance at the scale applicable to Ahmedabad Millowners' Association, those drawing between Rs. 50 to Rs. 100, D. A. at that scale plus Rs. 5, and those drawing above Rs. 100, dearness allowance at that scale plus Rs. 10. This demand was put forward before the Board originally on behalf of all the 9,208 employees of Class III and Class IV and some employees of Class I and Class II whose salary was below Rs. 300 per mensem, who were working either in the Gujarat Region or the Saurashtra Region. These employees were represented by seven different Unions, one of which was the Sangh who represented about 3,000 employees working in the Saurashtra region. The six Unions representing the employees working in the Gujarat region amicably settled these

disputes with the Board by entering into agreements. The Board gave some increase in dearness allowance retrospectively with effect from 1st October, 1961, while the second demand relating to gratuity and calculation of pension after adding 50 per cent of the dearness allowance was given up. The Sangh declined to accept this settlement, whereupon the Board offered terms in accordance with the settlement to all the employees in the Saurashtra region individually. Out of the total of 3,042 in the Saurashtra region, 622 signed General Standing Order 56, under which the Board had made its offer to individual employees on the basis of the settlements arrived at before the reference to conciliation. 1152 signed before the date of the failure report by the Conciliation Officer; 2058 signed before the reference and 518 signed after the reference. Thus the dispute, after the reference, became confined to the remaining 466 employees who did not on individual basis, accept the offer made by the Board. The Tribunal considered this dispute relating to the dearness allowance raised by these employees through the Sangh as also the other demand relating to gratuity and calculation of pension, and, by the impugned Award, rejected these demands. Consequently, the workmen have come up in this appeal through the Sangh.

4. The main ground for rejecting these demands, on which the Award is based, is that the Board does not have the capacity to meet the additional expenditure that would have to be incurred if these demands are acceded to. Before the Tribunal, this aspect of the case was sought to be met by the Sangh by urging that the total wage packet, including the dearness allowance claimed by them in the demand, would only satisfy the requirement of a minimum wage, so that the Board's capacity to pay was irrelevant; but the award shows that the Sangh completely failed to provide any material to prove that the total wages, including the dearness allowance as offered by the Board on the basis of the settlements, are less than the minimum wage. This Court, in *Hindustan Antibiotics Ltd. v. The Workmen*, 1967-1 SCR 652=(AIR 1967 SC 948) recognised the three concepts of minimum wage, fair wage and living wage by quoting the following passage from the decision in *Hindustan Times Ltd. New Delhi v. Their Workmen* 1964-1 SCR 234=(AIR

1963 SC 1332) and stating that it briefly and neatly defined the three concepts:

"In trying to keep true to the two points of social philosophy and economic necessities which vie for consideration, industrial adjudication has set for itself certain standards in the matter of wage fixation. At the bottom of the ladder, there is the minimum basic wage which the employer of any industrial labour must pay in order to be allowed to continue an industry. Above this is the fair wage, which may roughly be said to approximate to the need based minimum in the sense of a wage which is "adequate to cover the normal needs of the average employee regarded as a human being in a civilised society." Above the fair wage is the "living wage" — a wage which will maintain the workman in the highest state of industrial efficiency, which will enable him to provide his family with all the material things which are needed for their health and physical well-being, enough to enable him to qualify to discharge his duties as a citizen."

These decisions make it clear that if the claim be for a minimum wage, the employer must pay that wage in order to be allowed to continue the industry; and, in such a case, the capacity of the industry to pay is irrelevant. However, if the industry is already paying the minimum wage, and the claim is for fair wage or living wage, the capacity of the industry to pay is a very important factor and the burden above the minimum wage can only be justifiably imposed if the industry is capable of meeting that extra burden. On this principle in the present case, if the appellants had succeeded in showing that they were not receiving even the minimum wage on the basis of the offer made by the Board in line with the settlements arrived at with the other Unions and individual workmen members of the Sangh, there would have been full justification for granting additional dearness allowance ignoring the inability of the Board to meet that extra expenditure. The finding of the Tribunal, however, is that the demand of the workmen is not confined to minimum wage, but that, as a result of the demand, the wages will be above the minimum wage. Learned counsel appearing for the appellants before us also did not try to contend that the wages, which were being paid by the Board, were lower than the minimum wage, so that the claim for the additional dearness allowance cannot be con-

sidered without taking into account the capacity of the Board to meet the additional expenditure.

5. So far as the question of capacity of the Board to pay is concerned, there is a clear finding by the Tribunal that the Board is running at heavy losses, so that it is not in a position to meet the extra expenditure of about Rs. 49 lakhs a year which will be involved if the dearness allowance is fixed as claimed by the Sangh. The Tribunal has found that the Board, when constituted on 1st May, 1960, inherited an accumulated deficit of over Rs. 2 crores from the Bombay State Electricity Board. In its own working, the Board sustained a loss of over Rs. 29 lakhs between 1st May, 1960 and 31st March, 1961, and in the two succeeding years 1961-62 and 1962-63, the losses incurred were in the region of Rs. 39 lakhs and Rs. 41 lakhs. The Tribunal, thus, held that the total loss was to the tune of Rs. 31 millions; and since the Board had undertaken a further liability of over Rs. 6.75 lakhs a year under the settlements and the offer to individual workman, it could not possibly undertake the further burden of paying about Rs. 49 lakhs per year as increased dearness allowance. The Tribunal was also of the opinion that, considering this financial condition of the Board, there was no justification for introducing a Gratuity Scheme for workmen governed by the Provident Fund Rules, nor was there any justification for calculation of pension on the basis of adding 50 per cent of the dearness allowance to the basic pay. Mr. Chari, counsel for the appellants, challenged this decision of the Tribunal on two grounds. The first ground was that the Tribunal was wrong in judging the capacity of the Board to pay after taking into account the deficit of over Rs. 2 crores which it had inherited from the Bombay State Electricity Board and the second ground was that the financial capacity of the Board should be judged only on the basis of its commercial undertaking, excluding the activities of the Board which were in the nature of national duties.

6. So far as the first point is concerned, we think that there is some force in the submission made by learned counsel. The deficit inherited by the Board from its predecessor cannot be treated as a revenue loss which will have bearing on its paying capacity. Such inherited deficit should really have been treated as capital loss; but even this loss cannot be

completely ignored, because the paying capacity of an employer has to take into account even capital losses. However, even if this accumulated deficit of over Rs. 2 crores is ignored, it is clear that, during the three years after its formation, the Board itself incurred heavy losses which totalled to about Rs. 110 lakhs. Consequently, even if that accumulated deficit is not taken into account, it cannot be held that the Board will have the capacity of bearing the additional financial burden to the tune of Rs. 49 lakhs a year, if required to pay dearness allowance at the rates claimed by the Sangh.

7. On the second point, we are unable to accept the submission made by learned counsel. The Board was constituted under the Electricity (Supply) Act No. 54 of 1948, and Section 18 of that Act lays down the duties of the Board. By its very constitution, the Board is charged with the general duty of promoting the co-ordinated development of the generation, supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas not for the time being served or adequately served by any licensee. In particular, the duty of the Board is to prepare and carry out schemes with the objects mentioned above; to supply electricity to owners of controlled stations and to licensees whose stations are closed down under this Act; and to supply electricity as soon as practicable to any other licensees or persons requiring such supply and whom the Board may be competent under this Act so to supply. When the Board was constituted to carry out these duties, its capacity to bear the burden of paying wages to its employees has to be worked out after taking into account all the activities which the Statute requires it to carry on. The running of Power House is only one of the branch of those activities. The profit that the Board can be held to have earned can only be worked out after including in the accounts all the expenditure incurred by it on all its scheme for distribution of electricity to licensees or to consumers, whether in urban areas or in rural areas. In fact, there is not even an assertion on behalf of the appellants-workmen that they were employed solely in connection with a profitable undertaking of the Board and had nothing to do at all with the other activities which the Board is actually carrying on. No doubt, learned counsel is right in urging on the basis of the

decision of this Court in Hindustan Antibiotics Ltd., 1967-1 SCR 652 = (AIR 1967 SC 948) (supra) that the circumstance that the Board is an industry in the public sector does not exempt it from application of principles which apply to an industry in private sector and the Board must also be made to pay wages on the same basis as private sector employers. This, however, does not advance the case of the appellants, because, even in a private sector, additional burden over and above a minimum wage can only be justifiably imposed in industrial adjudication, if the employer has the capacity to meet that burden. In this case, the Tribunal has refused to grant the demand of the appellants not on the ground that the Board is an industry in public sector, but on the ground that it does not have the capacity to pay. That capacity has rightly been judged on the basis of all the undertakings being worked by the Board.

8. The Tribunal, after holding that there was no justification for granting the demands of the workmen because the Board had no capacity to bear the additional burden, proceeded further to examine whether the Board's existing scheme of payment of dearness allowance was reasonable and took into account various factors for arriving at its finding that it could not be held that the terms offered by the Board were unreasonable. In this connection, reliance was placed on behalf of the appellants on the fact that two Electric Supply Companies were paying wages which were much higher than the wages being paid by the Board, and there was no justification for refusing the demand for additional dearness allowance which would place the employees of the Board on par with the employees of those Electric Supply Companies. One of those Electric Supply Companies is the Ahmedabad Electricity Co. Ltd., Ahmedabad, in whose case wages were fixed by an Award published in 1956 Industrial Court Reporter at p. 746. The other is the Viramgam, Electric Supply Co Ltd., Viramgam, the Award relating to which is published in 1958 Industrial Court Reporter at p. 1010. The argument was that wages paid by the Board should not be lower than those paid by these two Electric Supply Companies which were engaged in the same line of business of production and supply of electricity. The Tribunal brushed aside these examples by stating that they were not comparable with the Board. In taking this view, we

do not think that the Tribunal committed any error. In *Williamsons (India) Private Ltd. v. Its Workmen*, 1962-1 Lab LJ 302 (SC) this Court clearly laid down what criteria had been established for considering what are comparable concerns when dealing with a question of wage fixation. It was held:—

“This Court has repeatedly observed that, in considering the question about comparable concerns, tribunals should bear in mind all the relevant facts in relation to the problem. The extent of the business carried by the concerns, the capital invested by them, the profits made by them, the nature of the business carried on by them, their standing, the strength of their labour force, the presence or absence and the extent of reserves, the dividends declared by them and the prospects about the future of their business—these and all other relevant facts have to be borne in mind.” In the present case, it is clear that if these various factors are taken into account, neither the Ahmedabad Electricity Co. Ltd., nor the Viramgam Electric Supply Co., can be held to be a concern comparable with the Board. As we have indicated earlier, the activities carried on by the Board are not only production of electricity and direct distribution in some areas; but also includes preparation of schemes for development of supply of electricity in areas not served so far and for supply of electricity to licensees. The two concerns at Ahmedabad and Viramgam merely generate and supply electricity to consumers in the cities or towns served by them. The Board, according to the Act constituting it, has primarily to supply electricity to licensees, and not confine its supply to direct consumers like these two concerns. The supply to consumers is only undertaken where there are no licensees to undertake the distribution of electricity generated by the Board, and this activity of direct supply to consumers is primarily carried on in rural areas where the population is sparsely distributed as compared to the cities or towns served by the other two concerns. Then, there is the important factor that the Board is running at a huge loss every year. The workmen did not provide figures to show what was the profitability of the other two concerns, though the Awards in their cases seem to indicate that both of them are running at a profit. In these circumstances, we cannot hold that the Tribunal committed any error in ignoring the wages being

paid by these two concerns when dealing with the question of payment of dearness allowance by the Board. In this connection, a request was made by learned counsel that we may remand the case to the Tribunal in order to enable the Sangh to produce evidence to the satisfaction of the Tribunal that these two concerns are comparable, or to cite examples of other undertakings in the same industry in the Saurashtra region, or, if there be no such undertakings available, of undertakings in other industries in the Saurashtra region so as to enable the Sangh to claim wages on parity with those undertakings. We do not think that there is any justification for remanding the case for such a purpose at this stage. It was open to the Sangh to produce material before the Tribunal when the dispute was first investigated by it, and no reason is shown why the Sangh did not do so. Further, as we have indicated earlier, the very circumstance that the Board does not have the financial capacity to meet the additional burden of the demands made by the workmen justifies the order made by the Tribunal. The further requests that the remand would enable the Sangh to show whether the losses brought to the notice of the Tribunal by the Board were, in fact, not losses has also no force, because when the losses were proved before the Tribunal by production of an affidavit on behalf of the Board and the deponent appeared in the witness-box, no attempt was made on behalf of the Sangh to cross-examine the deponent in order to establish that the losses had not been correctly represented. We do not think that, in these circumstances, any remand of this case is called for. It does appear that the Tribunal in its award committed the error of comparing the Board with the Maharashtra Electricity Board and similar Electricity Boards in other States and thus acted against the principle that wages should be compared on industry-cum-region basis; but that mistake does not justify any interference with the award which is otherwise correct and justified. The Tribunal was quite right in rejecting the demands made by the Sangh, particularly in the light of the further fact relied upon by the Tribunal that all the employees of the Board in the Gujarat Region as well as a large majority of over 2500 employees even in the Saurashtra Region had accepted the existing rates based on the settlements and only 466 employees had come for-

ard with this demand without establishing that the demand was restricted to ringing up their wages to the level of minimum wages.

9. The appeal is dismissed, but we make no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 93
(V 57 C 21)

I. HIDAYATULLAH, C. J., J. C. SHAH, RAMASWAMI, G. K. MITTER AND A. N. GROVER, JJ.

Mohd. Faruk, Petitioner v. State of Madhya Pradesh and others, Respondents.
Writ Petn. No. 60 of 1968, D/- 1-4-1969.

Constitution of India, Article 19 (1) (g) — Madhya Pradesh Municipal Corporation Act (23 of 1956), Section 430 — Right to carry on trade in slaughtering bulls and bullocks — Restriction on — Bye-laws of Municipality regulating such trade — Notification of Governor cancelling bye-laws having effect of prohibiting trade — Notification is violative of Article 19 (1) (g).

The Notification dated 12-1-1967 issued by the Governor of M. P. in exercise of the powers conferred under S. 430 (3) of the Act cancelling confirmation of the bye-laws made by the Jabalpur Municipal Committee for inspection and regulation of slaughter houses in so far as the bye-laws relate to slaughter of bulls and bullocks, which has the effect of prohibiting the slaughter of bulls and bullocks within the municipality of Jabalpur imposed a direct restriction upon the fundamental right of the petitioner and is ultra vires as infringing Article 19 (1) (g) of the Constitution. (Para 10)

The power to issue bye-laws indisputably includes the power to cancel or withdraw the bye-law, but the validity of the exercise of the power to issue and to cancel or withdraw the bye-laws must be adjudged in the light of its impact upon the fundamental rights of persons affected thereby. When the validity of a law placing restriction upon the exercise of fundamental rights in Article 19 (1) is challenged, the onus of proving to the satisfaction of the Court that the restriction is reasonable lies upon the State. A law requiring that

an act, which is inherently dangerous, noxious or injurious to public interest, health or safety or is likely to prove a nuisance to the community, shall be done under a permit or licence of an executive authority, it is not per se unreasonable and no person may claim a licence or permit to do that act as of right. Where the law providing for grant of a licence or a permit confers a discretion upon an administrative authority regulated by rules or principles express or implied, and exercisable in consonance with rules of natural justice, it will be presumed to impose a reasonable restriction. Where however, power is entrusted to an administrative agency to grant or withhold a permit or licence in its uncontrolled discretion, the law ex facie infringes the fundamental right under Article 19 (1). Imposition of restriction on the exercise of a fundamental right may be in the form of control or prohibition but when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone may ensure the maintenance of the general public interest lies heavily upon the State. (Para 8)

The impugned notification though technically within the competence of the State Government, directly infringes the fundamental right of the petitioner guaranteed by Article 19 (1) (g), and may be upheld only if it be established that it seeks to impose reasonable restrictions in the interests of the general public and a less drastic restriction will not ensure the interest of the general public. The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency—national or local—or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for im-

posing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved.

(Para 10)

The sentiments of a section of the people may be hurt by permitting slaughter of bulls and bullocks in premises maintained by a local authority. But a prohibition imposed on the exercise of a fundamental right to carry on an occupation, trade or business will not be regarded as reasonable, if it is imposed not in the interest of the general public, but merely to respect the susceptibilities and sentiments of a section of the people whose way of life, belief or thought is not the same as that of the claimant. AIR 1958 SC 731 and AIR 1961 SC 448, Ref.

(Para 11)

Cases Referred: Chronological Paras
(1961) AIR 1961 SC 448 (V 48) =

1961-2 SCR 610 = 1961 (1) Cri

LJ 573, Abdul Hakim Quarishi

v. State of Bihar

5

(1960) AIR 1960 SC 430 (V 47) =

1960-2 SCR 375, Narendra Kumar

v. Union of India

9

(1958) AIR 1958 SC 731 (V 45) =

1959 SCR 629, Mohd. Hanif

Quareshi v. State of Bihar

4, 5, 6

M/s. Frank Anthony and B. Datta, Advocates and Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co., for Petitioner; Mr. I. N. Shroff, Advocate, for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.: The petitioner Mohd. Faruk who carries on the vocation of slaughtering bulls and bullocks at the Madar Tekdi Slaughter-House at Jabalpur claims a declaration that the notification dated January 12, 1967 issued by the Governor of Madhya Pradesh in exercise of the powers conferred under sub-section (3) of Section 430 of the Madhya Pradesh Municipal Corporation Act 23 of 1956 "canceling confirmation of the bye-laws" made by the Jabalpur Municipal Committee for inspection and regulation of slaughter-houses "in so far as the bye-laws relate to slaughter of bulls and bullocks" infringes the fundamental freedoms guaranteed under Articles 14 and 19 of the Constitution.

2. Section 5 (37) of the Madhya Pradesh Municipal Corporation Act 23 of 1956 defines "municipal slaughter-house". By Section 66 (m) it is made obligatory upon the Corporation to make adequate provision for the construction, maintenance

and regulation of a slaughter-house. By sub-section (1) of Section 430 of the Act the Corporation may and is required by the Government shall fix places for the slaughter of animals for sale, and may with the like power grant and withdraw licences for the use of such premises. By sub-section (3) it is enacted that when premises have been fixed under sub-section (1) no person shall slaughter any such animal for sale within the city at any other place. By sub-section (4) bringing into the city for sale flesh of any animal intended for human consumption, which has been slaughtered at any slaughter-house or place not maintained or licensed under the Act, without the written permission of the Corporation, is prohibited. Section 427 of the Act empowers the Government, with the sanction of the Government, to make bye-laws consistent with the provisions of the Act and the rules made thereunder for carrying out "the provisions and intentions" of the Act. The bye-laws may, inter alia, relate to the management of municipal markets and the supervision of the manufacture, storage and sale of food, and that purpose may regulate the conditions in municipal slaughter-houses. By Section 430 it is provided that no bye-law made by the Corporation under the Act shall have any validity until it is confirmed by the Government. Power conferred upon the Government by Section 432 to modify or repeal either wholly or in part any bye-laws in consultation with the Corporation.

3. In exercise of the power conferred by Section 178 (3) of the C. P. and Berar Municipalities Act 2 of 1922, bye-laws were made by the Jabalpur Municipality in January 1948. Those bye-laws continued to remain in force under the Madhya Pradesh Municipal Corporation Act 23 of 1956. The bye-laws controlled and regulated the conditions under which animals may be slaughtered in the premises fixed for that purpose and provided for inspection and for ensuring adequate precaution in respect of sanitation for slaughter of animals certified by competent authorities as fit for slaughter. By the notification issued by the Jabalpur Municipality a slaughter-house at a place called "Madar Tekdi" was fixed as premises for slaughtering animals. Under that notification bulls and bullocks were permitted to be slaughtered along with other animals like buffaloes, sheep, goats and pigs. But on January 12, 1967, the State Government issued a notification

cancelling the confirmation of the by-laws" insofar as they related to slaughter of bulls and bullocks at Madar Tekdi Slaughter-House. That notification places restrictions upon the right of the petitioner to carry on his hereditary vocation.

4. The question of permitting slaughter of cows, bulls and bullocks has, for a long time, generated violent sentimental differences between sections of the people in our country. After the enactment of the Constitution the controversy relating to the limits within which restrictions may be placed upon the slaughter of cows, bulls and bullocks was agitated before this Court in *Mohd. Hanif Quareshi v. State of Bihar*, 1959 SCR 629 = (AIR 1958 SC 731). In that case the validity of provisions made in three State Acts which imposed a total ban upon slaughter of all categories of "animals of the species of bovine cattle" was challenged. These Acts were the Bihar Preservation and Improvement of Animals Act, 1955, the U. P. Prevention of Cow Slaughter Act, 1955, and the C. P. and Berar Animals Preservation Act, 1949. The petitioners who followed the occupation of butchers and dealing in the by-products of slaughter and whose businesses challenged the validity of the three Acts on the plea that the Acts infringed their fundamental rights under Articles 14, 19 (1) (g) and 25 of the Constitution. This Court held—(i) that a total ban on the slaughter of cows of all ages and calves of cows and of she-buffaloes, male and female, was reasonable and valid; (ii) that a total ban on the slaughter of she-buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes), so long as they were capable of being used as milch or draught cattle, was also reasonable and valid; and (iii) that a total ban on the slaughter of she-buffaloes, bulls and bullocks (cattle or buffalo) after they ceased to be capable of yielding milk or of breeding or working as draught animals was not in the interests of the general public and was invalid.

5. Attempts were made from time to time to circumvent the judgment of this Court in *Mohd. Hanif Quareshi's case*, 1959 SCR 629 = (AIR 1958 SC 731). After that judgment, Legislatures of the State of Bihar, U. P. and Madhya Pradesh enacted the minimum age of animals to be slaughtered. The Bihar Act prohibited slaughter of a bull, bullock or she-buffalo unless the animal was over 25 years of age and had become useless.

Under the U. P. Act slaughter of a bull or bullock was permitted only if it was over 20 years of age and was permanently unfit. Under the Madhya Pradesh Act slaughter of a bull, bullock or buffalo, except upon a certificate issued by the competent authority, was prohibited. The certificate could not be issued unless the animal was over 20 years of age and was unfit for work or breeding. This Court held in *Abdul Hakim Quraishi v. State of Bihar*, 1961-2 SCR 610 = (AIR 1961 SC 448) that the ban on the slaughter of bulls, bullocks and she-buffaloes below the age of 20 or 25 years was not a reasonable restriction in the interests of the general public and was void. The Court observed that a bull, bullock or buffalo did not remain useful after it was 15 years old, and whatever little use it may then have was greatly offset by the economic disadvantages of feeding and maintaining unserviceable cattle. This Court also held that the additional condition that the animal must, apart from being above 20 or 25 years of age, be unfit was a further unreasonable restriction. On that ground the relevant provisions in the Bihar, U. P. and Madhya Pradesh Acts were declared invalid.

6. The present case is apparently another attempt, though on a restricted scale to circumvent the judgment of this Court in *Mohd. Hanif Quareshi's case*, 1959 SCR 629 = (AIR 1958 SC 731). The bye-laws of the Jabalpur Municipality permitted slaughter of bulls and bullocks. A licence had to be obtained for that purpose. Slaughter of animals in places outside the premises fixed by the Municipality was prohibited by Section 257 (3) of the Act, and sale of meat within the area of the Municipality of the animals not slaughtered in the premises fixed by the Municipality was also prohibited. Under the notification by which the bye-laws were issued in 1948, bulls and bullocks could be slaughtered in premises fixed for that purpose. But by the notification dated January 12, 1967, confirmation of the bye-laws insofar as they related to bulls and bullocks was cancelled. The effect of that notification was to prohibit the slaughter of bulls and bullocks within the Municipality of Jabalpur. This cancellation of the confirmation of Bye-laws imposed a direct restriction upon the fundamental right of the petitioner under Article 19 (1) (g) of the Constitution.

7. In the affidavit filed on behalf of the State of Madhya Pradesh two principal

contentions were raised:—(1) the power to rescind confirmation of the bye-laws cannot be challenged by reference to Article 14 or Article 19 of the Constitution, because the power vested in the Government to confirm the bye-laws carries with it the power to rescind such confirmation; and (2) that since every person desiring to use a slaughter-house had to apply for and obtain a licence, which may be refused, and if given was liable to be withdrawn, no person may insist that he shall be given a licence to slaughter animals in a slaughter-house.

8. The power to issue bye-laws indisputably includes the power to cancel or withdraw the bye-laws, but the validity of the exercise of the power to issue and to cancel or withdraw the bye-laws must be adjudged in the light of its impact upon the fundamental rights of persons affected thereby. When the validity of a law placing restriction upon the exercise of fundamental rights in Article 19 (1) is challenged, the onus of proving to the satisfaction of the Court that the restriction is reasonable lies upon the State. A law requiring that an act which is inherently dangerous, noxious or injurious to public interest, health or safety or is likely to prove a nuisance to the community, shall be done under a permit or licence of an executive authority, it is not per se unreasonable and no person may claim a licence or permit to do that act as of right. Where the law providing for grant of a licence or a permit confers a discretion upon an administrative authority regulated by rules or principles expressed or implied, and exercisable in consonance with rules of natural justice, it will be presumed to impose a reasonable restriction. Where, however, power is entrusted to an administrative agency to grant or withhold a permit or licence in its uncontrolled discretion, the law *ex facie* infringes the fundamental right under Article 19 (1). Imposition of restriction on the exercise of a fundamental right may be in the form of control or prohibition, but when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone may ensure the maintenance of the general public interest lies heavily upon the State.

9. This Court in *Narendra Kumar v. Union of India*, 1960-2 SCR 375 = (AIR 1960 SC 430) held that the word "restriction" in Articles 19 (5) and 19 (6) of the Constitution includes cases of "prohi-

bition" also; that where a restriction reaches the stage of total restraint rights special care has to be taken by the Court to see that the test of reasonableness is satisfied by considering the question the background of the facts and circumstances under which the order was made taking into account the nature of the evil that was sought to be remedied by the law, the harm caused to individual citizens by the proposed remedy, the beneficial effect reasonably expected to result to the general public, and whether the restraint caused by the law was more than what was necessary in the interest of the general public.

10. The impugned notification, though technically within the competence of the State Government, directly infringes the fundamental right of the petitioner guaranteed by Article 19 (1) (g), and may be upheld only if it be established that it seeks to impose reasonable restrictions in the interests of the general public and a less drastic restriction will not be in the interest of the general public. The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency—national or local — or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved.

11. The sentiments of a section of the people may be hurt by permitting slaughter of bulls and bullocks in premises maintained by a local authority. But prohibition imposed on the exercise of fundamental right to carry on an occupation, trade or business will not be regarded as reasonable, if it is imposed not in the interest of the general public, but merely to respect the susceptibilities or sentiments of a section of the people.

whose way of life, belief or thought is not the same as that of the claimant.

12. The notification issued by the State Government must, therefore, be declared ultra vires as infringing Article 19 (1) (g) of the Constitution.

13. It is unnecessary to consider the validity of Section 430 of the Act which was sought to be challenged in the petition or to consider whether there has been any infringement of the guarantee of the equality clause of the Constitution.

14. The petitioner will be entitled to his costs in this Court.

Petition allowed.

AIR 1970 SUPREME COURT 97 (V 57 C 22)

J. M. SHELAT, V. BHARGAVA, C. A.
VAIDIALINGAM, K. S. HEGDE
AND A. N. GROVER, JJ.

Pankaj Kumar Chakrabarty and others,
Petitioners v. State of West Bengal, Res-
pondent; Kaka Ram and others, Inter-
veners.

Writ Petn. No. 377 of 1968, D/- 1-5-1969.

Constitution of India, Art. 22 (4), (5) and (7)—Preventive Detention Act (1950), Ss. 7, 8, 9 and 13 — Right of detenu to make representation against detention order — He has dual right to have representation considered by Government and also by Advisory Board — Representation to Government made after case is referred to Advisory Board — Government not relieved of obligation to consider representation.

The power of preventive detention is acquiesced in by the Constitution as a necessary evil and is therefore, hedged in by diverse procedural safeguards to minimise as much as possible the danger of its misuse. It is for this reason that Article 22 has been given a place in the Chapter on guaranteed rights.

(Para 8)

It is clear from Clauses (4) and (5) of Article 22 that there is a dual obligation on the appropriate Government and a dual right in favour of the detenu namely, (1) to have his representation, irrespective of the length of detention, considered by the appropriate Government and (2) to have once again that representation in the light of the circumstances of the case, considered by the Board

before it gives its opinion. Thus, whereas the Government considers the representation to ascertain whether the order is in conformity with its power under the relevant law, the Board considers such representation from the point of view of arriving at its opinion whether there is sufficient cause for detention. The obligation of the appropriate Government to afford to the detenu the opportunity to make a representation and to consider that representation is distinct from the Government's obligation to constitute a Board and to communicate the representation amongst other materials to the Board.

(Para 10)

The above conclusion is strengthened by the provisions of the Preventive Detention Act, (1950) made in conformity with Cls. (4) and (5) of Article 22. Section 7 of the Act enjoins upon the detaining authority to furnish to the detenu grounds of detention and to afford to him the earliest opportunity to make his representation to the appropriate Government. Ss. 8 and 9 enjoin upon the appropriate Government to constitute an Advisory Board and to place the grounds for detention, the detenu's representation and also the report of the officer where the order of detention is made by an officer and not by the Government. The obligation under Section 7 is quite distinct from that under Sections 8 and 9. Section 13 empowering the appropriate Government to revoke or modify an order of detention also shows that the appropriate Government cannot pass an order under S. 13 without considering the representation which has under Section 7 been addressed to it.

(Para 11)

Consequently, the detenu has a constitutional right and there is on the Government a corresponding constitutional obligation to consider his representation irrespective of whether it is made before or after his case is referred to the Advisory Board. AIR 1969 SC 1028, Approved.

(Para 12)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 1028 (V 56) =

W. P. No. 327 of 1968, D/- 31-1-1969=1969 Cri LJ 1446, Sk. Abdul Karim v. State of West Bengal 5, 7, 10, 12

Mr. S. N. Prasad, Advocate, amicus curiae for Petitioners (Nos. 15 and 36); Mr. Sukumar Basu, Advocate, for Respondent; M/s. R. K. Garg, and A. K. Gupta, Advocates, for Interveners (Nos. 1 to 5); Mr. Niren De, Attorney-General for India (M/s. R. H. Dhebar and S. P.

that period without the authority of such Magistrate. Clause (3), however, withdraws these safeguards in the case of two categories of persons, namely, an enemy alien and persons detained under a law providing for preventive detention. But the next two clauses impose certain restrictions on and safeguards against the power of detention. Clause (4) thus lays down that no law providing for such detention can authorise the detention for more than 3 months unless an Advisory Board composed as therein stated certifies that there is sufficient cause for such detention and such detention is in consonance with and is not for a period longer than the one provided by a Parliament Act made under Cl. (7). Clause (7) authorises Parliament to make a law prescribing the circumstances under which and the class or classes of cases in which a person can be detained for more than 3 months without obtaining the opinion of the Advisory Board and the maximum period for which a person may in any such class or classes of cases be detained and the procedure to be followed by the Advisory Board in the enquiry under Clause (4) (a). Clause (5) imposes an obligation on the detaining authority to furnish to the person detained by it grounds for his detention "as soon as may be" and give him "the earliest opportunity" of making a representation against the order of detention passed against him. These clauses thus clearly impose on the detaining authority the obligation to furnish to the detenu as soon as may be the grounds for his detention, the obligation to afford him the earliest opportunity of making a representation against the order and the obligation to constitute an Advisory Board and not to keep the detenu in detention for a period longer than 3 months unless before the expiry of that period it has obtained the opinion of the Board that there is sufficient cause for such detention except in cases prescribed in a Parliament Act passed under and by virtue of Clause (7). The reason for the expressions "as soon as may be" for furnishing the grounds and "the earliest opportunity" for making a representation in these clauses is the extreme anxiety of the Constitution to see that no person is detained contrary to the law enabling preventive detention or in breach of or contrary to the safeguards and restrictions provided in these clauses. The grounds for detention are to be served on the detenu as soon as may be and the earliest opportunity to make a representation

against the order is to be given to him to enable him to protest against the order that he is either wrongly or illegally detained.

10. It is true that Clause (5) does not in positive language provide as to whom the representation is to be made and by whom, when made, it is to be considered. But the expressions "as soon as may be" and "the earliest opportunity" in that clause clearly indicate that the grounds are to be served and the opportunity to make a representation are provided for to enable the detenu to show that his detention is unwarranted and since no other authority who should consider such representation is mentioned it can only be the detaining authority to whom it is to be made which has to consider it. Though Cl. (5) does not in express terms say so it follows from its provisions that it is the detaining authority which has to give to the detenu the earliest opportunity to make a representation and to consider it when so made whether its order is wrongful or contrary to the law enabling it to detain him. The illustrations given in *Sk. Abdul Karim's case*, W. P. No. 327 of 1968, D/- 31-1-1969 = (AIR 1969 SC 1028) (*supra*) show that Cl. (5) of Article 22 not only contains the obligation of the appropriate Government to furnish the grounds and to give the earliest opportunity to make a representation but also by necessary implication the obligation to consider that representation. Such an obligation is evidently provided for to give an opportunity to the detenu to show and a corresponding opportunity to the appropriate Government to consider any objections against the order which the detenu may raise so that no person is, through error or otherwise, wrongly arrested and detained. If it was intended that such a representation need not be considered by the Government where an Advisory Board is constituted and that representation in such cases is to be considered by the Board and not by the appropriate Government, Clause (5) would not have directed the detaining authority to afford the earliest opportunity to the detenu. In that case the words would more appropriately have been that the authority should obtain the opinion of the Board after giving an opportunity to the detenu to make a representation and communicate the same to the Board. But what would happen in cases where the detention is for less than 3 months and there is no necessity of having the opinion of the Board? If counsel's contention

were to be right the representation in such cases would not have to be considered either by the appropriate Government or by the Board and the right of representation and the corresponding obligation of the appropriate Government to give the earliest opportunity to make such representation would be rendered nugatory. In imposing the obligation to afford the opportunity to make a representation Clause (5) does not make any distinction between orders of detention for only 3 months or less and those for a longer duration. The obligation applies to both kinds of orders. The clause does not say that the representation is to be considered by the appropriate Government in the former class of cases and by the Board in the latter class of cases. In our view it is clear from Cls. (4) and (5) of Article 22 that there is a dual obligation on the appropriate Government and a dual right in favour of the detenu, namely, (1) to have his representation irrespective of the length of detention considered by the appropriate Government and (2) to have once again that representation in the light of the circumstances of the case considered by the Board before it gives its opinion. If in the light of that representation the board finds that there is no sufficient cause for detention the Government has to revoke the order of detention and set at liberty the detenu. Thus, whereas the Government considers the representation to ascertain whether the order is in conformity with its power under the relevant law, the Board considers such representation from the point of view of arriving at its opinion whether there is sufficient cause for detention. The obligation of the appropriate Government to afford to the detenu the opportunity to make a representation and to consider that representation is distinct from the Government's obligation to constitute a Board and to communicate the representation amongst other materials to the Board to enable it to form its opinion and to obtain such opinion.

11. This conclusion is strengthened by the other provisions of the Act. In conformity with clauses (4) and (5) of Art. 22, Section 7 of the Act enjoins upon the detaining authority to furnish to the detenu grounds of detention within five days from the date of his detention and to afford to the detenu the earliest opportunity to make his representation to the appropriate Government. Sections 8 and 9 enjoin upon the appropriate Govern-

ment to constitute an Advisory Board and to place within 30 days from the date of the detention the grounds for detention, the detenu's representation and also the report of the officer where the order of detention is made by an officer and not by the Government. The obligation under Section 7 is quite distinct from that under Sections 8 and 9. If the representation was for the consideration not by the Government but by the Board only as contended, there was no necessity to provide that it should be addressed to the Government and not directly to the Board. The Government could not have been intended to be only a transmitting authority nor could it have been contemplated that it should sit tight on that representation and remit it to the Board after it is constituted. The peremptory language in Clause (5) of Article 22 and Section 7 of the Act would not have been necessary if the Board and not the Government had to consider the representation. Section 13 also furnishes an answer to the argument of counsel for the State. Under that section the State Government and the Central Government are empowered to revoke or modify an order of detention. That power is evidently provided for to enable the Government to take appropriate action where on a representation made to it it finds that the order in question should be modified or even revoked. Obviously, the intention of Parliament could not have been that the appropriate Government should pass an order under Section 13 without considering the representation which has under Section 7 been addressed to it.

12. For the reasons aforesaid we are in agreement, with the decision in *Sk. Abdul Karim's case*, W. P. No. 327 of 1968, D/- 31-1-1969 = (AIR 1969 SC 1028) (*supra*). Consequently, the petitioners had a constitutional right and there was on the State Government a corresponding constitutional obligation to consider their representations irrespective of whether they were made before or after their cases were referred to the Advisory Board and that not having been done the order of detention against them cannot be sustained. In this view it is not necessary for us to examine the other objections raised against these orders. The petition is therefore allowed the orders of detention against petitioners 15 and 36 are set aside and we direct that they should be set at liberty forthwith.

Petition allowed.

AIR 1970 SUPREME COURT 102
(V 57 C 23)

(From Gujarat: (1965) 6 Guj LR 829)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.Khemchand Dayalji and Co., Appellant
v. Mohammadbhai Chandbhai, Respondent.

Civil Appeal No. 808 of 1966, D/- 24-3-1969.

Houses and Rents — Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947), Sections 28, 11, 49 (2) (iii) — Bombay Rents, Hotel and Lodging House Rates (Control) Rules (1948), Chap. IV, Rules 5, 6 — Small Cause Court, at Ahmedabad exercising jurisdiction in the matter of fixation of standard rent, under Bombay Act — Municipal taxes payable by tenant due and deposited into Court by order of Court — Landlord not to withdraw — Distress warrant in respect of taxes can be issued on application by landlord under S. 53 Presidency Small Cause Courts Act.

The Court of Small Causes Ahmedabad, during the pendency of proceeding before it determining the standard rent of the premises in exercise of the power under S. 11 of the Bombay Act, has jurisdiction to issue a distress warrant under S. 53 of the Presidency Small Cause Courts Act read with R. 5 of the rules framed under S. 49 of the Bombay Act, for recovery of the amount due as municipal taxes payable by the tenant as part of rent and which has been deposited in Court.

(Para 7)

By the enactment of the Ahmedabad City Courts Act, 1961, the proceedings before the Court of Small Causes at Ahmedabad were governed by that Act and by virtue of the amendment made in Section 28 of Bombay Act 57 of 1947 it became a Court of exclusive jurisdiction to try suits, proceedings, claims and questions arising under that Act. Being a Court governed by the Presidency Small Cause Courts Act, the Ahmedabad Court of Small Causes was competent to exercise, subject to the Ahmedabad City Courts Act, all the powers which a Presidency Small Cause Court may exercise. Power to issue a distress warrant being expressly conferred by Section 53 of the Presidency Small Cause Courts Act upon the Courts governed by it, the Court of Small Causes, Ahmedabad, was competent to exercise that power.

(Para 7)

Rule 5 was framed under the Bombay Act 57 of 1947 in exercise of the authority conferred by Section 49(2) (iii). After the enactment of the Ahmedabad City Courts Act, 1961 Rule 5 as originally framed by the Government of Bombay continued in force by virtue of Section 87 of the Bombay Reorganization Act 11 of 1960, and applied to the Ahmedabad Small Causes Court. When Rule 5 was framed under Bombay Act 57 of 1947 it was not ultra vires and it has also not become ultra vires after the enactment of the Ahmedabad City Courts Act in its application to the city of Ahmedabad.

(Para 8)

The amount of municipal taxes was due and it was payable by the tenants and though deposited in Court in proceeding for fixation of standard rent, it could not be withdrawn by the Landlord. The municipal taxes were, therefore in arrears and a distress warrant could be applied for by the Landlord under S. 53 of the Presidency Small Cause Courts Act.

(Para 11)

M/s. Arun H. Mehta and I. N. Shroff, Advocates, for Appellant; Mr. S. T. Desai, Senior Advocate, (Mr. P. C. Bhartari, Advocate, and M/s. J. B. Dadachanji and O. C. Mathur, Advocates of M/s J. B. Dadachanji and Co. with him) for Respondent.

The following Judgment of the Court was delivered by

SHAH, J.:— The respondent is the owner of a house in the town of Ahmedabad. The appellants are the tenants of that house at a monthly rental of Rupees 2,171/-. Under the argeement of lease the appellants were to pay out of the agreed rent Rs. 810 per month, and the balance was to be appropriated towards a loan advanced by them to the respondent for constructing the house. The appellants had also agreed to pay municipal taxes and electricity charges.

2. The appellants filed suit No. 1308 of 1963 in the Court of Small Causes, Ahmedabad, for an order, inter alia, determining the standard rent of the premises in exercise of the power under Section 11 of the Bombay Rents, Hotel and Lodging House Rates Control Act 57 of 1947. The Court of Small Causes, Ahmedabad, on an application filed by the appellants fixed the contractual rent as "interim standard rent" and directed the appellants to pay the rent and municipal taxes. Pursuant to this order, the appellants deposited Rs. 2,403 as rent and Rs. 8, 921.25 due as municipal taxes for the

5. The relevant provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act 57 of 1947 and other statutes which have a bearing may first be noticed. Bombay Act 57 of 1947 was intended to control rents and to confer protection against eviction upon tenants of premises in certain urban areas in the Province of Bombay. By Section 23 of the Act certain Courts were designated as Courts of exclusive jurisdiction to entertain and try suits and proceedings between a landlord and tenant, relating to recovery of rent or possession to which the provisions of the Act applied, and also to decide claims or questions arising under the Act. Section 28 as originally enacted and later amended by Bombay Acts 58 of 1949 and 15 of 1952, in so far as it is material reads:

(1) * * * * *

(2) proceedings under Chapters VII and VIII of the Presidency Small Cause Courts Act, 1882, and

(3) proceedings for execution of any decree or order passed in any such suit or proceedings, the Court of Small Causes, Bombay shall follow the practice and procedure provided for the time being (a) in the said Act except Chapter VI thereof, and (b) in the rules made under Section 9 of the said Act."

6. By the enactment of the Bombay Reorganization Act 11 of 1960 a separate State of Gujarat was constituted out of the territory which formed the State of Bombay, and the area within the city limits of Ahmedabad formed part of the State of Gujarat. By the Gujarat Adaptation of Laws (State and Concurrent Subjects) Order, 1960, Clause (a) of sub-section (1) of Section 28 of Bombay Act 57 of 1947 as it was originally enacted was deleted. The Legislature of the State of Gujarat enacted the Ahmedabad City Courts Act 19 of 1961 which by Section 17 provided that the Presidency Small Cause Courts Act, 1882 (XV of 1882), shall extend to and come into force in the City of Ahmedabad on and from the appointed day. By Section 18 it was provided:

"The Presidency Small Cause Courts Act, 1882 (XV of 1882), and the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bombay LVII of 1947), shall in their application to the City of Ahmedabad stand amended in the manner and to the extent specified in the Schedule."

By Section 19 it was provided:

"With effect on and from the appointed day * * * the Provincial Small Cause Courts Act, 1887 (IX of 1887), and all rules, notifications and orders made thereunder shall cease to apply to, or be in force, in the City of Ahmedabad, * * *". By the Schedule certain amendments were made in the Presidency Small Cause Courts Act, 1882, in its application to the City of Ahmedabad. By Clause 13 of the Schedule, Section 50 of the Presidency Small Cause Courts Act was to apply to every place within the City of Ahmedabad. Certain amendments were also made in Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, and in sub-section (1) of Section 28, before Clause (aa) the following clause was inserted:

"(a) in the City of Ahmedabad, the Court of Small Causes of Ahmedabad,"

7. By the enactment of the Ahmedabad City Courts Act, 1961, the proceedings before the Court of Small Causes at Ahmedabad were governed by that Act and by virtue of the amendment made in Section 28 of Bombay Act 57 of 1947 it became a Court of exclusive jurisdiction to try suits, proceedings, claims and questions arising under that Act. Being a Court governed by the Presidency Small Cause Courts Act, the Ahmedabad Court of Small Causes was competent to exercise, subject to the Ahmedabad City Courts Act, all the powers which a Presidency Small Cause Court may exercise. Power to issue a distress warrant being expressly conferred by Section 53 of the Presidency Small Cause Courts Act upon the Courts governed by it, the Court of Small Causes, Ahmedabad, was competent to exercise that power.

8. Rule 5 was framed under the Bombay Act 57 of 1947 in exercise of the authority conferred by Section 49 (2) (iii). After the enactment of the Ahmedabad City Courts Act, 1961, Rule 5 as originally framed by the Government of Bombay continued in force by virtue of Section 87 of the Bombay Reorganization Act 11 of 1960, and applied to the Ahmedabad Small Cause Court. When Rule 5 was framed under Bombay Act 57 of 1947 it was not ultra vires, and it is not shown to have become ultra vires after the enactment of the Ahmedabad City Courts Act in its application to the City of Ahmedabad.

9. The argument that Section 28 sets up a new set of Courts with special Powers and jurisdiction is without substance. Section 28 merely confers upon the existing Courts exclusive jurisdiction in respect of matters relating to possession of premises and recovery of rent and to determine claims and questions arising under that Act. On that account it does not become a Special Court: it is a Court which is competent to exercise all the powers which are conferred upon it by virtue of its constitution under the statute which governs it. The Court of Small Causes at Ahmedabad had, therefore, power to issue distress warrant and that power could be exercised even in respect of suits and proceedings which were exclusively triable by it by virtue of the Bombay Act 57 of 1947.

10. We are also unable to hold that so long as application for fixation of standard rent is pending, the Court's jurisdiction to issue a distress warrant remains suspended. Until standard rent is

determined, or an interim order is made, rent at the contractual rate is payable and process for recovery by distress warrant may always be adopted. Section 11 of Bombay Act 57 of 1947 confers upon the Court power to fix standard rent and permitted increases in certain cases. The Court is also competent to determine interim standard rent, and direct payment pending final determination of standard rent.

11. The appellants applied for fixation of standard rent and invited the Court to pass an order fixing interim standard rent and the Court of Small Causes proceeded to pass the order for payment of rent and municipal taxes. In the present case there was an express order of the Court requiring the appellants to deposit in Court Rs. 810 per month and also to deposit municipal taxes. The Court of Small Causes ordered that the amount deposited by the appellants towards municipal taxes shall not be paid over to the landlord. The amount was on that account not available to the respondent. The respondent was unable to pay the taxes and the Municipality threatened to attach the property. The amount of municipal taxes was due and it was payable by the appellants. Though deposited in Court, it could not be withdrawn by the respondent. The municipal taxes were, therefore, in arrears and a distress warrant could be applied for under Section 53 of the Presidency Small Cause Courts Act by the respondent.

12. It was urged that the appellants had to pay the amount of interim standard rent twice over: once when they deposited it in the Court and again when they satisfied the demand to avoid execution of the distress warrant. The landlord undoubtedly cannot obtain the amount twice over. But that does not mean that when the tenant has not made the amount available to the landlord the application for distress was not maintainable.

13. The argument that the erroneous order passed by the Court of Small Causes preventing the landlord from recovering the amount of municipal taxes could have been got corrected by approaching the superior courts and so long as that order stood, no distress could be levied, ignores the fact that the appellants had persuaded the Court of Small Causes to pass that order. In our judgment, there was no bar to the respondent maintaining the application for distress.

14. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 105 (V 57 C 24)

(From Allahabad)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

The Cantonment Board, Meerut, Appellant v. Narain Dass (dead) and another, Respondents.

Civil Appeal No. 747 of 1966, D/- 9-4-1969.

(A) Cantonment Act (1924), Ss. 185 (1) and 187 (1) — Distinction between — Shop on private land — Shop owner constructing structure projecting into a drain belonging to Cantonment Board — Case falls within S. 187 (1) — S. A. No. 2097 of 1958, D/- 2-2-1965 (All), Reversed.

Section 185 deals with erection or re-erection of buildings on private lands whereas Section 187 deals with the construction of projections or structures overhanging, projecting into or encroaching on any street, any drain or aqueduct. The two provisions deal with different situations, one has nothing to do with the other. Obviously the Legislature does not want the Cantonment Board to demolish buildings erected on private lands after the period mentioned in Section 185 (1) but public interest requires that no such limitation should be placed on the Cantonment Board while acting under Section 187 (1). Otherwise our streets and roads may soon disappear.

(Para 8)

The respondent had constructed a shop on the land belonging to him. Cantonment Board had no right in or over that land. A stone projection over the drain by the side of the road in front of the shop to facilitate ingress into the shop and egress therefrom was constructed with the permission of the Board. Subsequently the owner of the shop put up a wooden kiosk over the stone projection without obtaining the permission of the Board. The Board issued notices requiring the owner to demolish and remove the kiosk. On the question whether notices were governed by Section 185 (1) or Section 187 (1):

* (S. A. No. 2097 of 1958, D/- 2-2-1965 (All)).

Held that Section 187 (1) and not Section 185 (1) was the governing provision in the case. S. A. No. 2097 of 1958, D/-2-2-1965 (All), Reversed.

(Para 8)

Section 185 (1) applies only to cases where a building is erected or re-erected over a land belonging to someone other than the Cantonment Board. That is why that section says that a notice under that section can be given to a owner, lessee or occupier of any land. A notice under that section cannot be given to any person other than the owner or lessee or the occupier of the land over which the building in question had been erected or re-erected. The notices were not given to the owner, lessee or occupier of the land over which kiosk was put up. The kiosk had been constructed over the land under the ownership of the Cantonment Board. The permission, given by the Cantonment Board to the owner of the shop to put up the projection did not confer on him any proprietary right over the drain. It merely gave him a licence to use the projection. He could not exclude the public from using that projection.

(Paras 3 and 5)

The act complained of clearly fell within the scope of Section 187 (1) as the kiosk was undoubtedly a structure. Further it was a projection into the drain and it also encroached on the drain even if it did not also overhang it.

(Para 7)

(B) Cantonments Act (1924), Section 187 — Whether local Boards can take action under provisions similar to Section 187 even after the period of limitation for filing suits by those bodies for possession of public streets or roads or parts thereof or on which they have discontinued their possession expires. (Quaere)

(Para 9)

Mr. C. B. Agarwala, Sr. Advocate (Mr. O. P. Rana, Advocate, with him); for Appellant; Mr. P. N. Bhardwaj, Advocate, for Respondent No. 2.

The following judgment of the Court was delivered by

HEGDE, J. :— The only question arising for decision in this appeal by special leave is whether the notices impugned in these proceedings are governed by S. 185 (1) or Section 187 (1) of the Cantonments Act, 1924. The trial Court held that Section 185 (1) is the governing provision. The first appellate court differed from it and held that Section 187 (1) governs. The High Court in second appeal has restored the decision of the trial Court.

2. The respondent is the owner of shop No. 344 in Mohalla Bakri, Lal Kurti Bazar, Meerut Cantt. The shop in question was constructed about 20 years before the institution of the suit from which this appeal arises. At about the time of the construction of that shop permission was obtained from the Cantonment Board to put up a stone projection over the drain by the side of the road in front of the shop to facilitate ingress into the shop and egress therefrom. The first appellate court has found and that finding has been accepted by the High Court that about 18 years prior to the institution of the suit, the owner of the shop put up a wooden kiosk over the stone projection and the same is being used as a pan shop. According to the finding of those courts the kiosk in question was put up without obtaining the permission of the Cantonment Board. On November 9, 1953, the Cantonment Board issued a notice to the occupier of shop No. 344 under S. 187, requiring him to demolish and remove the kiosk within 7 days from the receipt of that notice. As that demand was not complied with, a final notice under S. 187 was given to him on December 8, 1953. Thereafter the owner of the shop instituted the suit from which this appeal has arisen seeking a perpetual injunction restraining the Cantonment Board from getting the kiosk removed. As mentioned earlier, the trial court, decreed the suit holding that as the kiosk had been put up 18 years prior to the issue of the notices referred to earlier, the Cantonment Board cannot compel its removal in view of Section 185 (1). This decision was reversed by the learned District Judge in appeal. The learned District Judge accepted the finding of the trial court that the kiosk in question had been put up about 18 years prior to the date of the suit but yet according to him it was competent for the Cantonment Board to get the same removed under Section 187 (1). The learned District Judge opined that Section 185 (1) has no relevance to the facts of the case. In second appeal, the High Court agreed with the conclusion of the trial Court that Section 185 (1) is the governing provision.

3. The established facts are:— Shop No. 344 was constructed on the land belonging to the respondent. Cantonment Board had no right in or over that land. The stone projection was constructed over the drain adjoining the road after obtaining the permission of the Cantonment Board. It cannot be disput-

ed that the property in the road including the drain statutorily vests in the Cantonment Board. The permission, given by the Cantonment Board to the owner of the shop to put up the projection does not confer on him any proprietary right over the drain. It merely gives him a licence to use the projection. He cannot exclude the public from using that projection. The kiosk had been put up without obtaining the permission of the Cantonment Board. The kiosk is a structure and it projects or encroaches upon the drain belonging to the Cantonment Board. It can even be said that it overhangs the drain. We have now to examine the provision of law applicable bearing in mind those facts.

4. Section 185 (1) reads:

"A (Board) may, at any time, by notice in writing direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the (Board) considers that such erection or re-erection is an offence under Section 184, and may in such case (or in any other case in which the Board considers that the erection or re-erection of a building is an offence under Section 184, within (twelve months) of the completion of such erection or re-erection) in like manner direct the alteration or demolition as it thinks necessary, of the building or any part thereof, so erected or re-erected."

5. We are unable to agree with the High Court that this section applies to the facts of the present case. In our judgment that section applies only to cases where a building is erected or re-erected over a land belonging to someone other than the Cantonment Board. That is why that section says that a notice under that section can be given "to a owner, lessee or occupier of any land". A notice under that section cannot be given to any person other than the owner or lessee or the occupier of the land over which the building in question had been erected or re-erected. The notices with which we are concerned in this case were not given to the owner, lessee or occupier of the land over which kiosk is put up. As seen earlier the kiosk has been constructed over the land under the ownership of the Cantonment Board. Neither the owner of shop No. 344 or its occupier can be considered as a lessee of the land over which the projection was put up. Hence the provisions contained in Section 185 (1) are not attracted to the present case.

6. This takes us to Section 187 (1). It reads:

"No owner or occupier of any building in a cantonment shall, without the permission in writing of the (Board) add to or place against or in front of the building any projection or structure overhanging, projecting into, or, encroaching on any street or any drain, sewer or aqueduct therein".

7. This section deals with constructions which are projections or structures overhanging, projecting into or encroaching on any street or any drain, sewer or aqueduct. Undoubtedly the kiosk is a structure. Further it is a projection into a drain. It also encroaches on the drain if it does not also overhang it. Therefore the act complained of clearly falls within the scope of Section 187 (1).

8. In other words Section 185 deals with erection or re-erection of buildings on private lands whereas Section 187 deals with the construction or projections or structures overhanging, projecting into or encroaching on any street, any drain or aqueduct. The two provisions deal with different situations. One has nothing to do with the other. Obviously the legislature does not want the Cantonment Board to demolish buildings erected on private lands after the period mentioned in Section 185 (1) but public interest requires that no such limitation should be placed on the Cantonment Board while acting under Section 187 (1). Otherwise our streets and roads may soon disappear. The High Court missed the distinction between Section 185 (1) and Section 187 (1). Quite clearly the present case falls within Section 187 (1).

9. Judicial opinion is divided on the question whether local Boards can take action under provisions similar to S. 187 even after the period of limitation for filing suits by those bodies for possession of public streets or roads or parts thereof or on which they have discontinued their possession expires. It is not necessary to go into that controversy in the present case. The period of limitation prescribed for a suit of the type referred to earlier is 30 years. In the present case action under Section 187 (1) had been commenced within 18 years from the date of the encroachment.

10. For the reasons mentioned above this appeal is allowed and decree of the High Court is set aside and that of the first appellate court restored.

11. Now coming to the question of costs, at the time of granting special leave this Court had directed that the appellant shall pay the costs of the respondent in any event. We incorporate that order as a part of this judgment.

Appeal allowed.

AIR 1970 SUPREME COURT 108 (V 57 C 25)

(From Allahabad)*

J. C. SHAH AND G. K. MITTER, JJ.

Ratan Lal Shah, Appellant v. Firm Lalman Das Chhadamma Lal and another, Respondents.

Civil Appeal No. 1019 of 1966, D/- 15-4-1969.

Civil P. C. (1908), Order 41, Rule 4 — Object — Suit against firm through its partners M and R for decree for value of goods supplied — R denying liability for claim in its entirety — M however admitting supply of goods and accepting his liability for one-fifth of amount claimed — Claim decreed in its entirety against M and R and the firm — Appeal by R impleading M as second respondent — Failure to serve notice of appeal on M — Dismissal of appeal, held, not sustainable — First Appeal No. 16 of 1953, D/- 10-7-1963 (All), Reversed.

The object of Order 41, Rule 4 is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The Court in such an appeal may reverse or vary the decree in favour of all the parties who are in the same interest as the appellant.

(Para 3)

The suit was filed against the partnership firm through its partners M and R for a decree for value of goods supplied by the plaintiffs to the firm. In that suit R denied liability. M by a separate statement admitted that the goods were supplied but submitted that he was liable only for one-fifth of the amount claimed. The claim of plaintiffs was decreed in its entirety against M and R and the partnership firm. R alone appealed to High Court denying liability for the claim of plaintiffs in its entirety. M was impleaded as second respondent

* (F. A. No. 16 of 1953, D/- 10-7-1963—Allahabad.)

but the notice of appeal was not served on M.

Held that the appeal could not be dismissed on the ground that M was not served with the notice of appeal, nor could the appeal be dismissed on the ground that there was a possibility of two conflicting decrees. First Appeal No. 16 of 1953, D/- 10-7-1963 (All), Reversed.

(Para 3)

In the appeal filed by R there was no possibility of a decree being passed which might impose a more onerous liability upon M. The trial court had passed a decree against R and M jointly and severally. M was liable for the full amount of the claim of the plaintiffs. If the appeal filed by R succeeded, the Court may reduce the liability of M but there may conceivably be no order by the Court operating to the prejudice of M in the appeal.

(Para 4)

Even if it be assumed that failure to serve notice of appeal upon M was wholly attributable, to the negligence of R, R could not be deprived of his right to prosecute the appeal and to claim relief under Order 41, Rule 4 on that ground. The decree of the Trial Court proceeded on a ground common to M and R. In the appeal filed by R he was denying liability for the claim of the plaintiffs in its entirety. This was essentially a case in which the Court's jurisdiction under Order 41, Rule 4, Civil P. C. could be exercised. AIR 1964 SC 1305, Rel. on.

(Para 5)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 1305 (V 51) =
(1964) 4 SCR 647, Karam Singh
v. Pratap Chand 3

Mr. C. B. Agarwala, Sr. Advocate (Mr. K. P. Gupta, Advocate, with him), for Appellant; Mr. B. C. Misra, Sr. Advocate (M/s. O. P. Gupta, Ram Prakash Agarwal and Sultan Singh, Advocates with him), for Respondent No. 1.

The following Judgment of the Court was delivered by

SHAH, J.: Firm Lalmandas Chhadammalal—hereinafter called 'the plaintiffs'—commenced an action against "Mohan Singh Ratan Lal, through its partners Mohan Singh and Ratan Lal", in the Court of the Senior Civil Judge, Nainital, for a decree for Rs. 12,893 and interest thereon for value of goods supplied. Ratan Lal denied liability for payment of the amount claimed. Mohan Singh by a separate written statement admitted that goods were supplied by the

plaintiffs to the firm, but submitted that he was liable only for one-fifth of the amount claimed. The Trial Judge decreed the claim of the plaintiff in its entirety against "Mohan Singh and Ratan Lal and the firm known as Mohan Singh Ratan Lal".

2. Against the decree, Ratan Lal alone appealed to the High Court of Allahabad. Mohan Singh was impleaded as the second respondent in the appeal. The notice of appeal sent to Mohan Singh was returned unserved and an application made by counsel for the appellant to serve Mohan Singh "in the ordinary course as well as by registered post" was not disposed of by the Court. On July 9, 1963 Ratan Lal applied that it was "detected that there had been no service of the notice of appeal upon Mohan Singh and it was essential for the ends of justice that notice of appeal may be served upon Mohan Singh". The Court by order dated July 10, 1963, rejected the application and proceeded to hear the appeal. The Court was of the view that since there was a joint decree against Ratan Lal and Mohan Singh in a suit founded on a joint cause of action and the decree against Mohan Singh had become final, Ratan Lal could not claim to be heard on his appeal. The High Court observed:

"If we hear him (Ratan Lal) the result may be that on the success of his appeal there will be two conflicting decisions between the 'same parties in the same suit based on the same cause of action. Furthermore, the appellant has not taken steps to serve the second respondent (Mohan Singh) and the appeal must be dismissed for want of prosecution. On both these grounds we dismiss this appeal."

Against the order passed by the High Court, this appeal has been preferred with special leave.

3. In our view the judgment of the High Court cannot be sustained. The appeal could not be dismissed on the ground that Mohan Singh was not served with the notice of appeal, nor could the appeal be dismissed on the ground that there was a possibility of two conflicting decrees. Order 41, Rule 4 of the Code of Civil Procedure provides:

"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from

the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

The object of the rule is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The Court in such an appeal may reverse or vary the decree in favour of all the parties who are in the same interest as the appellant. There was some conflict of judicial opinion in the High Courts on the question whether power under Order 41, Rule 4 of the Code of Civil Procedure may be exercised where all the parties against whom a decree is passed on a ground which is common to them are not impleaded in the appeal. The preponderance of authority in the High Courts was that even in the absence of a person against whom a decree has been passed on a ground common with the appellant the appeal was maintainable and appropriate relief may be granted. It is, however, unnecessary to examine those decisions for, in our judgment, the question has been considered by this Court in *Karam Singh Sobti v. Shri Pratap Chand*, (1964) 4 SCR 647 = (AIR 1964 SC 1305). In that case a landlord of certain premises filed an action in ejectment against the tenant and the sub-tenant in respect of premises on the ground that the tenant had sub-let the premises without the landlord's consent. The Trial Judge decreed the suit holding that the landlord had not acquiesced in the sub-letting. The sub-tenant alone appealed to the Additional Senior Subordinate Judge who set aside the order of the Trial Court. It was urged before this Court that the appeal by the sub-tenant to the Subordinate Judge was incompetent, because the tenant against whom a decree in ejectment was passed had not appealed. On certain questions which are not material for the purpose of this judgment, there was difference of opinion between Sarkar, J., on the one hand, and S. K. Das Acting C. J. and Hidayatullah J., on the other, but the Court unanimously held in that case that the appeal was maintainable before the Subordinate Judge, even though the tenant had not appealed against the order of the Court of First Instance. Sarkar, J., observed at p. 663:

"The suit had been filed both against the tenant and the sub-tenant, being respectively the Association and the appellant. One decree had been passed by the trial Judge against both. The appel-

lant had his own right to appeal from that decree. That right could not be affected by the Association's decision not to file an appeal. There was one decree and, therefore, the appellant was entitled to have it set aside even though thereby the Association would also be freed from the decree. He could say that that decree was wrong and should be set aside as it was passed on the erroneous finding that the respondent had not acquiesced in the sub-letting by the Association to him. He could challenge that decree on any ground available. The lower appellate Court was therefore, quite competent in the appeal by the appellant from the joint decree in ejectment against him and the Association, to give him whatever relief he was found entitled to, even though the Association had filed no appeal."

With that view S. K. Das, Acting C. J. and Hidayatullah, J., agreed: see p. 652. It is true that in that case the tenant was made a party to the appeal before the Subordinate Judge. But the judgment of the Court proceeded upon a larger ground that the sub-tenant had a right to appeal against the decree passed against him and that right was not affected by the tenant's decision not to file an appeal.

4. Counsel for the plaintiffs contended that the appeal filed by Ratan Lal if it be heard may possibly result in an order which may prejudicially affect Mohan Singh, and if Mohan Singh has no opportunity of being heard no decree may be passed against him, for to do so would be contrary to the fundamental rules of natural justice. But in the appeal filed by Ratan Lal there is no possibility of a decree being passed which may impose a more onerous liability upon Mohan Singh. The Trial Court has passed a decree against Ratan Lal and Mohan Singh jointly and severally. Mohan Singh is liable for the full amount of the claim of the plaintiffs. If the appeal filed by Ratan Lal succeeds, the Court may reduce the liability of Mohan Singh, but there may conceivably be no order by the Court operating to the prejudice of Mohan Singh in the appeal.

5. It was also urged by counsel for the plaintiffs that Ratan Lal had been negligent in the High Court in prosecuting the appeal, and it would be putting a premium upon his negligence to allow him now to prosecute the appeal. It is not possible on the record, as it stands, to say whether failure to serve notice of appeal upon Mohan Singh was wholly attributable to the negligence of Ratan

Lal. But even if it be assumed that he was negligent, on that ground he cannot be deprived of his legal right to prosecute the appeal and to claim relief under Order 41, Rule 4 of the Code of Civil Procedure, if the circumstances of the case warrant it. The decree of the Trial Court proceeded on a ground common to Mohan Singh and Ratan Lal. In the appeal filed by Ratan Lal he was denying liability for the claim of the plaintiffs in its entirety. This was essentially a case in which the Court's jurisdiction under Order 41, Rule 4, Code of Civil Procedure could be exercised.

6. The appeal is allowed and the decree passed by the High Court is set aside. The proceedings are being remanded, the High Court will admit the appeal in its original number and hear and dispose of it according to law. There will be no order as to costs in this Court of this appeal. In view of the fact that there has been some negligence on the part of Ratan Lal to prosecute the appeal in the High Court, we direct that he will pay the costs of the appeal in the High Court in any event.

Appeal allowed.

AIR 1970 SUPREME COURT 110
(V 57 C 26)

(From Madhya Pradesh)*

J. C. SHAH AND G. K. MITTER, JJ.

Ram Dayal, Appellant v. Brijraj Singh and others, Respondents.

Civil Appeal No. 1526 of 1968, D/- 30-4-1969.

(A) Representation of the People Act (1951), Section 90 — Election petition — Amendment of — Application to amend seeking to introduce new ground for setting aside election filed after bar of limitation prescribed under Section 81 (1) — Amendment cannot be allowed. AIR 1957 SC 444, Applied. (Para 2)

(B) Representation of the People Act (1951), Section 2 (1) — 'Sign' — Meaning of — Person unable to write his name — Should put his mark or thumb impression as prescribed by Rule 2 (2), Conduct of Election Rules, 1961.

Where a person is unable to write his name, he may place his mark on the instrument or other paper and the requirements of law are complied with, provided he puts the mark in the presence

* (Elec. Petn. No. 39 of 1967, D/- 4-5-1968—M. P.)

of the Returning Officer or the Presiding Officer or such other officer as may be specified in that behalf by the Election Commission and such officer on being satisfied as to his identity attests the mark as being the mark of that person.

(Para 4)

(C) Representation of the People Act (1951), Sections 33 (1) and 36 — Requirement of signature of candidate and proposer on nomination paper is mandatory — Nomination paper bearing thumb impression of proposer but not attested as required by law filed on last date for receiving nomination paper — Defect is substantial within Section 36 (4) and cannot be remedied at the time of scrutiny — Nomination has to be rejected.

The requirement under Section 33 (1) of the Act that the nomination shall be signed by the candidate and by the proposer is mandatory. Signing, whenever signature is necessary, must be in strict accordance with the requirements of the Act and where the signature cannot be written it must be authorised in the manner prescribed by the Rules. Attestation is not a mere technical or unsubstantial requirement within the meaning of Section 36 (4) of the Act and cannot be dispensed with. The attestation and the satisfaction must exist at the stage of presentation and omission of such an essential feature may not be subsequently validated at the stage of scrutiny any more than the omission of a candidate to sign at all could have been. AIR 1954 SC 510, Rel. on. Hence if the nomination paper bearing the thumb mark of the proposer is not attested as required by law when it was filed on the last date for nomination it has to be rejected at the time of scrutiny.

(Para 4)

(D) Representation of the People Act (1951), Section 116-A — Election petition by voter — High Court refusing to set aside election of successful candidate but recording an order of disqualification against C on account of his corrupt practice — Appeal by voter against order of High Court refusing to set aside election impleading C as respondent — Held that in absence of appeal by C against order passed against him, scope of appeal could not be expanded by permitting C to plead that he had not committed any act amounting to corrupt practice.

(Para 7)

(E) Representation of the People Act (1951), Sections 77 (1) and 123 (6) — Corrupt practice — Return of expenses must

include only the expenditure incurred or authorised by candidate himself or his election agent — Expense incurred by any other agent without anything more need not be included.

Under Section 123 (6) of the Representation of the People Act, 1951, the incurring or authorizing of expenditure in contravention of Section 77 is a corrupt practice. Under Section 77 (1) only the expenditure incurred or authorised by the candidate himself or by his election agent is required to be included in the account or return of election expenses and thus expenses incurred by any other agent or person without anything more need not be included in the account or return, as such incurring of expenditure would be purely voluntary.

(Para 18)

Cases Referred: Chronological Paras. (1957) AIR 1957 SC 444 (V 44) =

1957 SCR 370, Harish Chandra

Bajpai v. Triloki Singh

2:

(1954) AIR 1954 SC 510 (V 41) =

1955-1 SCR 481, Rattan Anmol

Singh v. Atma Ram

4:

G. L. Sanghi, Sobhag Mal Jain and B. P. Maheshwari, Advocates, for Appellant; Mr. H. R. Gokhale, Senior Advocate, (Mr. P. L. Dubey, Advocate, and M/s. Rameshwar Nath and Mahinder Narain, Advocates of M/s. Rajinder Narain and Co., with him), for Respondent (No. 1); Mr. V. C. Parashar, Advocate, for Respondent (No. 4).

The following Judgment of the Court was delivered by

SHAH, J.: At the general elections held in February 1967, Brijraj Singh (first respondent in this appeal) was declared elected to a seat in the Madhya Pradesh Legislative Assembly from the Sabalgarh Constituency defeating his rival candidate Raja Pancham Singh by 1706 votes. The appellant Ram Dayal who is a voter in the constituency moved an election petition in the High Court of Madhya Pradesh for an order setting aside the election on two grounds:

(1) that the nomination paper of one Dhani Ram was illegally rejected by the Returning Officer; and

(2) that Brijraj Singh and his agents committed several corrupt practices in relation to the election.

A third ground that Dataram (third respondent in this appeal) when his nomination was accepted was below the age of 25 and was on that account incompetent to stand for election, was sought to be set up by an application for amendment

of the election petition. The application was disallowed by the High Court. The High Court held that an application for amendment which sought to set up a new ground made after the expiry of the period prescribed for filing an election petition cannot be entertained. On a consideration of the evidence the High Court rejected the other grounds, and dismissed the petition. The appellant has appealed to this Court.

2. An election petition has, under Section 81 (1) of the Representation of the People Act, 1951, to be filed within 45 days of the date of the publication of the result of the election. An application for setting aside the election, that Dataram was below the age of 25 and on that account the election was liable to be set aside under Section 100 (1) (d) (i) of the Act made on August 15, 1967, would plainly have been barred, and by amendment the ground could not be permitted to be added. This Court in *Harish Chandra Bajpai v. Triloki Singh*, 1957 SCR 370 = (AIR 1957 SC 444) held that the Election Tribunal has power to allow an amendment in respect of particulars of illegal and corrupt practices, or to permit new instances to be included, provided the grounds or charges are specifically stated in the petition, but its power to permit amendment of a petition under Order VI, Rule 17 of the Code of Civil Procedure will not be exercised so as to allow new grounds or charges to be raised or the character of the petition to be so altered as to make it in substance a new petition, if a fresh petition on those allegations would on the date of the proposed amendment be barred. By the amendment a new ground for setting aside the election was sought to be introduced and the High Court was right in rejecting the application for amendment.

3. The plea that the rejection of the nomination paper of Dhani Ram by the Returning Officer was illegal has no substance. On January 19, 1967 Dhani Ram delivered to the Returning Officer two nomination papers signed by him. Each nomination paper bore a thumb impression of one Gokla as the proposer. But the thumb impressions were not authenticated or attested in the presence of the Returning officer or any other officer specified in the Rules. The Returning Officer rejected the nomination papers.

4. Section 33 (1) of the Representation of the People Act, 1951, requires that each candidate shall deliver to the returning

officer a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer. The expression "sign" is defined in Section 2 (i) of the Act as amended by Act 27 of 1956 as meaning "in relation to a person who is unable to write his name authenticating in such manner as may be prescribed". Rule 2 (2) of the Conduct of Election Rules, 1961 provides:

"For the purposes of the Act or these rules, a person who is unable to write his name shall, unless otherwise expressly provided in these rules, be deemed to have signed an instrument or other paper if —

(a) he has placed a mark on such instrument or other paper in the presence of the Returning officer or the Presiding officer or such other officer as may be specified in this behalf by the Election Commission.

(b) such officer on being satisfied as to his identity has attested the mark as being the mark of that person."

Where a person is unable to write his name, he may place his mark on the instrument or other paper and the requirements of law are complied with, provided he puts the mark in the presence of the Returning officer or the Presiding officer or such other officer as may be specified in that behalf by the Election Commission and such officer on being satisfied as to his identity attests the mark as being the mark of that person. Gokla was illiterate. He impressed his thumb mark on the nomination paper: but it was not placed in the presence of any of the designated officers, nor was there any authentication or attestation of the thumb-mark. The requirement under Section 33 (1) of the Act that the nomination shall be signed by the candidate and by the proposer is mandatory. Signing, whenever signature is necessary, must be in strict accordance with the requirements of the Act and where the signature cannot be written it must be authorised in the manner prescribed by the Rules. Attestation is not a mere technical or unsubstantial requirement within the meaning of Section 36 (4) of the Act and cannot be dispensed with. The attestation and the satisfaction must exist at the stage of presentation and omission of such an essential feature may not be subsequently validated at the stage of scrutiny any more than the omission of a candidate to sign at all could have been: *Rattan Anmol Singh v. Atma Ram*, 1955-

1 SCR 481= (AIR 1954 SC 510). The nomination papers of Dhani Ram were filed on the last day fixed for receiving the nomination papers. Not being attested as required by law on the date of filing, the defect could not be rectified at the time of scrutiny. Evidence of witnesses for the appellant who deposed that at the date of scrutiny, Gokla was present outside the office of the Returning Officer and that Dhani Ram brought to the notice of the Returning Officer that Gokla was present and that his signature may be attested, and that the Returning officer declined to accede to the request need not be considered. The Returning officer could not allow Dhani Ram or his proposer to rectify the defect in the nomination papers after the last date of nomination.

5. Several corrupt practices were set up in the petition. The corrupt practices relied upon by the appellant in this may be broadly classified under three heads:

(1) that on January 19, 1967, Brijraj Singh paid Rs. 250 to Sone Ram respondent No. 5 at Morena and successfully persuaded him not to file his nomination paper.

(2) that Brijraj Singh and his agents toured the constituency in a jeep fitted with a microphone and visited many villages and delivered speeches reflecting upon the character and conduct of Raja Pancham Singh a candidate sponsored by the Congress Party. One Chhotey Lal respondent No. 4 was made to contest the election by Brijraj Singh to "divide the votes of Raja Pancham Singh" and that Chhotey Lal who supported the candidature of Brijraj Singh made statements between January 20, 1967 and February 19, 1967 and distributed leaflets containing statements of fact relating to the personal character and conduct of Raja Pancham Singh which were false to the knowledge of Chhotey Lal or who did not believe them to be true, and that the leaflets were issued and circulated with the consent of Brijraj Singh, and

(3) that the Maharaja Scindia of Gwalior accompanied by Brijraj Singh visited several villages in a helicopter and addressed election meetings in support of the candidature of Brijraj Singh and the Maharaja acted as his agent and incurred expenditure for carrying on election propaganda: if the expenditure incurred for the purpose of obtaining the use of the helicopter and a fleet of motor cars used by him were taken into account,

such expenses being incurred or authorised by Brijraj Singh would considerably exceed the limit prescribed by the statute.

6. In the view of the High Court Chhotey Lal did commit a corrupt practice in that he distributed on January 29, 1967 at Kelaras village leaflets containing statements of fact relating to the personal conduct of Raja Pancham Singh, but it was not proved that Chhotey Lal contested the election at the instance of Brijraj Singh "to divide the votes of Raja Pancham Singh" or that he was the agent at any time of Brijraj Singh, nor was it proved that Chhotey Lal supported the candidature of Brijraj Singh or that any pamphlet of the nature circulated by Chhotey Lal was issued or circulated by Brijraj Singh. In that view the High Court held that the election of Brijraj Singh was not materially affected by the candidature of Chhotey Lal. The High Court rejected the contention of the appellant that Brijraj Singh committed other corrupt practices alleged. The High Court accordingly passed an order declaring that the appellant had failed to establish that Brijraj Singh had committed any corrupt practice with which he was charged. The High Court dismissed the election petition filed by the appellant with costs, but declared that the 4th respondent Chhotey Lal was guilty of the corrupt practice within the meaning of Sec. 123 (4) of the Act and was on that account disqualified for a period of six years from the date of the order under Section 8A of the Act. Against that order this appeal has been preferred by the appellant.

7. Chhotey Lal has not appealed against the order recorded against him. He is impleaded as a party-respondent and he has appeared before this Court through counsel. At the hearing counsel appearing for Chhotey Lal urged that the finding of the High Court that Chhotey Lal was guilty of the corrupt practice charged against him is contrary to evidence. But in the absence of an appeal filed by Chhotey Lal the ground cannot be permitted to be agitated by him. The appeal was filed by the appellant challenging the order of the High Court refusing to set aside the election of Brijraj Singh on the three grounds set out hereinbefore. The scope of the appeal cannot be expanded by permitting Chhotey Lal who could have, but has not chosen to appeal, to plead that he has not committed any acts amounting to a corrupt practice.

8. The case that Brijraj Singh gave Rs. 250/- to Sone Ram and induced him to withdraw his candidature is unreliable. One Shanker Lal deposed that on Jan. 19, 1967, he set Brijraj Singh and Sone Ram in the compound of the office of the Collector, Morena, and the former induced Sone Ram not to contest the election and offered to pay a bribe of Rs. 250/-, and paid Rs. 250/- to Sone Ram. According to the witness there were several persons present at the time when the bribe was offered and paid, but none of those persons was called as a witness on behalf of the appellant. One Tikaram who was alleged to be present was examined on behalf of Brijraj Singh and he denied that any such offer was made or bribe paid. Sone Ram also denied that he had received any bribe from Brijraj Singh. He stated that he had borrowed Rs. 200/- from his maternal uncle to deposit the amount for his candidature but since his maternal uncle declined to incur any further expenditure and dissuaded him from contesting the election he had to abandon his candidature. In the opinion of the Trial Judge the witness Shankarlal was an untruthful witness and we see no reason to disagree with that view.

9. We may now turn to the plea that Brijraj Singh made false allegations against the personal conduct and character of Raja Pancham Singh orally and by circulating pamphlets, on which a great deal of argument was advanced before us. It was the case of the appellant that Brijraj Singh and his two workers Laxmichand and Shankarlal visited several villages between February 2, 1967 and February 26, 1967, in connection with the election campaign and made false statements against the character and conduct of Pancham Singh in the meetings held in those villages, and "in, door to door canvassing in" those villages. Those allegations are denied by Brijraj Singh and by Laxmichand and Shankarlal. The case of the appellant was that these allegations were made in the course of the election propaganda in ten villages, but evidence was led in respect of statements made in six villages. It is said that Brijraj Singh and his supporters visited the village Narhela and held a meeting in that village. One Dhaniram stated that a meeting was held at the village Narhela at the witness did not say that either Brijraj Singh or his workers made any allegations against the personal character of Pancham Singh. According to this witness Brijraj Singh merely requested the

persons assembled there in the meeting to vote for him. Witness Ghansu stated that a meeting was held at the village Narhela and the same was addressed by Brijraj Singh and Laxmichand and that these two persons stated that Pancham Singh was associating with dacoits" and had misappropriated money belonging to a school and had got the school closed and that whenever any member of the legislative assembly sought to visit him "he set his dogs" at him. In the election petition there was no reference to any meeting held at Narhela or of any offending statements made at any such meeting. It was stated in paragraph III (a) of the election petition, in setting out the details of the corrupt practices, that the first respondent accompanied by Laxmichand and Shankarlal toured in a jeep fitted with a microphone and visited the village Narhela on February 2, 1967 and canvassed votes going from door to door. The witness Ghansu did not belong to Narhela, and no witness from village Narhela was examined. Laxmichand, Shankarlal and Brijraj Singh denied that any statement against the personal conduct and character of Pancham Singh was made by them at Narhela either in any meeting or in "door to door canvassing". Phoolsingh—the only witness examined on behalf of the appellant—did not support his case that Brijraj Singh had made any statements derogatory of Pancham Singh at Budhreta. About the village Khirla, witness Kesharsingh stated that Brijraj Singh and Laxmichand had held meetings and had made statements against the personal conduct and character of Pancham Singh. But the witness did not belong to the village Khirla: he is a resident of Pahadgarh village which is at a distance of fifteen miles from Khirla. No witness from Khirla was examined. Witness Dataram said that at a meeting held at Sujarma, Brijraj Singh and his agents made "statements derogatory of Pancham Singh." But the testimony of the witness who is said to be constantly under "Police surveillance" is unreliable. About the meeting held at village Kolaras the appellant examined three witnesses — Narayan, Kanhaiyalal and Sardarsingh. The first two witnesses said nothing about any statement made about the personal character of Raja Pancham Singh at the meeting. Sardarsingh supported the case of the appellant, but the testimony of the witness was inconsistent with the case of the appellant. About the meeting held at village Kulouli the appellant examined witness Badri who

stated that both Brijaraj Singh and Laxmichand had made statements derogatory of Pancham Singh. His explanation about his presence at the village Kulouli was apparently untrue and his testimony was otherwise unreliable.

10. The learned Judge summarised the evidence of the witnesses on behalf of the appellant and concluded that the appellant had "miserably failed" to establish that Brijraj Singh and his agents Laxmichand and Shankarlal had made any statements derogatory to the personal character of Pancham Singh. In the view of the learned Judge it was not proved that Brijraj Singh and his two agents had made statements that Pancham Singh was an associate of dacoits, nor was the statement that Pancham Singh had misappropriated the funds of the school proved. The learned Judge also held that the statement alleged to have been made by Brijraj Singh and his agents that Pancham Singh was responsible for getting the school at Pahadgarh closed and that "he lets loose ferocious dogs towards the persons who go to see him" were trivial and did not involve any moral turpitude, and even assuming that those statements were made, no corrupt practice could be said to have been committed on that account under Section 123 (4) of the Act.

11. The learned Trial Judge found that Chhotey Lal committed a corrupt practice by distributing pamphlets casting reflections upon the personal character of Pancham Singh. But in the view of the learned Trial Judge there was no reliable evidence to prove that Chhotey Lal acted on behalf of Brijaraj Singh or that the latter defrayed the expenses of the Pamphlet or that the agents of Brijraj Singh distributed the offending pamphlets. The learned Judge has carefully considered the evidence and no serious argument has been advanced before us on that part of the case which may justify us in taking a different view. Not a word was said that the expenses incurred by Chhotey Lal for getting the pamphlets printed were reimbursed nor was the evidence of the witnesses Sanwaldas Gupta, Kalyansingh Tyagi examined on behalf of the appellant that Brijraj Singh and his agents circulated the pamphlets true. The learned Judge observed that the story that out of the 2500 copies of the pamphlets printed, 2000 copies of the pamphlets had been handed over by Chhotey Lal to Brijaraj Singh on the night of Jan. 19, 1967

was "a clumsy and crude invention of those two witnesses", and "was utterly false and unreliable". After considering the various improbabilities and the discrepancies relating to the testimony of the witnesses Sanwaldas Gupta and Kalyansingh Tyagi, the learned Judge observed that those witnesses "invented lies" and did "their best to introduce clumsy and crude improvements at the stage of evidence" with the "object of bolstering up" the appellant's case and through him that of Raja Pancham Singh. In his view the story that the pamphlet Annexure 'A' was issued or circulated with the consent of Brijraj Singh was false. The learned Judge also found on a consideration of the evidence that at no stage did Chhotey Lal support the candidature of Brijraj Singh and that it was not proved that the pamphlet Annexure 'A' was ever issued or circulated with the consent of Brijraj Singh. In his view Brijraj Singh had no connection with the printing and publication of the pamphlet and on that account the plea of corrupt practice set out and founded on the circulation of the pamphlet was not proved. We see no reason to disagree with the view expressed by the learned Judge.

12. It was then urged that the Maharaja Scindia of Gwalior incurred considerable expenditure as agent of Brijraj Singh in canvassing votes and the expenditure so incurred was liable to be included in the election expenses of Brijraj Singh. It was claimed that the Maharaja and the Rajmata of Gwalior as agents of Brijraj Singh took a leading part in canvassing votes in different villages and in doing so used a helicopter and a fleet of motor cars and spent large sums of money which were not disclosed in the account of election expenses filed by the first respondent Brijraj Singh.

13. Brijraj Singh had contested the election as an independent candidate. But the appellant says that the Maharaja and the Rajmata of Gwalior addressed election meetings and in those meetings they declared that Brijraj Singh was sponsored as a candidate by them, and that the voters should support Brijraj Singh. Brijraj Singh in his evidence stated that the Maharaja had the "Central Election office of Maharaja Gwalior" representing the alliance of various political parties and individuals opposed to the Congress candidate and in propagating its views and policy during the election this organisation also supported

the candidates who opposed Panoram Singh.

14. There was no reliable evidence that the candidature of Brijraj Singh was sponsored by the Maharaja and the Rajmata of Gwalior. The opinion expressed by the witness Dataram cannot do duty for evidence in support of the case of the appellant. Sanwaldas Gupta and Kalyansingh Tyagi stated that they had requested the Maharaja to adopt Chhotey Lal as his candidate for election, but they were told by the Maharaja that he had already decided to set up Brijraj Singh as his candidate and that they also should actively support him. The evidence of these witnesses was found to be unreliable by the High Court. In our judgment the High Court has rightly rejected their testimony. It was said that in certain villages speeches were made by Brijraj Singh that he was set up as a candidate by the Rajmata of Gwalior. But there is no reliable evidence in support of that case.

15. Reliance was strongly placed upon visits made by the Rajmata of Gwalior at village Kelaras and Sabalgarh on February 4 or February 5, 1967, with a fleet of motor cars and about the speeches delivered in those villages declaring that Brijraj Singh was set up by her and that the voters should vote for him and strengthen her hands. It is also said that the Maharaja visited Kelaras, Pahadgarh, Sujarma, Budhreta, Kulhoul, Sabalgarh, Jhundpura and Narhela on February 11 or 12, 1967 in a helicopter and addressed meetings in those villages and in his speeches declared that Brijraj Singh was sponsored as a candidate by him and his mother and the voters should vote for him.

16. A large number of witnesses Keshrisingh, Narayan, Sardarsingh, Dhanniram, Phoolsingh, Kanhaiyalal, Mata Prasad, Dwarka Prasad, Sanwaldas Gupta, Kalyansingh Tyagi, besides the appellant, were examined in support of that case. Brijraj Singh admitted that on February 4 or 5, 1967, the Rajmata had visited the villages Kelaras and Sabalgarh and had addressed meeting in those villages. But he denied that she declared in these meetings that he was set up as a candidate by her. He further stated that the Maharaja had visited on February 11 or 12, February 1967, five villages, Kelaras, Pahadgarh, Budhreta, Jhundpura and Sabalgarh in a helicopter and addressed meetings in those villages. But in none of those meetings did he declare that

Brijraj Singh was a candidate set up by the Maharaja. The witnesses examined on behalf of the appellant were, in view of their general tenor, found unreliable. The learned Judge therefore stated his conclusion that on February 4 or 5, 1967, the Rajmata of Gwalior visited two villages, Kelaras and Sabalgarh and addressed meetings there; and her son the Maharaja visited five villages, namely Kelaras, Pahadgarh, Budhreta, Jhundpura and Sabalgarh in a helicopter on or about February 11 or 12, 1967 and addressed meetings there, but there was no reliable evidence to prove that Brijraj Singh was sponsored as a candidate by the Rajmata or the Maharaja of Gwalior. In the view of the learned Judge the testimony of the witnesses on behalf of the appellant was "so thoroughly unreliable that no reliance could be placed upon it." He concluded after considering the evidence of Budhram, that Brijraj Singh was an independent candidate and contested the election as an independent candidate, and even though meetings were addressed by the Maharaja and his mother — the Rajmata — they did not say that Brijraj Singh was set up as "their candidate." We have carefully gone through the evidence of the witnesses and heard the arguments advanced at the Bar and see no reason to disagree with the view taken by the learned Judge.

17. The evidence of the witnesses that Brijraj Singh travelled with the Maharaja of Gwalior in his helicopter and visited several villages for his election campaign was also unreliable and was, in our judgment, rightly disbelieved. The evidence shows that when the Maharaja visited the village Kelaras the only occupants in the helicopter were the Maharaja and the pilot and that Brijraj Singh was not in the helicopter when the Maharaja visited Kelaras. Similarly about the village Jhundpura there is evidence that Brijraj Singh was not with the Maharaja in the helicopter. About the village Budhreta the witness Phool Singh deposed that Brijraj Singh was in the helicopter travelling with the Maharaja. But from the cross-examination of the witness it appears that his testimony was "worthless". The testimony of Phool Singh was inconsistent with the testimony of Ramcharanlal — Sarpanch of the village. Similarly about the visit to Sabalgarh village two of the witnesses examined were Budhram and Sanwaldas Gupta. Budhram said nothing about Brijraj Singh accompanying the Maharaja in the heli-

copter. Sanwaldas Gupta supported the case of the appellant, but having regard to his interest in the appellant and the general unreliability of his testimony, he could not be believed. About the village Pahadgarh, according to Mata Prasad examined on behalf of the appellant Brijraj Singh was in the helicopter and the witness claimed that he had taken photographs of Brijraj Singh while he was in the helicopter. We have seen the original photographs Exts. P—11A, P—11B, P—12A, P—12B, P—13A and P—14A which are in respect of the journeys by the helicopter, the helicopter getting ready for take off, of the meetings addressed by the Maharaja and of the occupants in the helicopter. Some of the photographs are so hazy and indistinct that it is impossible to identify any one in the group. For instance the photograph Ext. P—13A in which it is claimed that Brijraj Singh was in the helicopter shows merely a smudge and it is impossible to say that any one was sitting in the helicopter. In the view of the learned Judge the witness Mata Prasad and Dwarka Prasad had been tutored to give false testimony that Brijraj Singh had accompanied the Maharaja at the time when the helicopter landed and also when it took off and on the consideration of the evidence it was established that Brijraj Singh was not with the Maharaja of Gwalior either at the time when the helicopter landed at the five villages — Kelaras, Jhundpura, Budhreta, Sabalgarh and Pahadgarh or when the helicopter took off. The learned Trial Judge disbelieved the witness Mata Prasad. We have scrutinised the evidence of Mata Prasad and have seen the original photographs and have no doubt that the learned Judge was right in holding that the testimony of the witness Mata Prasad was unreliable.

18. In the absence of any connection between the canvassing activities carried on by the Maharaja and the Rajmata with the candidature of Brijraj Singh, it is impossible to hold that any expenditure was incurred for Brijraj Singh which was liable to be included in the election expenses of the first respondent. Under Section 123 (6) of the Representation of the People Act, 1951, the incurring or authorizing of expenditure in contravention of S. 77 is a corrupt practice and Section 77 provides, insofar as it is material:

“(1) Every candidate at an election shall, either by himself or by his election

agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date of publication of the notification calling the election and the date of declaration of the result thereof, both dates inclusive.

(2) * * * * *

(3) The total of the said expenditure shall not exceed such amount as may be prescribed.”

Unless it is established that the expenditure was incurred in connection with the election by the candidate or by his election agent or was authorised by him it is not liable to be included under Section 77 of the Representation of the People Act. We agree with the High Court that under Section 77 (1) only the expenditure incurred or authorised by the candidate himself or by his election agent is required to be included in the account or return of election expenses and thus expenses incurred by any other agent or person without anything more need not be included in the account or return, as such incurring of expenditure would be purely voluntary. Assuming that expenditure was incurred by the Maharaja and the Rajmata for the purpose of canvassing votes against Raja Pancham Singh, in the absence of any evidence to show that the Maharaja and the Rajmata of Gwalior acted as election agents of Brijraj Singh or the expenditure was authorised by Brijraj Singh it was not liable to be included in the account of the election expenses.

19. We agree with the High Court that there is no evidence on the record to prove that Brijraj Singh actually spent any money on the helicopter used by the Maharaja in visiting the five villages and the two cars used by the Rajmata in visiting the two villages. There is no evidence on the record direct or circumstantial to prove that Brijraj Singh had authorised the Maharaja and his mother to incur the expenditure on the helicopter and the two cars. It is not necessary then to consider whether the expenditure incurred by the Maharaja and the Rajmata of Gwalior in respect of the helicopter and the motor cars can be said to be expenditure incurred by a political party for carrying on propaganda to promote their views and their party interest and their policies and to educate the electoral constituency, and on that account is not liable to be included in the election expenses of the candidate.

20. Having carefully considered the evidence and having heard the arguments advanced at the Bar at considerable length, we are of the view that the appellant has failed to establish that Brijraj Singh was set up as a candidate by the Maharaja or the Rajmata of Gwalior as their nominee or that the Maharaja and the Rajmata had incurred any expenditure as an agent of Brijraj Singh or the expenditure incurred by the Maharaja and the Rajmata of Gwalior was authorised by Brijraj Singh and was liable to be included in his account of election expenses under Section 77 of the Representation of the People Act, 1951.

21. The appeal fails and is dismissed with costs in favour of the first respondent. The order of costs in favour of the 4th respondent passed by the High Court is set aside.

Appeal dismissed.

AIR 1970 SUPREME COURT 118 (V 57 C 27)

(From Calcutta)*

M. HIDAYATULLAH, C. J. AND
G. K. MITTER, J.

Collector of Customs, Calcutta and others, Appellants v. M/s. Soorajmull Nagarmull and another, Respondents.

Civil Appeals Nos. 429 and 430 of 1966, D/-28-3-1969.

Civil P. C. (1908), O. 21, R. 2 — Scope — Suit by firm for refund of excess customs duty recovered by Collector of customs — Decree passed against Union of India — Decretal amount paid to Income-tax Authorities by Collector in response to notice under Section 46 (5A), Income-tax Act (1922) — Refusal of adjustment of decrees, held, illegal — No distinction between voluntary and non-voluntary but legally valid payment out of Court — Appeals Nos. 199 and 200 of 1962, D/- 22-1-1964 (Cal), Reversed. Observations in AIR 1937 Cal 211 and AIR 1935 All 513, Not approved.

Order 21 Rule 2 merely contemplates payment out of Court and says nothing about voluntary payment. If, therefore a garnishee payment or one made under Section 46 (5A) Income Tax Act (1922) has been legally made out of Court in full

*(Appeals Nos. 199 and 200 of 1962, D/- 22-1-1964 (Cal)).

KM/KM/B811/69/CWM/D

and final discharge of the liability under a decree, the judgment debtor can move the Court for getting the adjustment or payment certified under Order 21, Rule 2. (1968) 9 Suth WR 462, Dist; AIR 1938 All 141, Explained. (Paras 9 and 11)

There is no reason to make any distinction between voluntary payment out of Court and payment out of Court which law regards valid. Observations in AIR 1937 Cal 211 and AIR 1935 All 513, Not approved. (Para 10)

Where in the suit filed against the Collector of Customs, the Assistant Collector of Customs for Appraisalment and the Union of India, decrees were passed against the Union of India for refund of excess duty charged in excess from the plaintiff-firm and since the firm had not paid certain sum due as tax the Income-tax Officer issued a notice under Section 46 (5A), Income-tax Act calling upon the Collector of Customs to pay the amount to him stating that his receipt would constitute a good and sufficient discharge of the liability for refund to the firm.

Held, that the payment made by the Collector of Customs was required to be certified under Order 21 Rule 2: Appeals Nos. 199 and 200 of 1962, D/- 22-1-1964 (Cal), Reversed. (Para 11)

The plea that the decrees were not passed against the Collector of Customs but against the Union of India and that payment by the Collector of Customs was not a payment by the judgment-debtor was highly technical. The amount was recovered by the Collector of Customs from the firm and was being held by the Union of India through the Collector of Customs. The Collector of Customs paid the money not on behalf of himself but on behalf of the Union of India and it must be treated as a proper payment of the amount to the firm. (Para 6)

The Union of India operates through different Departments and a notice to the Collector of Customs in the circumstances was a proper notice to issue because it was the Collector of Customs who had in the first instance recovered this money and held it from the firm.

(Para 6)

Held further that the notice could not be considered defective on the ground that it showed that the money was lying with the Collector of Customs whereas it was, in fact, lying with the Union of India and that it was not money held by the Collector of Customs on behalf of the firm. The Collector of Customs had re-

covered the amount in question and under the decrees of the court the Union of India was liable to refund it to the firm. The amount which was with the Collector of Customs could be asked to be deposited with the Income Tax Authorities under Section 46 (5A), Income-tax Act.

(Paras 7, 8)

The Super Tax is also a kind of income tax and therefore the notice could not be considered defective also on the ground that it asked for payment towards Income-tax and towards penalty, while the receipts which were granted to the firm, stated that the amount was for Super-tax. 1933-1 ITR 1 (CA), Rel. on.

(Para 9)

Cases Referred: Chronological Paras

- (1938) AIR 1938 All 141 (V 25)=
ILR (1938) All 294, Thomas
Skinner v. Ram Rachpal 9, 10
- (1937) AIR 1937 Cal 211 (V 24)=
ILR (1937) 1 Cal 781, Mahiganj
Loan Office Ltd. v. Beharilal
Chaki 9, 10
- (1935) AIR 1935 All 513 (V 22)=
1935 All LJ 543, A. P. Bagchi v.
Mrs. F. Morgan 9, 10
- (1933) 1933-1 ITR 1 (CA), In
re, Reckitt 9
- (1868) 9 Suth WR 462, Bidhoo
Beebee v. Keshub Chunder
Baboo 9, 10
- Mr. B. Sen, Senior Advocate, (Mr. S. P.
Nayar, Advocate, with him), for Appel-
lants (In both the appeals); M/s. A. N.
Sinha and D. N. Gupta, Advocates, for
Respondent No. 1. (In both the Appeals).

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: This is an appeal against the judgment and decree of the High Court of Calcutta refusing to enter satisfaction of two decrees under Order 21, Rule 2 of the Code of Civil Procedure obtained by the respondents against the Union of India in the following circumstances.

2. The respondents M/s. Soorajmull Nagarmull imported spindle oil from Philadelphia. The firm was required to pay Customs Duty under Item 27 (3) of the First Schedule to the Tariff Act, 1934 at 27 per cent ad valorem. The firm filed two suits asking for refund of excess duty claiming that the oil was dutiable only under Item 27 (8) at-2/6 per imperial gallon. The suits were filed against the Collector of Customs, the Assistant Collector of Customs for Appraisalment and the Union of India. The suits were

successful and decrees were passed against the Union of India for refund of the amount charged in excess. In one suit the decree was for payment of Rs. 43,723 with interest at 6 per cent per annum from 1st day of April, 1952 until realisation. In the second suit the decree was for Rs. 75,925 with similar interest.

3. Since the firm had not paid a sum of Rs. 18,08,667.72 as tax the Income-tax Officer, Circle II, Calcutta issued a notice under Section 46 (5A) of the Indian Income-tax Act, 1922 calling upon the Collector of Customs to pay the amount of the decree to him and stating that his receipt would constitute a good and sufficient discharge of the liability for refund to the firms. The Collector of Customs paid the amount into the Reserve Bank and the Reserve Bank issued receipts crediting the amount against Super-tax due from the firm. The Collector of Customs then applied to the High Court of Calcutta under Or. 21, R. 2 of the Code of Civil Procedure for the adjustment of the decrees by this payment. This was refused by a learned single Judge who gave no reasons while dismissing the petition. On appeal to the Division Bench it was held by the Division Bench on January 22, 1964 that the adjustment of the decrees could not be granted. It is against the last order that the present appeals have been filed by special leave of this Court.

4. The High Court in reaching the conclusion observed that the decrees were against the Union of India and not the Collector of Customs. Further the sums were held by the Collector of Customs on behalf of the Union of India and not on behalf of the firm. The High Court found the notice to be defective inasmuch as it asked for payment towards Income-tax and towards penalty, while the receipts which were granted to the firm, stated that the amount was for Super-tax. On these three grounds, the High Court held that the learned single Judge was right in dismissing the application of the Collector of Customs for the adjustment of the decrees.

5. Order 21, Rule 2 of the Code of Civil Procedure takes note of payments out of court to decree-holders and provides that where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is

to execute the decree, and the Court shall record the same accordingly. It is also provided that the judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified.

6. The contention of the respondents in these appeals is that the decrees were not passed against the Collector of Customs but against the Union of India and that payment by the Collector of Customs was not a payment by the judgment-debtor. In our judgment this plea is highly technical. The amount was recovered by the Collector of Customs from the firm and was being held by the Union of India through the Collector of Customs. The Collector of Customs paid the money not on behalf of himself but on behalf of the Union of India and it must be treated as a proper payment of the amount to the firm. The objection of the respondent that it amounts to a payment by one Department of the Government to another does not, in our opinion, hold much substance. It is also extremely technical. The Union of India operates through different Departments and a notice to the Collector of Customs in the circumstances was a proper notice to issue because it was the Collector of Customs who had in the first instance recovered this money and held it from the firm.

7. It is next contended that the notice is defective inasmuch as it shows that the money was lying with the Collector of Customs whereas it was, in fact, lying with the Union of India and that it was not money held by the Collector of Customs on behalf of the firm. Section 46 (5A) of the Income-tax Act reads as follows:

"46. Mode and time of recovery.

* * * * *

(5A) The Income-tax Officer may at any time or from time to time, by notice in writing (a copy of which shall be forwarded to the assessee at his last address known to the Income-tax Officer) require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Income-tax Officer, either forthwith upon the money becoming due or being held or at or within the time

specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the taxpayer in respect of arrears of income-tax and penalty or the whole of the money when it is equal to or less than that amount.

* * * * *

Any person making any payment in compliance with a notice under this sub-section shall be deemed to have made the payment under the authority of the assessee and the receipt of the Income-tax Officer shall constitute a good and sufficient discharge of the liability of such person to the assessee to the extent of the amount referred to in the receipt.

Any person discharging any liability to the assessee after receipt of the notice referred to in this sub-section shall be personally liable to the Income-tax Officer to the extent of the liability discharged or to the extent of the liability of the assessee for tax and penalties, whichever is less.

If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Income-tax Officer, further proceedings may be taken by and before the Collector on the footing that the Income-tax Officer's notice has the same effect as an attachment by the Collector in exercise of his powers under the proviso to sub-section (2) of Section 46.

* * * * *

8. Such notices of the Income-tax Officer are no more than a kind of a garnishee order issued to the person holding money which money is due to an assessee. The Collector of Customs had recovered this money and under the decrees of the Court the Union of India was liable to refund it to the firm. A garnishee order is issued to a debtor not to pay to his own creditor but to some third party who has obtained a final judgment against the creditor. By a parity of reasoning this amount which was with the Collector of Customs, could be asked to be deposited with the Income-tax Authorities under S. 46 (5A). The argument is extremely technical for that the firm is entitled to get a double benefit of the decree, first by having the decretal amount paid to the benefit of the firm and then to recover it again from the Union of India.

9. It is contended lastly that the notice of the Income-tax Officer spoke of In-

come-tax and/or penalty whereas the amount was taken towards payment of Super-tax due from the firm. It is, however, conceded in the face of authorities cited at the Bar that the Super-tax is also a kind of Income-tax and, therefore, the notice could issue in the form it did. The leading case on the subject is *In re Reckitt*, 1933- 1 ITR 1 (CA) and learned counsel for the respondents did not controvert the proposition laid down there. It is, however, argued on the authority of *Bidhoo Beebee v. Keshub Chunder Baboo*, (1868) 9 Suth WR 462, *Mahiganj Loan Office, Ltd. v. Behari Lal Chaki*, ILR (1937) 1 Cal 781 = (AIR 1937 Cal 211), *A. P. Bagchi v. Mrs. F. Morgan*, AIR 1935 All 513 and *Thomas Skinner v. Ram Rachpal*, ILR (1938) All 294 = (AIR 1938 All 141) that the payment which can be adjusted under Order 21, Rule 2 is a voluntary payment by the judgment-debtor to the decree-holder and that this is not a case of voluntary payment at all. The rulings which have been cited do not, in our opinion, apply here. This point was not considered in the High Court and seems to have been thought of here. Order 21, Rule 2 merely contemplates payment out of Court and says nothing about voluntary payment. A garnishee order can never by its nature lead to a voluntary payment and it is not to be thought that a garnishee order does not lead to the adjustment of the decree sufficient for being certified by the Court. Payment by virtue of Section 46(5A), as we have stated before, is in the nature of a garnishee payment and must, therefore, be subject to the same rule.

10. The rulings themselves do not control the present matter. In (1868) 9 Suth WR 462 the payment was not under a garnishee order but under the process of the court issued in execution by arrest of the judgment-debtor. Contrasting what had happened in the case with the words of the second rule of Order 21 (then S. 206 of the Code of 1859) the learned Judges observed that Section 206 covers cases of voluntary payment. The debtor was protected by treating the payment as being made through the court. The exact point we are dealing with was not before the Court. In ILR (1937) 1 Cal 781 = (AIR 1937 Cal 211) there was a scheme framed by the depositors of a banking company for return of their deposits in spite of opposition from decree-holders depositors of the Company. The scheme was sanctioned by the Court. The

scheme was binding on the decree-holder but it was not treated as an adjustment within O. 21, R. 2 of the Code of Civil Procedure. The reason given was that the adjustment must be to the satisfaction of the decree-holder and must be with the consent of both the decree-holder and the judgment-debtor and not one which is made binding by operation of law. It is to be noticed that that was a payment to which the judgment-debtor had objected although it was binding on him. We see no reason for making a distinction between a voluntary payment out of court and a payment out of court which the law regards as valid. No reasons are given in the judgment why such a distinction should be made. In ILR (1938) All 294 = (AIR 1938 All 141), the payment was made in court and not outside Court. This is the nearest case to the present one and but for this difference, it is reasonable to think that the learned Judges would have taken the same view of the matter as we have taken. The reason given by the learned Judges brings out the real object of the rule.

"where a judgment-debtor makes payment outside the Court, the Court knows nothing about the payment and therefore Rule 2, Order 21 ordains that the parties should inform the Court about the payment."

This object in our opinion is fully achieved when there is payment under a garnishee order outside the Court. In the case cited the Court knew of the payment and could give protection in other ways. In AIR 1935 All 513 the payment was again without the consent of the judgment-debtor either in fact or in law. Too much emphasis appears to have been placed upon mutual understanding and too little on payment out of court which is the essence of the rule. The case turned on whether there was any understanding between the parties that sums spent by the judgment-debtor on repairs would be set off against the decretal amount and therefore Order 21, Rule 2 of the Code of Civil Procedure was held inapplicable.

11. In none of the cases the point of a garnishee order was considered. In our opinion, a case of a garnishee payment or one made under Section 46 (5A) of the Income-tax Act of 1922 stands on a different footing and if the payment has been legally made out of Court in full and final discharge of the liability under a decree,

there is no reason why the judgment-debtor cannot move the Court for getting the adjustment or payment certified. The payment was required to be certified under Order 21, Rule 2 of the Code of Civil Procedure and we order that it be so certified.

12. The appeals are accordingly allowed with costs here and in the High Court. Appeals allowed.

AIR 1970 SUPREME COURT 122
(V 57 C 28)

(From Punjab)*

M. HIDAYATULLAH, C. J., J. C. SHAH,
V. RAMASWAMI, G. K. MITTER
AND A. N. GROVER, JJ.

Union of India, Appellant v. Jagjit Singh, Respondent.

Civil Appeal No. 1111 of 1965, D/- 1-4-1969.

(A) Police Act (1861), S. 7 — Punjab Police Rules (1934), Chapter XVI, R. 16.1 (2) — Expressions “District Superintendent of Police” in Act and “Superintendent of Police” in Rules — Both refer to same authority — No incongruity between Act and Rules — Superintendent of Police though not designated as District S. P. can dismiss a Sub-Inspector working under him. L.P.A. No. 36-D of 1963 D/- 11-4-1963 (Punj), Reversed. (Para 8)

(B) Civil Services — Punjab Police Rules (1934), Chapter XVI, R. 16.24 (1) — Dy. S. P. re-employed in same capacity from date of his retirement — During re-employment he continues to be ‘Police Officer’ within meaning of Rule 16.24 (1) — Departmental enquiry of Sub-Inspector conducted by him during re-employment — Rule 16.24 (1) is not contravened. L.P.A. No. 36-D of 1963, D/- 11-4-1963 (Punj), Reversed. (Para 9)

Cases Referred: Chronological Paras (1969) AIR 1969 SC 1108 (V 56)=

Civil Appeal No. 277 of 1966, D/- 12-3-1969. Delhi Administration v. Chanan Shah

12

(1961) AIR 1961 SC 751 (V 48)=
1961-2 SCR 679, State of Uttar Pradesh v. Baburam

12

Mr. B. Sen, Senior Advocate, (Mr. R. N. Sachthey, Advocate, with him), for Appellant; M/s. Frank Anthony, D. R.

*L.P.A. No. 36-D of 1963, D/- 11-4-1963 — (Punj — at Delhi)

Sehgal and D. D. Sharma, Advocates, for Respondent.

The following judgment of the court was delivered by

MITTER, J.:— This is an appeal by special leave from a judgment and order dated April 11, 1963 of the Punjab High Court (Circuit Bench at Delhi) in a Letters Patent Appeal which summarily dismissed the appeal preferred by the appellant from a judgment and order in a Second Appeal upholding the decree in favour of the respondent passed by the Additional District Judge, Delhi.

2. The questions canvassed in this appeal were whether the dismissal of the respondent from service in the police force was illegal on the ground that the officer entrusted with the departmental enquiry against the respondent was not a police officer; secondly, whether the order of dismissal passed by Shri Jagannath was invalid because he was not a District Superintendent of Police; and thirdly, whether the dismissal was void on account of non-compliance with the provisions of Rule 16.38 of the Punjab Police Rules.

3. In order to appreciate the points raised, it is necessary to state the following relevant facts. The respondent had been appointed a Sub Inspector of police by the Inspector-General of Police in Sind before the partition of India and was thereafter posted in Delhi by the Deputy Inspector-General of Police Delhi after his migration to India. In the year 1949 he was posted as Sub Inspector of Police in Police Station Daryaganj, Delhi. A departmental enquiry was launched against him on the charge of acceptance of bribe in connection with a criminal case in the same year. The officer entrusted with the enquiry was one Diwanchand Bhatia who was employed up to April 1949 as a Deputy Superintendent of Police in the City of Delhi. He retired from service in that month but was re-employed from the date of retirement as a Deputy Superintendent of Police (Enforcement Department). The enquiry against the respondent had taken place after the retirement of the said Diwanchand but during the period of his re-employment. The respondent was found guilty of the charge and was dismissed from service by the order dated December 8, 1949 passed by one Jagannath, a Superintendent of Police in the Delhi Police Force. The appellant (respondent?) filed

a suit challenging his dismissal on the grounds already mentioned in the court of the Subordinate Judge Delhi on January 12, 1954. The defendant, Union of India, filed its written statement disputing the contentions of the plaintiff. The Subordinate Judge framed several issues; the principal ones relate to the competency of Jagannath to pass the order of dismissal and of Diwanchand Bhatia to conduct the enquiry against the plaintiff. Finding in favour of the plaintiff on both the issues, he decreed the suit. This decree was upheld in appeal by the Additional District Judge, Delhi and in Second Appeal by a single Judge of the Punjab High Court who modified the decree by an alteration in the figure of the salary claimed by the plaintiff but upholding his claim on the main issues. The Letters Patent Appeal, as already stated, was dismissed summarily.

4. The first contention on behalf of the appellant was that Jagannath who was functioning as a Superintendent of Police but not designated as a District Superintendent of Police was quite competent to pass the order of dismissal against the respondent. Under S. 4 of the Police Act V of 1861, an Act for the regulation of Police,

"The administration of the police throughout a general police-district shall be vested in an officer to be styled the Inspector-General of Police, and in such Deputy Inspectors-General and Assistant Inspectors-General as to the State Government shall deem fit.

The administration of the police throughout the local jurisdiction of the Magistrate of the district shall, under the general control and direction of such Magistrate, be vested in a District Superintendent and such Assistant District Superintendent as the State Government shall consider necessary."

Section 3 reads:

"The superintendence of the police throughout a general police district shall vest in and shall be exercised by the State Government to which such district is subordinate; and except as authorised under the provisions of this Act, no person, officer or Court shall be empowered by the State Government to supersede or control any police functionary."

Section 7 provides for the appointment, dismissal etc., of inferior officers. The relevant portion thereof reads:

"Subject to the provisions of Art. 311 of the Constitution, and to such rules as the State Government may from time to time make under this Act, the Inspector-General, Deputy Inspectors-General, Assistant Inspectors-General and District Superintendents of Police may at any time dismiss, suspend or reduce any police-officer of the subordinate ranks whom they shall think remiss or negligent in the discharge of his duty, or unfit for the same,"

The difference between the texts of the sections, after the coming into force of the Constitution and that before January 1950 is immaterial for our purpose. The interpretation clause is Section 1 under which (a) 'police' shall include all persons who shall be enrolled under this Act; (b) the words 'general police-district' shall embrace any presidency (State) or place, or any part of any presidency (State) or place, in which this Act shall be ordered to take effect; (c) "District Superintendent" and "District Superintendent of Police" shall include any Assistant District Superintendent or other person appointed by General or Special order of the State Government to perform all or any of the duties of a District Superintendent of Police under this Act in any district; and (d) 'Magistrate of the district' shall mean the chief officer charged with the executive administration of a district and exercising the powers of a Magistrate, by whatever designation the Chief officer charged with such executive administration is styled. Under Section 2 of the Act the entire police establishment under a State Government shall, for the purposes of this Act, be deemed to be one police-force, and shall be formally enrolled; and shall consist of such number of officers and men, and shall be constituted in such manner as shall from time to time be ordered by the State Government.

5. It is to be noted that the words "Superintendent of Police" do not occur anywhere in the Act. In the Act this expression is prefixed by the words "District" or "Assistant District". Under Rule 1.1 of the Punjab Police Rules, 1934 framed under the Police Act, the Punjab was divided into general police districts, viz., the Provincial Police District and Railway Police district and all ranks of police employed in the province were appointed or enrolled under Section 2 of the Act. Rule 1.2 shows that the responsibility for the command of the police force, its recruitment, discipline, internal economy and administration throughout

the general police districts vested in the Inspector-General of Police who was to be assisted in the control and administration of the police force by such number of Deputy Inspectors-General and Assistant Inspectors-General as the Provincial Government might from time to time appoint. Rule 1.4 gave the administrative division of the police force. Rule 1.6 gives the functions of the Deputy Inspectors-General of Police and lays down that in the exercise of such responsibility they were to interfere as little as possible with the executive authority of the Superintendents under them. Under R. 1.8:

"The Superintendent of Police is the executive head of the district police force. He is directly responsible for the matters relating to its internal economy, training and management, and for the maintenance of its discipline and the efficient performance of all its duties.

In every district there shall be one or more Superintendents and such number of Assistant Superintendents, Deputy Superintendents, inspectors, sergeants, sub-inspectors, assistant sub-inspectors, head constables and constables as the Provincial Government may direct." The important thing to note in this connection is that the expression "District Superintendent of Police" is not used in the rules and the last mentioned rule shows that it was possible to have more than one Superintendent of Police in a district.

6. Chapter XII of the Rules deals with appointments and enrolments in the police force. Rule 12.1 contains a table summarising the directions given by the Provincial Government under Clause (b) of sub-s. (1) of S. 241 of the Government of India Act, 1935 in regard to the authorities competent to make appointments to the non-gazetted ranks. In respect of sub-inspectors the authority to whom the power of appointment is delegated is

"Superintendent of Police and Deputy Superintendent (Administrative), Government Railway Police and Assistant Superintendent, Government Railway Police." This authority is given full powers subject to rules governing the conditions of service as defined in the Police Rules.

7. Chapter XVI deals with punishments and sub-r. (1) of R. 16.1 of this Chapter lays down that no police officer shall be departmentally punished otherwise than as provided in these rules. Sub-r. (2) of Rule 16.1 gives a table

showing the departmental punishments which can be inflicted and the authorities competent to inflict the same. The table shows that the order of dismissal of a Sub-Inspector can be passed by a Superintendent of Police and Deputy Superintendent (Administrative), Government Railway Police.

8. The question therefore arises whether the words "Superintendent of Police" in the Rules and the words "District Superintendent of Police" in the Act refer to one and the same authority, or whether there is any distinction or difference between the two. In our opinion, there is none. Section 4 of the Police Act shows that the administration of police throughout the local jurisdiction of the Magistrate of the district under the general control and direction of such Magistrate is to be vested in a District Superintendent. It is common knowledge that the police force expanded very considerably in between the year 1861 when the Act was passed and the year 1934 when the Rules were framed and a Magisterial district was divided into smaller areas for the purpose of better enforcement of law and order and a Superintendent of Police was placed in charge of each such area. This finds support from the testimony of Abdul Rehman, D. W. 1, Superintendent of Police, C. I. D. Lucknow. He said that he was posted as Superintendent of Police at the headquarters at Delhi in 1950. According to him, the District Magistrate was in charge of the entire Delhi area including New Delhi, Old Delhi and rural areas. Further, the police officer in charge of the entire area was the Inspector-General of Police and there were two Superintendents of Police, one for Delhi City and the other for New Delhi. Shri Jagannath was the Superintendent of Police, City and all the police stations of the city were under his charge. It is nobody's case that a Superintendent of Police is an authority inferior to that of a District Superintendent of Police, each Magisterial district having in many cases more than one Superintendent of Police. There is thus no incongruity between the Act and the Rules which have to be read together and as Jagannath, Superintendent of Police, was undoubtedly the Superintendent of Police, City of Delhi with jurisdiction over the police station Faiz Bazar where the plaintiff was posted, he was competent to pass the order of dismissal on him.

9. On the question of the competence of Diwanchand Bhatia, the relevant rule is R. 16.24 in Chapter XVI of the Punjab Police Rules which lays down the procedure to be followed in departmental enquiries. Sub-r. (i) of R. 16.24 (1) provides that:

"The police officer accused of misconduct shall be brought before an officer empowered to punish him, or such superior officer as the Superintendent may direct to conduct the enquiry.

x x x x x x x

On behalf of the appellant it was contended before us that all that this rule requires was that the officer conducting the enquiry must be superior in status to the person against whom charges had been levelled and there can be no doubt that a Deputy Superintendent of Police was an officer superior to a Sub-Inspector of Police. According to counsel it was really not necessary to consider whether he was also a police officer but on the facts of this case there can be no doubt that Diwanchand Bhatia was a police officer. Ex. D-5 is a certificate to the effect that Diwanchand Bhatia had on the forenoon of 28th April 1949 received charge of the office of the Deputy Superintendent of Police, Enforcement, Delhi with the designation "Officiating Deputy Superintendent of Police." Ex. D-4, the order of the Inspector-General of Police, Delhi dated June 6, 1949 shows that Diwanchand Bhatia was "posted to city vice Malik Bodh Raj, Deputy Superintendent of Police, who will take over charge as Deputy Superintendent of Police, Enforcement." There is also the oral testimony of Diwanchand Bhatia to the effect that he had taken over charge as shown in those documents and that he had conducted the enquiry against the respondent. It was sought to be argued before us by counsel for the respondent that Diwanchand Bhatia, when he conducted the enquiry had already retired from the post of police officer and he was only re-employed in the Enforcement Department and this would not make him a police Officer. We see no force in this contention as the Enforcement Department was still a police department and a Deputy Superintendent of Police (Enforcement) was still a Deputy Superintendent of Police. The word 'enforcement' merely specifies the department to which he was attached and the order Ex. D-4 shows that he was to take over charge

from Malik Bodh Raj who in turn was another Deputy Superintendent of Police.

10. The third point canvassed before us does not seem to have engaged the attention of the courts hearing the matter although it was raised in the plaint. It was the plaintiff's case in paragraph 6-A of the amended plaint that the departmental enquiry could only have been started after the taking of certain essential preliminary steps and that it was necessary for the police first to give immediate information to the District Magistrate of the alleged commission of a crime by the plaintiff and it was for that officer to decide whether the enquiry was to be conducted by a police officer or by a selected Magistrate First Class and that in his case the departmental enquiry had been started without following the above procedure. Although the plaint does not mention the rules in the Punjab Police Rules referred to by the plaintiff in paragraph 6-A there can be no doubt that the reference was to Rule 16.38 of Chapter XVI, sub-rules (1) and (2) whereof run as follows:

"(1) Immediate information shall be given to the District Magistrate of any complaint received by the Superintendent of Police, which indicates the commission by a police officer of a criminal offence in connection with his official relations with the public. The District Magistrate will decide whether the investigation of the complaint shall be conducted by a police officer, or made over to a selected magistrate having First Class powers.

(2) When investigation of such a complaint establishes a prima facie case, a judicial prosecution shall normally follow; the matter shall be disposed of departmentally only if the District Magistrate so orders for reasons to be recorded. When it is decided to proceed departmentally the procedure prescribed in rule 16.24 shall be followed. An officer found guilty on a charge of the nature referred to in this rule shall ordinarily be dismissed.

(3) to (6) XX XX XX."

11. It was the contention of the respondent that there was no evidence to show compliance with the above rule. It was contended that the evidence on record was not sufficient for the purpose. Diwanchand Bhatia stated in his evidence in chief that he had received an application for making an enquiry against the plaintiff from Jagannath, Superintendent of Police and that after making a prelimi-

nary enquiry when he found a prima facie case against the plaintiff he sent the same to the District Magistrate for approval. Thereupon the District Magistrate wrote that a departmental enquiry be made against the plaintiff and it was only following the direction of the District Magistrate that the enquiry was made. The Superintendent of Police, Jagannath, stated in his evidence in chief that he could not say whether the sanction of the District Magistrate had been obtained for the enquiry by Diwanchand Bhatia.

12. Mr. Anthony who argued on behalf of the respondent drew our attention to a judgment of this Court in *State of Uttar Pradesh v. Babu Ram*, 1961-2 SCR 679 = (AIR 1961 SC 751) where it was observed that the Police Act and the Rules made thereunder constituted a self-contained code providing for the appointment of police officers and prescribing the procedure for their removal. According to him no departure from the rules was possible and in order to justify a dismissal strict compliance with the rules was mandatory. Observations to a similar effect were also quoted from the judgment of this Court in *Delhi Administration v. Chaman Shah*, C. A. No. 277 of 1966, D/- 12-3-1969 = (AIR 1969 SC 1108). There what was said was:

"It is not necessary to decide whether the provisions of Rule 16.38 of the Punjab Police Rules are mandatory or directory. Even assuming that the rule is directory we find that there has been no substantial compliance with its provisions."

We do not think that the same can be said of the facts of this case. We see no reason to disbelieve the testimony of Diwanchand Bhatia. The learned trial Judge did not frame an issue on this point and Abdul Rehman, the Superintendent of Police, C.I.D. who gave evidence in this case stated that the file relating to the departmental enquiry against the plaintiff had been destroyed under Police Rule 12.35 by his order. He also referred to the document Ex. D-2 which is an extract regarding the destruction of Fauji Missals. The order seems to have been passed on 15th January 1953 long before the institution of the plaintiff's suit. In the circumstances, we see no reason not to accept the evidence of Diwanchand Bhatia according to which Rule 16.38 of Chapter XVI had been complied with.

13. In the result, the appeal is allowed, the judgment and order of the courts

below set aside and the suit filed by the respondent dismissed. As the special leave was given in this case on condition that the appellant will in any event pay the costs of the respondent, we make no order as to costs of this appeal and do not think it necessary to disturb the previous order for costs.

Appeal allowed.

AIR 1970 SUPREME COURT 126 (V 57 C 29)

(From Bombay)*

M. HIDAYATULLAH, C. J., J. C. SHAH,
V. RAMASWAMI, G. K. MITTER AND
A. N. GROVER, JJ.

Venkatrao Esajirao Limbekar and others, Appellants v. State of Bombay and others, Respondents.

Civil Appeal No. 464 of 1966, D/- 15-4-1969.

(A) Tenancy Laws — Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and Further Amendment) Act (Maharashtra Act 45 of 1961), Section 2 — Repeal and re-enactment of Hyderabad Act 21 of 1950 and its Amending Acts — Effect — Government can enquire under Section 38E of the 1950 Act — Maharashtra Act 45 of 1961 and Hyderabad Act 21 of 1950 together with Hyderabad Act 3 of 1954 do not contravene Articles 19 and 31 and are protected by Article 31B of the Constitution.

The provisions of the Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and Further Amendment) Act (1961) as also of the Hyderabad Tenancy and Agricultural Lands Act (21 of 1950) together with Hyderabad Tenancy and Agricultural Lands (Amendment) Act (3 of 1954), do not contravene Articles 19 and 31 of the Constitution. By the Constitution (Seventeenth Amendment) Act 1964, after entry 20, entries 21 to 66 were inserted in the Ninth Schedule to the Constitution. Entries 35 and 36 relate to the Maharashtra Act (45 of 1961) and Hyderabad Act 21 of 1950 respectively. Article 31B gives full protection to an Act and its provisions in the Schedule against any challenge on the ground of inconsistency with or abridging of any of the rights conferred by

* (Spl. Civil Appln. No. 1882 of 1962, D/- 25-3-1964—Bom.)

Part III of the Constitution. This would be so notwithstanding any judgment, decree or order of any Court or Tribunal to the contrary. The amending laws and, in particular, Hyderabad Act 3 of 1954 which inserted Section 38E would also be covered by the same protection because the Parent Act, namely, the Hyderabad Act 21 of 1950 was included in the Ninth Schedule in the year 1964 which was long after the enactment of the amending Act. Consequently, Maharashtra Government can proceed with enquiry under Section 38E of 1950 Act (as repealed and re-enacted by Act 45 of 1961) in respect of land which was part of erstwhile Hyderabad State before reorganisation of States and give retrospective effect to Maharashtra Act of 1961. Even assuming that retrospective effect cannot be given to 1961 Act, Government's power to enquire under Sec. 38E remains unaffected as the Hyderabad Act 1950 and its amending Act 3 of 1954 are covered by protection under Article 31B of the Constitution. Spl. C. A. No. 1882 of 1962, D/- 25-3-1964 (Bom), Affirmed.

(Paras 6, 7)

(B) Constitution of India, Articles 31 (3), 111 — Assent of President to Amending Act — Assent to parent Act, even if not accorded earlier, must be taken to have been granted when Amending Act was assented to. (Obiter). AIR 1961 Andh Pra 523, Overruled. (Para 7)

Cases Referred: Chronological Paras
(1961) AIR 1961 Andh Pra 523

(V 48) = 1961 Andh LT 580,
Inamdars of Sulhanagar Colony
v. Govt. of Andhra Pradesh 4, 7
(1959) AIR 1959 SC 459 (V 46) =
61 Bom LR 811, Sri Ram Ram
Narain v. State of Bombay 5

Mr. A. K. Sen, Senior Advocate, (Mr. K. P. Gupta, Advocate, with him), for Appellants; M/s. M. S. K. Sastri and R. H. Dhebar, Advocates, for Respondents.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave from a judgment of the Bombay High Court dismissing a petition under Article 226 of the Constitution which had been filed by the appellants. The validity of the Hyderabad Tenancy and Agricultural Lands (Re-enactment) Act, 1961, hereinafter called the "Maharashtra Act", was challenged. It was also sought to restrain the respondents from proceed-

ing with the enquiry under Section 38 (E) of the Hyderabad Tenancy and Agricultural Lands Act (Act XXI of 1950) as amended by the Hyderabad Tenancy and Agricultural Lands (Amendment) Act (Act III of 1954), read with the relevant rules.

2. The appellants are land-owners in Pathri Taluka of Parbhani District. This district was originally a part of the erstwhile State of Hyderabad and the provisions of the Hyderabad Act XXI of 1950 were applicable there. By amending Act No. III of 1954 which received the assent of the President on 31st January 1954 a number of amendments were made. Section 38 (E) was inserted. By that section the Government could declare by notification that ownership of all lands held by protected tenants which they were entitled to purchase from their landholders under the provisions of Chapter IV were to stand transferred to such tenants.

3. The district of Parbhani became a part of the erstwhile Bombay State on the enactment of the States Re-organisation Act, 1956. By means of Bombay (Hyderabad Areas) Adoption of Laws (State and Concurrent Subjects) Order 1956, the State of Bombay adopted and modified Hyderabad Act XXI of 1950. A notification was issued on May 21, 1957 by the Government of Bombay making a declaration under Section 38 (E) of Hyderabad Act XXI of 1950 in the district of Parbhani. The Agricultural Lands Tribunal and the Special Tehsildar, Parbhani District as also the Secretary, The Agricultural Lands Tribunal Pathri Taluka of the same District started an inquiry under Rule 54 of the Hyderabad Transfer of Ownership Rules and published a provisional list of those who were declared to be land-owners which included some of the tenants of the appellants. The appellants filed objections which were dismissed.

4. The Bombay Legislature passed Act XXXII of 1958 which was first published in the Bombay Government Gazette on April 10, 1958 after having received the assent of the President. By this Act further amendments were made in Hyderabad Act XXI of 1950. In July 1959 the appellants filed a writ petition in the High Court of Bombay assailing the vires of the provisions of Section 38E of Hyderabad Act XXI of 1950. The grounds of attack, inter alia, were that Arts. 19(1)(f) and 31 of the Constitution had been contravened and that the aforesaid Act had not been reserved for and had not re-

ceived the assent of the President. The validity of the notification issued in May 1957 was also attacked. This petition was dismissed by the High Court in March 1960. In January 1961 this Court granted special leave to appeal against that judgment. In March 1961 during the pendency of the appeal the Andhra Pradesh High Court in *Inamdars of Sulhanagar Colony v. Government of Andhra Pradesh*, AIR 1961 Andh Pra 523 struck down Hyderabad Act XXI of 1950 as amended by Act III of 1954 on the sole ground that it had not received the assent of the President as required by Article 31 (3) of the Constitution. In February, 1961, the Maharashtra Act was enacted after the assent of the President *had been obtained*. It repealed and re-enacted the Hyderabad Act XXI of 1950 and declared that it shall be deemed to have come into force on 10th day of June 1950 as re-enacted. It also repealed the amending laws and re-enacted them and declared that as re-enacted they shall be deemed to have come into force on the day specified against each of them in the table given therein. It made certain further amendments. Thereupon the appeal pending in this Court was withdrawn by the appellants with liberty to challenge the constitutionality of the Maharashtra Act. In November, 1962 the appellants filed a petition under Article 226 of the Constitution in the Bombay High Court challenging the Maharashtra Act. This petition was dismissed by the High Court in March 1964.

5. It appears that only two points were urged before the High Court. The first was that the State Legislature had no power to re-enact the provisions of the Hyderabad Acts (the parent Act and the amending Acts) with retrospective effect. This argument was repelled by a brief observation that the State Legislature was competent to give retrospective effect to the provisions enacted by it. The second point raised was that Sec. 38E which provided that protected tenants would be deemed to have become owners of the land held by them subject to certain conditions with effect from the date notified by the Government was ultra vires Articles 19 and 31 of the Constitution. The High Court referred to its earlier decision in Special Civil Application No. 1128 of 1959 in which the same contention had been pressed but had not been accepted. The High Court also relied on a decision of this court in *Sri Ram Ram Narain v. State of Bombay*, 61 Bom

LR 811=(AIR 1959 SC 459) in which the constitutional validity of similar provisions contained in Section 32 of the Bombay Tenancy and Agricultural Lands Act had been upheld.

6. The present appeal must fail. The provisions of the Maharashtra Act as also of the Hyderabad Act XXI of 1950 together with the amending Act are immune from any challenge on the ground of contravention of Articles 19 and 31 of the Constitution. By the Constitution (Seventeenth Amendment) Act 1964, after entry 20, entries 21 to 66 were inserted in the Ninth Schedule to the Constitution. Entries 35 and 36 relate to the Maharashtra Act and Hyderabad Act XXI of 1950 respectively. Article 31-B gives full protection to an Act and its provisions in the Schedule against any challenge on the ground of inconsistency with or abridging of any of the rights conferred by Part III of the Constitution. This would be so notwithstanding any judgment, decree or order of any court or Tribunal to the contrary. The amending laws and, in particular, Hyderabad Act III of 1954 which inserted Section 38E would also be covered by the same protection because the parent Act, namely, the Hyderabad Act XXI of 1950 was included in the Ninth Schedule in the year 1964 which was long after the enactment of the amending Act.

7. In the above view of the matter no attempt was made on behalf of the appellants to raise the second question about the competency of the Legislature of the Maharashtra State to enact the Maharashtra Act with retrospective effect in respect of Parbhani District which became a part of the erstwhile Bombay State only after the enactment of the Bombay States Reorganisation Act, 1956. The reason apparently is that even on the assumption that the Maharashtra Legislature could not have validly enacted retrospective legislation with regard to Parbhani District, the Hyderabad Act XXI of 1950 as amended by Act III of 1954 was in force at the time when the notification was made in May 1957 pursuant to which proceedings were taken which were challenged by the appellants. As regards the decision of the Andhra Pradesh High Court AIR 1961 Andh Pra 523 (supra) by which the Hyderabad Act XXI of 1950 was struck down as not having received the assent of the President under Article 31 (3) the position taken up in the writ petition was that

such assent had been given to it on April 8, 1958 and till then the said Act was not valid and operative. According to the judgment of the Andhra Pradesh High Court, Hyderabad Act XXI of 1950 had never been assented to by the President although it had received the assent of the Rajpramukh of the erstwhile Hyderabad State. Now the question of lack of assent of the President was never pressed before the High Court, nor have we been invited to examine it. We would, however, like to observe that, as noticed before, when Hyderabad Amending Act III of 1954 was enacted the assent of the President was duly obtained. Similarly when Bombay Act XXXII of 1958 which was meant for amending Hyderabad Act XXI of 1950 was enacted the assent of the President had been given. If the assent of the President had been accorded to the amending Acts, it would be difficult to hold that the President had never assented to the parent Act, namely, Hyderabad Act XXI of 1950. Even if such assent had not been accorded earlier it must be taken to have been granted when Amending Act III of 1954 was assented to.

8. For the above reasons this appeal is dismissed, there will be no order as to costs.

Appeal dismissed.

**AIR 1970 SUPREME COURT 129
(V 57 C 30)**

(From Madhya Pradesh: AIR 1966
Madh Pra 301)

**M. HIDAYATULLAH, C. J., J. M.
SHELAT, V. BHARGAVA, K. S.
HEGDE AND A. N. GROVER, JJ.**

M/s. Vrajlal Manilal and Co. and another, Appellants v. State of Madhya Pradesh and others, Respondents.

Civil Appeal No. 2262 of 1966, D/- 25-4-1969.

(A) Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Adhiniyam (29 of 1964), Section 5 (2) (b) — Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Niyamawali (1965), Rules 4 to 9 — Provisions were intended to restrict not only movement of tendu leaves from purchasing units to place of storage but also their subsequent movement.

It is clear from Section 5 (2) (b) and the rules and the forms prescribed that

the intention underlying them all is to prohibit, except under permit, the movement of leaves from the units where they are purchased to any place outside either for storing them or for their consumption in the manufacture of bidis or for exporting them outside the State. It cannot, therefore, be contended that they were intended to restrict only the movement from the purchasing unit to the place of storage and that the leaves would be free for subsequent movement.

(Para 7)

(B) Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Adhiniyam (29 of 1964), Section 5 — Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Niyamawali (1965), Rule 9 — Constitutional validity — Act creating State monopoly in trade of tendu leaves — Transport of leaves do not form integral part of trade — Restrictions imposed on transport affects fundamental rights under Article 19 (1) (f) and (g) and have to satisfy tests of reasonableness under Article 19, Clause (5) and first part of Clause (6) and also Article 304(b) — Section 5 and Rule 9 as also order dated 4-6-1965 cannot be held unreasonable except to the extent of its requiring a permit for distribution by sattedars to mazdoors and cannot be challenged — Order dated 12-10-1965 being a mere cancellation of concession is not a restriction — (Constitution of India, Art. 19 (1) (f), (g) and (5), (6) and Article 304 (b)).

The Act was enacted for regulating the trade in tendu leaves by creating a State monopoly in such trade. Trade in tendu leaves would consist of dealing in those leaves, i. e. their purchase and sale. Transport of leaves once purchased or sold would not *prima facie* be an organic or integral part of dealing in those leaves. Hence the restrictions on their transport contained in Section 5 cannot be held to be the integral part of the trade monopoly but as ancillary or incidental thereto, made for its effective enforcement, and as such it affects the right of the purchaser under Article 19 (1) (f) to hold and to dispose of the goods he has acquired, a right which is not correlated, as the right under Clause (g) is, with the monopoly which the section seeks to create. It follows, therefore, that such a provision would have to pass the test of reasonableness under Clause (5) and the first part of Clause (6) of Article 19. That would also be the position in respect of Article 304 (b). But since the requirement of these provisions is the same the yardstick of reasonableness

would be common to all these cases.

(Para 10)

Reading Section 5 (2) along with R. 9 of the said rules, what they are intended to require is that a manufacturer must have a permit to move the leaves purchased by him from the unit or units where he has purchased them to his warehouse outside and from there to his branches and also when he transports them to his sattedars. But, no such permit was intended to be necessary when the leaves are distributed for the manufacture of bidis by these sattedars to the mazdoors whom he employs. A construction so limited in its sweep is commendable as it is consistent with the object of the Act and is also in harmony with Clauses (5) and (6) of Article 19 and Clause (b) of Article 304. Reading the ban against movement of old leaves contained in the order dated June 4, 1965 the restrictions against free transport cannot be held to be unreasonable and the validity of Section 5 and Rule 9 as also the order of June 4, 1965, except to the extent of its requiring a permit for distribution to the mazdoors, cannot be successfully challenged. So far as the order dated October 12, 1965 is concerned, it was a mere cancellation of a concession and such cancellation cannot be challenged as a restriction, much less as an unreasonable restriction. AIR 1966 Madh Pra 301, Affirmed.

(Para 13)

(C) Constitution of India, Article 19 — Act infringing rights under Clause (1) — Act is invalid unless it is protected by Clauses (2) to (6) — Burden of proof lies on those who seek its protection.

When an enactment is found to infringe any of the fundamental rights guaranteed under Article 19 (1), it must be held to be invalid unless those who support it can bring it under the protective provisions of Clauses (2) to (6) of that Article. To do so, the burden is on those who seek that protection and not on the citizen to show that the restrictive enactment is invalid. AIR 1954 SC 728 and AIR 1964 SC 925, Rel. on. (Para 10)

(D) Constitution of India, Pre. — Constitutionality of Act — Rules of construction indicated.

A mere literary or mechanical construction would not be appropriate where important questions such as the impact of an exercise of a legislative power on constitutional provisions and safeguards thereunder are concerned. In cases of such

a kind, two rules of construction have to be kept in mind: (1) that courts generally lean towards the constitutionality of a legislative measure impugned before them upon the presumption that a legislature would not deliberately flout a constitutional safeguard or right, and (2) that while construing such an enactment the court must examine the object and the purpose of the impugned Act, the mischief it seeks to prevent and ascertain from such factors its true scope and meaning. (Para 11)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 925 (V 51) = 1964-5 SCR 975, Khyerbari Tea Co. Ltd. v. State of Assam 10

(1963) AIR 1963 SC 1047 (V 50) = 1963 Supp 2 SCR 691, Akadasi Padhan v. State of Orissa 8

(1954) AIR 1954 SC 728 (V 41) = 1955-1 SCR 707, Saghir Ahmad v. State of U. P. 10

Mr. A. K. Sen, Senior Advocate (Mr. Rameshwar Nath, Advocate of M/s. Rajinder Narain and Co. with him), for Appellants; Mr. I. N. Shroff, Advocate, for Respondents.

The following Judgment of the Court was delivered by

SHELAT, J.: This appeal under certificate is directed against the judgment of the High Court of Madhya Pradesh dismissing the writ petition filed by the appellants in that Court.

2. The appellants are a partnership firm carrying on the business of manufacturing and selling bidis and purchase, stock, transport and consume for that purpose considerable quantity of tendu leaves. In 1964, the State Legislature passed the Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Adhiniyam, 29 of 1964 (hereinafter referred to as the Act). The Act received the President's assent on November 23, 1964 and was brought into force on November 23, 1964. The Act inter alia created a State monopoly in the trade of tendu leaves and under Section 5 (1) thereof prohibited anyone, excepting those mentioned therein either to purchase or transport tendu leaves. Sub-section (2) of Section 5, however, permitted a grower to transport them within the unit where they grow and a purchaser who has purchased them from the State Government, its authorised officers and agents for manufacture bidis or for exporting outside the State to transport them outside such unit under a permit and in accordance with the terms and

conditions thereof. By virtue of Sec. 19 the State Government framed rules called the Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Niyamavali, 1965 (referred to hereinafter as the rules). Rule 9 of the said rules provided for an application for a transport permit in form M and the issuance of such permit in form N. The appellants accordingly applied for and obtained permits authorising them to transport tendu leaves purchased by them from the various forest units to their godowns situate outside those units. In the course of their business the appellants transport the said leaves first from the said units to their warehouses, from there to their branches and thereafter distribute them and tobacco to their sattedars, who are independent contractors, and who in their turn distribute the said leaves and tobacco to various mazdoors living in different villages for rolling the bidis. According to the practice of the appellants, the said sattedars enter into contracts with them under which the appellants supply to them the said leaves and the tobacco and the sattedars deliver to the appellants bidis rolled by the mazdoors in proportion to the quantity of the leaves and tobacco supplied to them. On June 4, 1965, the Divisional Forest Officer issued an order which forbade altogether movement of old tendu leaves and as regards new leaves provided that their movement from one village to another had to be covered by a permit. It also provided that permits would be necessary for bulk transport from warehouses to branches and from there to sattedars, and that such permits would be issued by range assistants and range officers on receipt of applications therefor. The appellants thereupon made a representation to the Divisional Forest Officer mentioning the several difficulties which would result from the said order and the said officer, by his order dated June 8, 1965, in partial modification of his said order, permitted branch managers of bidi manufacturing firms themselves to issue transport permits to sattedars. Finding, however, that instead of distributing the said leaves to the sattedars, the branch managers were issuing permits for bulk transport, the said officer on October 12, 1965 rescinded his order of June 8, 1965. The result was that the appellants were required to obtain permits for moving the tendu leaves from their branch offices to the sattedars. The appellants thereafter filed the said writ petition in the High Court claiming that

under Section 5 and the said rules they were required to obtain permits only when moving the leaves purchased by them from units where they were grown to their warehouses and that once they were so moved to the warehouses there could be no restriction in their further movement from the warehouses to their branches and from there to their sattedars and the mazdoors. The appellants claimed a writ in the nature of mandamus for setting aside the said orders dated June 4, 1965 and October 12, 1965 and also for striking down Section 5 if it was construed as prohibiting, except under permit, movement of the said leaves from their warehouses to the branches and from thence to the sattedars and the mazdoors. The State Government, on the other hand, claimed that the restrictions against transport of the leaves were justified under Section 5 and the rules and were valid. The High Court held that on a proper construction of Sec. 5 (2) (b) a permit was necessary for transport of the leaves by a purchaser not only when he moved them from the units where they were purchased to a place outside but also when he moved them from one place to another outside the said unit, that Section 5 (1), being a provision creating the State monopoly in the trade of tendu leaves, was protected by the latter part of Article 19 (6) of the Constitution, that the restriction imposed by Sec. 5 (1) on transport was valid and that sub-s. (2) being merely a relaxation against the said prohibition was valid. It further held that the restrictions on transport of tendu leaves before and after the sale thereof by Government was an integral part of the trade monopoly intended to prevent surreptitious sales of tendu leaves by persons other than Government, their officers and agents that it was necessary to control the movement of the said leaves to prevent purchasers from surreptitiously purchasing and transporting them under cover of leaves purchased from Government by mixing the contraband with those lawfully purchased and that such control was basically and essentially necessary for creating the said monopoly. In the result, the High Court held that the said restrictions with regard to purchase as also transport were valid and the challenge against Section 5 and the said rules was not sustainable.

3. Counsel for the appellants raised the following contentions: (1) that S. 5 (2) (b) should be construed, though it is couched in wide language, to mean that

it prohibits without permit movement of tendu leaves from the units where they are purchased to the warehouses of the purchaser outside such units, that that restriction alone was necessary for effectively implementing the State's monopoly in tendu leaves, and that once they were purchased and property in them had passed to the purchaser and the leaves were brought to his warehouse there could no longer be any necessity to restrict their movement from the stage of warehousing them to the stage of their consumption in manufacturing the bidis; (2) that neither Section 5 (2) (b) nor the rules authorise restrictions on the movement of these leaves once they were brought under a permit to the warehouse, and therefore, the order dated June 4, 1965 requiring the purchaser to obtain permits for transporting them from his warehouse to his branch and from there to the sattedars and the mazdoors was ultra vires the section and the rules; (3) that the restrictions as to transport were ancillary to and were for the effective enforcement of the trade monopoly and not an essential or integral part of the scheme of that monopoly, that they were, therefore, not protected by the latter part of Article 19 (6), or Article 304 (b), and have, therefore, to pass the test of reasonableness; and (4) that, if Section 5 were to be literally construed so as to mean that it authorises the restriction on movement after the leaves were warehoused requiring permits for their transport from stage to stage until they reached the mazdoors, the entire system of permits would become unworkable and the restrictions would have to be held as unreasonable; that such a construction rendering Section 5 and the rules unconstitutional on the ground of being violative of Article 19 (1) (f) and (g) and Arts. 301 and 304 could not have been intended by the legislature. Counsel for the State, on the other hand, maintained that the language of Section 5 was clear and unambiguous, that it forbade without permit transport at any stage right upto the stage of manufacture of the bidis and that those restrictions were the essential part of the scheme of the State monopoly and therefore were protected by the latter part of Article 19 (6); and further that even if they were not, they were reasonable restrictions and therefore permissible.

4. In support of their rival contentions counsel drew our attention to the various forms provided in the rules as also to rule 4 of the new rules dated

February 14, 1966 which repealed the rules of 1965. We may, however, make it clear that the parties in the present appeal are governed by the rules of 1965, and therefore, anything that we say here would not govern either the construction or the effect of the new rules.

5. In examining the correctness of the contentions urged before us the first task is to ascertain what exactly the legislature intended to do while enacting Section 5. The long title of the Act clearly says that it was passed for regulating trade in tendu leaves in the public interest by creating the State monopoly in that trade, that is to say, in the purchase and sale of Tendu leaves by the State alone and not for creating a monopoly in their transport. To that end the Act empowers Government to divide the specified area or areas to which the Act is applied into units and to appoint agents for different units, and gives a monopoly to Government, its authorised officers and agents to purchase these leaves from the growers at prices fixed by it and makes other provisions to achieve the said object. Under Section 5 (1), from the date when the Act is brought into force in area or areas as may be notified, no person, except the Government, its authorised officer or agent in respect of the unit where these leaves are grown can purchase or transport them. Sub-sec. (1), thus, imposes a total ban against purchase, sale and transport of tendu leaves except by the three categories of persons mentioned therein. Under Sections 7, 8 and 9 the Government has to fix the purchase price in consultation with an advisory committee appointed therefor and open depots where the growers would sell their leaves to it or to its authorised officers or agents at prices fixed as aforesaid. Though Section 5 (1) claims a ban against purchase except by those mentioned therein, explanation 1 permits purchases from Government, its authorised officers and agents and such purchases are deemed not to be in contravention of the Act. Notwithstanding the ban against transport under sub-section (1), sub-section (2) permits two categories of persons to transport the said leaves: (a) a grower is allowed to move his leaves from one place to another within the unit where they are grown, and (b) a person who has purchased the leaves as aforesaid either for manufacturing bidis within the State or for their export outside the State is allowed to transport under a permit leaves so purchased from out of the unit

where he has purchased in accordance with the terms and conditions thereof. The first exception is made to enable the grower to sell his leaves to Government and the second is made to enable the purchaser to utilise the leaves for the two purposes for which he has purchased them.

6. Under the rules, an exporter means a person who sells tendu leaves to one having business outside the State or who exports them for the manufacture by him of bidis outside the State. A manufacturer of bidis includes a person manufacturing them through mazdoors by advancing to them these leaves or tobacco or both. Rules 4 and 6 provide for registration of growers, manufacturers and exporters, and Rule 7 provides for the sale of leaves purchased under Section 5 (1) by Government, its officers and agents. Under R. 6 a manufacturer and an exporter has to maintain accounts of his stock and submit periodical returns thereof in forms H and I showing amongst other things the balance of stock at the date when the last return was made, the stock added and the manner of its disposal including the stock consumed, sold or rendered useless and destroyed. Rule 8 provides for a certificate of sale to be issued to the purchaser by Government, its authorised officer and agent. Under Rule 9 an application for a transport permit is to be made in form M and the permit issued must be in form N. Form M provides for giving particulars such as the quantity of leaves purchased, the unit or units where they are purchased, the place or places where they are stored, the destination to which they are to be transported and the place or places where such transported leaves are to be stored. Similar particulars are to be mentioned in the permit as stated in form N.

7. These elaborate provisions in conjunction with the provisions of Section 5 indicate the extreme jealousy of the draftsman not to leave any loopholes in the net-work of control enabling anyone to possess these leaves by illegitimate acquisition or their being smuggled out in violation of these provisions from out of the units where they are grown or from the place where they are warehoused after their purchase. It is clear from Section 5 (2) (b), the rules and the said forms that the intention underlying them all is to prohibit, except under permit, the movement of leaves from the units where they are purchased to any place outside either for storing

them or for their consumption in the manufacture of bidis or for exporting them outside the State. The elaborate treatment and the clarity of the language of these provisions make the argument, that they were intended to restrict only the movement from the purchasing unit to the place of storage and that the leaves would be free for subsequent movement, impossible. The first limb of Mr. Sen's argument consequently cannot be upheld.

8. Such a construction, however, raises the question as to the constitutional sustainability of Section 5 and Rule 9 which are the provisions seriously challenged before us. An identical question challenging the validity of Sections 3 and 4 of the Orissa Kendu Leaves (Control and Trade) Act, 28 of 1961, an Act almost similar in terms to the one before us, and the scope of the amended Clause (6) of Article 19 came up before this Court in *Akadasi Padhan v. State of Orissa*, 1963 Supp 2 SCR 691=(AIR 1963 SC 1047). Dealing with Clause (6) of Article 19 and its impact on Clauses (f) and (g) of Article 19 (1) this Court laid down at page 707 of the report (SCR) = (at p. 1054 of AIR) as follows:

"In dealing with the question about the precise denotation of the clause 'a law relating to', it is necessary to bear in mind that this clause occurs in Art. 19 (6) which is, in a sense, an exception to the main provision of Article 19 (1) (g). Laws protected by Article 19 (6) are regarded as valid even though they impinge upon the fundamental right guaranteed under Article 19 (1) (g). That is the effect of the scheme contained in Article 19 (1) read with clauses (2) to (6) of the said Article. That being so, it would be unreasonable to place upon the relevant clause an unduly wide and liberal construction. 'A law relating to' a State monopoly cannot, in the context, include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the latter part of Article 19 (6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to

the operation of the monopoly, they do not fall under the said part and their validity must be judged under the first part of Article 19 (6). In other words, the effect of the amendment made in Article 19 (6) is to protect the law relating to the creation of monopoly and that means that it is only the provisions of the law which are integrally and essentially connected with the creation of the monopoly that are protected. The rest of the provisions which may be "incidental" do not fall under the latter part of Art. 19 (6) and would inevitably have to satisfy the test of the first part of Article 19 (6)."

In that case Sections 3 and 4 of the Orissa Act were challenged on the ground that the monopolistic rights to purchase kendu leaves under Section 3 and the right to fix purchase price of these leaves conferred by the two sections impinged upon the right of the petitioners there under Art. 19 (1) (f) and (g) and that the restrictions imposed by them were unreasonable and were not saved either under Clause (5) or Clause (6) of Article 19. The Court held that whereas the exclusive right of purchase conferred by Section 3 was an essential part of the trade monopoly which could validly be created under the latter part of Clause (6) and was therefore beyond the challenge of reasonableness of restrictions which it imposed, the exclusive right to fix the prices conferred by Section 4 was not, though it may be that such a power was necessary to effectually enforce the trade monopoly under Section 3. Therefore, though the latter did not have to pass the test of reasonableness, the former had to under Clause (5) and the first part of Clause (6), as it imposed a restriction not only on the right under Clause (g) but also under Cl. (f). However, on examining the right of the State to fix the prices, the Court came to the conclusion that the restriction imposed by Section 4 on the growers of Kendu leaves was not only in their own interest but also reasonable and rejected the challenge of unconstitutionality of both Sections 3 and 4. As already stated, the challenge to Section 3, which provided the exclusive right to purchase and transport was confined only to the exclusive right of the State to purchase kendu leaves. No question was raised regarding the exclusive right of transport under Section 3 which prohibited others, save the State, its authorised officers and agents, from transporting the leaves from one place to another, and therefore, the Court did not express any opinion as regards

that part of Section 3. That question, therefore, is not concluded by that decision and is open for determination.

9. The impugned Section 5 raises in relation to the problem of transport two questions: (1) whether the restrictions are an integral part of the trade monopoly it seeks to create and therefore free from any challenge as to their reasonableness under the latter part of Article 19 (6), and (2) as regards its interpretation and scope. It may be recalled that in the Orissa case the Court declined to treat Section 4 of that Act which conferred the exclusive right to fix the prices on the State as an integral and organic part of the trade monopoly in Kendu leaves but treated it only as effectively abetting its implementation. Can an embargo on transport by anyone, save those mentioned in Clauses (a), (b) and (c) of S. 5 (1) and the manufacturers of bidis and exporters of these leaves under the permit be regarded as an integral and organic part of the trade monopoly in them i. e., a monopoly in purchasing and selling them in such area or areas to which the Act is applied? It may be as stated in the State's counter-affidavit that the trade monopoly can be effectively implemented only if the movement of the leaves is checked and regulated by confining the right of free movement to the State and its agents and under permits to the manufacturers of bidis and the exporters and that if free movement were allowed there would be loopholes which would suffer illegitimate acquisitions and sales in leaves smuggled through the areas where they grow raising also difficulties in checking the stocks legitimately purchased from Government. If a person were to purchase a quantity of leaves and is allowed to move it freely from the unit where it is purchased to his warehouse outside that unit and from there to other points, it might be easy for such a purchaser to effect illegitimate sales and purchases and yet show at the same time the correct stock when checked by the authorities. It may also be that without the restrictions of movement it would become difficult, if not impossible, to identify the stock of a manufacturer or an exporter when checked in his warehouse as the one which he had purchased from Government. All this may be true, but is the prohibition or regulation of transport an integral or essential part of the monopoly without which the monopoly which the Act seeks to create cannot come into being?

10. The long title of the Act recites that the Act was enacted for regulating "the trade in tendu leaves" by creating a State monopoly in such trade. Trade in tendu leaves would consist of dealing in those leaves, i. e., their purchase and sale. Transport of the leaves once purchased or sold would not *prima facie* be an organic or integral part of dealing in those leaves. It is something extraneous to dealing in those leaves, something which takes place after the purchase or the sale thereof is completed and property in them has passed from the dealer to the purchaser and therefore does not form part of the trade in that commodity. That being so the restrictions on their transport contained in Section 5 cannot be held to be the integral part of the trade monopoly but as ancillary or incidental thereto, made for its effective enforcement. If that be so, it affects the right of the purchaser under Art. 19 (1) (f) to hold and to dispose of the goods he has acquired, a right which is not correlated, as the right under Clause (g) is, with the monopoly which the section seeks to create. It follows, therefore, that such a provision would have to pass the test of reasonableness under Cl. (5) and the first part of Clause (6) of Art. 19. That would also be the position in respect of Article 304 (b). But since the requirement of these provisions is the same the yardstick of reasonableness would be common to all these cases. It is well recognised that when an enactment is found to infringe any of the fundamental rights guaranteed under Article 19 (1), it must be held to be invalid unless those who support it can bring it under the protective provisions of Clause (5) or Clause (6) of that Article. To do so, the burden is on those who seek that protection and not on the citizen to show that the restrictive enactment is invalid. [cf. *Saghir Ahmad v. State of U. P.*, 1955-1 SCR 707=(AIR 1954 SC 728) and *Khyerbari Tea Co. Ltd. v. State of Assam*, 1964-5 SCR 975 at p. 1003 = (AIR 1964 SC 925 at pp. 938 939)].

11. That leads us to the next question as to the scope of the embargo on movement imposed by Section 5. If read literally, sub-section (1) places a total ban on any and every person against transporting the leaves, except those only mentioned in Clauses (a), (b) and (c) therein. Sub-sec. (2) also if read literally, would mean that an exception is made only in the case of (a) a grower who can move

his leaves freely but within the unit where they have grown, and (b) a purchaser who has purchased the leaves for manufacturing bidis within the State or for their export outside the State, but under a permit and in accordance with its terms and conditions. Section 5 read thus, therefore, would mean that except for these two categories of persons, no one can apply for a permit to move the leaves from one place to another as if the legislature intended that the leaves must remain where they are when purchased. Does it mean that a person who purchases these leaves for purposes other than manufacture of bidis or export cannot move them even from the unit where he has purchased to his place of residence or business? That would appear to be so because the provisions for a permit apply only to the manufacturer of bidis and the exporter and to no other purchaser. That manifestly could not have been the intention of the legislature, for, the leaves being perishable, they are liable to get destroyed if their movement is totally forbidden. Quite apart from this consideration, a mere literary or mechanical construction would not be appropriate where important questions such as the impact of an exercise of a legislative power on constitutional provisions and safeguards thereunder are concerned. In cases of such a kind, two rules of construction have to be kept in mind: (1) that courts generally lean towards the constitutionality of a legislative measure impugned before them upon the presumption that a legislature would not deliberately flout a constitutional safeguard or right, and (2) that while construing such an enactment the court must examine the object and the purpose of the impugned Act, the mischief it seeks to prevent and ascertain from such factors its true scope and meaning. The object of the Act clearly was to regulate trade in tendu leaves in the public interest and for that end to create a State monopoly so that the purchasers of these leaves may not exploit the need and the poverty of small growers and pay the least possible price. The legislature thought that it was in the public interest to entrust the entire trade to the State who would fix reasonable prices in consultation with an advisory committee and make at the same time compulsory for the State to purchase the entire stock which the growers would offer for sale at those prices. Considering the object of the Act, it cannot be conceived that upon the assumption that such a monopoly

was in the public interest the exclusive right of the State to purchase and sell these leaves is unreasonable. But the question as regards their transport is far from easy of solution. It may be that free movement of leaves even after they are sold to merchants would create difficulties in effectively implementing the intended monopoly in their trade or that such free movement would make checking of illegitimate transactions in the leaves difficult. But then it is difficult to conceive of a monopoly in this particular commodity, as in others without any likely loopholes whatsoever. Can the State, therefore, to plug all such loopholes pass a measure which, according to the appellants, imposes unreasonable restrictions and which results in stultifying their business? There is a strong school of thought which believes that monistic tendencies in economics spell stagnation and that pluralism is as much desirable in economics as in politics and other fields of life. That may or may not be correct, but take the present case as an illustration. According to the appellants, they manufacture as many as $1\frac{1}{2}$ crores of bidis a day. They have established a net-work of branches in several areas of the State. Wherever they purchase the leaves they have to be moved to their warehouses outside and from there to their branches and then to the sattedars who undertake to have bidis rolled through mazdoors to whom they in turn distribute tobacco and these leaves supplied to them by the appellants. Even according to the Divisional Forest Officer there were as many as 6 or 7 thousand sattedars in Saugor district alone with whom manufacturers of bidis had contracts as mentioned above. The number of mazdoors whom these sattedars employ for rolling bidis would certainly be considerable. We were told that practically every household in villages scattered from one another engages itself in bidi-rolling labour. It is also conceivable that in some of the households, not only the adults but the minors also would be engaged in this work. If the movement of leaves from stage to stage were to be so regulated as to require permits at each stage it is not difficult to imagine that considerable inconvenience to all engaged in the business of manufacturing bidis would inevitably ensue. The correspondence on record shows that at one time even the Divisional Forest Officer was of the view that it would be impossible for the staff

under him to cope with the work of issuing permits at each stage of the movement of the leaves and therefore permitted the branch managers of the appellants to issue permits when leaves were moved from their branches to the sattedars. That relaxation was, however, cancelled as in his view the branch managers began to move the leaves in bulk contrary to his intention in granting that relaxation.

12. In spite however, of the inconvenience which such a system might result in, there can, at the same time be little doubt, and even Mr. Sen agreed, that some kind of check on movement is necessary, for, without it the monopoly created by the Act would not effectively function. In our view a permit system which regulates the movement of leaves purchased by a manufacturer of bidis from the unit where they are purchased to his warehouse, then to the branches and to the sattedars cannot upto that stage be regarded as unreasonable in the light of the object of the Act, the economic conditions prevailing in the State and the mischief which it seeks to cure. At the same time to expect the manufacturer to get permits issued to his sattedars for distribution by them to the innumerable mazdoors of comparatively small quantities of these leaves would be not only unreasonable but frustrating. The various checks imposed under the rules on the manufacturer by way of his having to maintain stock registers, submit periodical returns, the right of inspection of the authorities etc. are sufficient to reasonably check transactions contrary to the Act. But, considering the extraordinary inconvenience which would be caused to the manufacturer and balancing that with the mischief feared by the State, we think that when Section 5 was enacted the legislature could not have intended that the manufacturer should also obtain permits in respect of the leaves distributed to the vast number of mazdoors for rolling the bidis by the sattedars who are themselves considerable in number. Though, therefore, Section 5 is couched in apparently wide language, the very object of the Act, as disclosed in its long title, contains inherent limitations against an absolute or as strictly regulated a ban as it would at first reading of the section appear.

13. In our view reading Section 5 (2) along with R. 9 of the said rules, what they are intended to require is that a manufacturer must have a permit to move the leaves purchased by him from the unit

or units where he has purchased them to his warehouse outside and from there to his branches and also when he transports them to his sattedars. But, no such permit was intended to be necessary when the leaves are distributed for the manufacture of bidis by these sattedars to the mazdoors whom he employs. A construction so limited in its sweep is commendable as it is consistent with the object of the Act and is also in harmony with Cls. (5) and (6) of Art. 19 and Cl. (b) of Art. 304. Regarding the ban against movement of old leaves contained in the order dated June 4, 1965, there can be no difficulty as it is conceded that old leaves in the context mean those which were in stock when these rules came into force and not the balance of leaves left unconsumed from year to year. So construed, the restrictions against free transport cannot be held to be unreasonable and the validity of Section 5 and rule 9 as also the order of June 4, 1965, except to the extent of its requiring a permit for distribution to the mazdoors, cannot be successfully challenged. So far as the order dated October 12, 1965 is concerned, it was a mere cancellation of a concession and such cancellation cannot be challenged as a restriction, much less as an unreasonable restriction.

14. In the result, subject to the observations hereinabove made, the appeal is dismissed, but in the circumstances of the case we make no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 137
(V 57 C 31)

(From Punjab)*

J. C. SHAH AND C. A.
VAIDIALINGAM, JJ.

Yuvraj Digvijay Singh, Appellant v.
Yuvrani Pratap Kumari, Respondent.

Civil Appeal No. 905 of 1968, D/- 2-5-1969.

(A) Hindu Marriage Act (1955), Section 12 (1) (a) — Petitioner must prove that mental or physical condition of respondent from time of marriage till institution of proceedings was such as to make consummation of marriage a practical impossibility.

* (F. A. O. No. 182-D of 1961, D/- 25-8-1966—Punj at Delhi.)

A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. In order to entitle a petitioner under Sec. 12 (1) (a) Hindu Marriage Act, 1955 to obtain a decree of nullity, he will have to establish that his wife, the respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings. (Para 5)

(B) Constitution of India, Article 136 — Concurrent findings of fact based on proper consideration of entire evidence — No interference by Supreme Court — Finding by two lower courts that, petitioner's case about respondent's impotency could not be believed and that respondent's evidence that she had always been ready and willing to allow her husband to consummate marriage should be believed — Supreme Court refused to interfere and annul the marriage under Section 12 (1) (a) Hindu Marriage Act — AIR 1958 SC 441 and (1924) AC 349 and (1912) P 173, Disting. — (Hindu Marriage Act (1955), Section 12 (1) (a).) (Para 9)

Cases Referred: Chronological Paras
(1958) AIR 1958 SC 441 (V 45) =
1958 SCR 1410, Earnest John
White v. Kathleen Olive White 10
(1924) 1924 AC 349 = 131 LT 70,
G v. G 13
(1912) 1912 P 173 = 81 LJP 90,
G v. G 14

M/s. I. N. Shroff and Anand Prakash, Advocates, for Appellant; Mr. S. T. Desai, Senior Advocate, (M/s. I. M. Lall, S. R. Agarwal, Champat Rai, Sampat and E. C. Agarwal, Advocates with him), for Respondent.

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: This appeal, by special leave, is directed against the judgment dated August 25, 1966 of the Circuit Bench of the High Court of Punjab at New Delhi, confirming the judgment of the District Judge, Delhi, dismissing the petition filed by the appellant under Section 12 of the Hindu Marriage Act, 1955 (Act XXV of 1955) (hereinafter called the Act.)

2. At the conclusion of the hearing of this appeal on April 28, 1969 we had indicated our conclusion that no interference with the judgment of the High Court was called for and that the appeal is dismissed without any order as to costs. The detailed reasons for our decision were to be given later. Accordingly we

hereby give our reasons for coming to the said conclusion.

3. The appellant had married the respondent according to Hindu rites on April 20, 1955. After the marriage the parties lived together for about three years at various places such as Delhi, Alwar, Bombay and Europe and, according to the appellant, during this period the marriage was not consummated. The appellant filed an application before the District Judge at Delhi, on March 15, 1960 under Section 12 of the Act praying that the marriage between himself and his wife, the respondent, being voidable, may be annulled by a decree of nullity. In brief, the case of the appellant was that since his marriage he had made frequent attempts to consummate it, but, due to an invincible and persistent repugnance on the part of the respondent to the act of consummation, he had failed to achieve it and, as such, the marriage had remained unconsummated. He further averred that his wife, the respondent, was impotent at the time of the marriage and continued to be so until the filing of his petition. According to him the impotency of the respondent was responsible for the non-consummation of the marriage.

4. The respondent-wife contested the application on various grounds. She emphatically denied that she had shown any repugnance whatsoever to the act of consummation of marriage. She further stated that she had lived with the appellant for about three years and had also accompanied him on his visit to England and the Continent and, during that period she was always ready and prepared to give full access to the petitioner to her person for consummating the marriage. She specifically averred that the consummation could not take place because the appellant was suffering from some physical disability or impotency and that he never made any attempt at consummation. She repudiated the allegation that she was either impotent at the time of the marriage or that she was impotent at the time of the institution of the proceedings. She reiterated that the appellant was physically and emotionally unable to consummate the marriage and he had made a false excuse of impotency of the wife as being the cause for non-consummation of the marriage. She further stated that the appellant was physically and sexually impotent and, consequently, unable to perform the normal sexual functions and, in view of this, he had never

expressed his willingness, by his conduct or behaviour, to consummate the marriage even though the parties lived together for a number of years and had occupied the same bed in the same room.

5. It will therefore be seen that while the appellant filed the application on the ground that the respondent was impotent, the respondent, in turn, had alleged that it was the appellant who was impotent. The material provision of the Act under which the application was filed by the appellant is Section 12 (1) (a) which is as follows:

"12 (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:—

(a) that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding:

* * * *

A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree of nullity, as prayed for by him, he will have to establish that his wife, the respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings.

6. Both the appellant and the respondent have been examined by doctors and their oral evidence and reports are on record. Though the impotency of the appellant does not strictly arise for consideration in a petition filed by him, nevertheless the trial Court framed issues even in that regard. Issues Nos. 1 and 2, which are material, are as follows:

"1. Whether the respondent was impotent at the time of the marriage and has continued to be so till the filing of the present petition?

2. Is the petitioner impotent and consequently unable to perform the normal sexual function with the respondent? If so, what is the effect thereof?"

The learned District Judge, after a consideration of the evidence on record, ultimately held that the appellant had failed to prove that the respondent was at any time impotent and, as such, decided issue no. 1 against the appellant. He fur-

ther held, on issue no. 2 that the facts of the case, on the contrary, showed that because of some physical or psychological cause, it was the appellant who was not able to consummate the marriage with the respondent. In this view the petition filed by the husband appellant was dismissed.

7. On appeal by the appellant, the learned Judges of the Circuit Bench of the Punjab High Court differed from the finding of the trial Court on issue no. 2. The learned Judges however held that it had not been proved that the appellant was impotent, but, on the material issue regarding the impotency of the respondent-wife the learned Judges were of the view that there were various factors and circumstances throwing a serious doubt on the allegation made by the appellant. The High Court held that it had not been established by the appellant that non-consummation of the marriage was due to the impotency of the respondent. It further held that on the state of evidence it did not believe that the respondent-wife had been proved to be impotent. The High Court also declined to believe the case of the appellant that the respondent had persisted in her attitude of exhibiting repulsion to the sexual act.

8. It is not really necessary for us to deal elaborately with the evidence in the case on the basis of which concurrent findings have been recorded by the District Court and the High Court, rejecting the case of the appellant that his wife the respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings.

9. Mr. Shroff, learned counsel for the appellant, found considerable difficulty in satisfying us that the finding recorded by the two Courts on this aspect was erroneous or not supported by the evidence. No doubt, there was a feeble attempt made by the learned counsel to urge that the evidence of the respondent that she had always been ready and willing to allow her husband to consummate the marriage should not be believed. When the two Courts have accepted her evidence, it is futile on the part of the appellant to urge this contention.

10. The reliance placed by Mr. Shroff on the decision of this Court in *Earnest John White v. Kathleen Olive White*, 1958 SCR 1410 = (AIR 1958 SC 441) is misplaced. In that decision, it has been laid down that though it is not usual for

this Court to interfere on questions of fact, nevertheless, if the Courts below ignore or mis-construe important pieces of evidence in arriving at their finding, such finding is liable to be interfered with by this Court. We are satisfied that the Courts below, in the instant case, have neither ignored nor mis-construed important pieces of evidence when they came to the conclusion that the appellant's case, regarding the impotency of the respondent, could not be believed.

11. On the findings that both the appellant and the respondent were not impotent and the marriage had not been admittedly consummated, counsel urged that the conclusion to be drawn was that such consummation was not possible because of an invincible repugnance on the part of the wife. Counsel further urged that taking into account the practical impossibility of consummation, the application filed by the appellant should be allowed.

12. So far as the charge of 'invincible repugnance to the sexual act' on the part of the respondent is concerned, it is only necessary to refer to the finding of the High Court that the allegation had not been proved but that, on the other hand, lack of proper approach by the appellant for consummating the marriage might have been responsible for non-consummation. It is the further view of the High Court that the evidence of the appellant that he went on making attempts on several occasions for consummation of the marriage cannot be believed.

13. Mr. Shroff referred us to the decision of the House of Lords in *G. v. G.*, 1924 AC 349. That was an action by a husband against his wife for a decree of nullity of marriage on the ground of impotency. It was established that the husband was potent and had made frequent attempts to consummate the marriage but he could not succeed in owing to the unreasoning resistance of the wife. The wife was declared, on medical examination, not to suffer from any structural incapacity. Under those circumstances the House of Lords held that the conclusion to be drawn from the evidence was that the wife's refusal was due to an invincible repugnance to the act of consummation and, as such, the husband was entitled to a decree of nullity. This decision does not assist the appellant, as we have already referred to the finding of the High Court disbelieving the evidence of the appellant on this aspect.

14. Mr. Shroff next relied on the decision in *G. v. G.*, 1912 P 173 holding that a Court would be justified in annulling a marriage if it was found that the marriage had not been and could not be consummated by the parties thereto, though no reason for non-consummation was manifest or apparent. In that decision both the husband and the wife were perfectly normal and each charged the other as being responsible for non-consummation of the marriage. The Court held that without going into the question as to who was the guilty party, it was evident that the marriage had not been consummated and could not be consummated in future also. Accordingly the Court annulled the marriage for the reason that it was satisfied that — “quoad hunc et quoad hunc, these people cannot consummate the marriage.”

The Court further held that the two people should not be tied up together for the rest of their lives in a state of misery. The position in the case before us is entirely different. Neither of the two Courts have found that the marriage cannot be consummated in future and they have not also accepted the appellant's plea that the respondent had always resisted his attempts to consummate the marriage.

15. When once the finding has been arrived at that the appellant has not established that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding, the inevitable result is the dismissal of the appellant's application under Section 12 (1) (a) of the Act. The result is that the appeal fails and is dismissed. There will be no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 140
(V 57 C 32)

(From Allahabad)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Sub-Divisional Officer, Sadar, Faizabad,
Appellant v. Shambhoo Narain Singh,
Respondent.

Civil Appeal No. 721 of 1966, D/- 31-3-1969.

*(Spl. Appeal No. 93 of 1963, D/- 9-12-1964—All-LB.)

KM/KM/B813/69/BNP/D

Panchayats — U. P. Panchayat Raj Act (26 of 1947), Section 95 (1) (g) — Power to punish under — Enquiry into charges levelled against Officer of Gaon Sabha pending — Suspension of Officer in exercise of power — Suspension is without jurisdiction.

The State Government has no power to suspend a Pradhan of a Gaon Sabha pending enquiry into charges levelled against him. It is true that under Section 95 (1) (g), power is conferred on the Government to suspend or remove a member of a Gaon Panchayat or joint committee Bhumi Prabandhak Samiti or an office-bearer of a Gaon Sabha or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if the conditions mentioned therein are satisfied. But that power is admittedly a power to punish. No specific power to suspend a Pradhan pending enquiry into the charges levelled against him has been conferred on the State Government. (Para 4)

A Pradhan cannot be considered as a servant of the Government. He is an elected representative. There is no contractual relationship between him and the Government much less the relationship of master and servant. His rights and duties are those laid down in the Act. That being so the State Government can have no competence to require Pradhans not to discharge their functions as Pradhans during the pendency of an enquiry into the charges made against them. AIR 1959 SC 1342 and AIR 1961 SC 276 and AIR 1964 SC 787 and AIR 1968 SC 800, Distinguished; AIR 1952 SC 362, Ref.

(Paras 5, 6)

It is well recognised that where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means as are essentially necessary to its execution. But before implying the existence of such a power the court must be satisfied that the existence of that power is absolutely essential for the discharge of the power conferred and not merely that it is convenient to have such a power. The power to place under suspension an officer is not absolutely essential for the proper exercise of the power conferred under Section 95 (1) (g). The mere possibility of interference with the course of enquiry or of further misuse of powers are not sufficient to enlarge the scope of a statutory power. AIR 1968 All 158, Approved. (Paras 8, 10)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 800 (V 55) =
1968-2 SCR 577, Balwant Rai Rati-
lal Patel v. State of Maharashtra 5
- (1966) AIR 1966 All 158 (V 53) =
1965 All LJ 663, Babu Nandan v.
Sub Divisional Officer, Salempur 10
- (1964) AIR 1964 SC 787 (V 51) =
1964-5 SCR 431, R. P. Kapur v.
Union of India 5
- (1961) AIR 1961 SC 276 (V 48) =
1961-1 SCR 750, T. Cajee v. U.
Jormonik Siem 5
- (1959) AIR 1959 SC 1342 (V 46) =
1960-1 SCR 476, Management of
Hotel Imperial, New Delhi v. Hotel
Workers' Union 5
- (1952) AIR 1952 SC 362 (V 39) =
1952 SCR 1122, Sm. Hira Devi v.
District Board, Shahjahanpur 6
- Mr. C. B. Agarwala, Senior Advocate
(Mr. O. P. Rana, Advocate with him), for
Appellant; M/s. S. C. Agarwal, R. K. Garg
and D. P. Singh, Advocates of M/s.
Ramamurti and Co. and Miss S. Chakra-
varty, Advocate, for Respondent.

The following Judgment of the Court
was delivered by

HEGDE, J.: In this appeal by special
leave, the scope of Section 95 (1) (g) of
the U. P. Panchayat Raj Act, 1947 (to be
hereinafter referred to as the Act) arises
for decision.

2. The facts material for the purpose
of deciding this appeal are these: The
respondent was the elected Pradhan of
the Goan Sabha of Asapur District Faiza-
bad. The Sub-Divisional Officer, Sadar,
Faizabad placed him under suspension
as per his order of September 18, 1963.
The order in question reads as follows:

"Sri Shambhoo Narain Singh, Pradhan of
Gram Sabha and Chairman, Land
Management Committee of village Asa-
pur is placed under suspension with effect
from the immediate date. He is further
directed to hand over the charge to the
Up-Pradhan of Gram Sabha, Asapur. The
Up-Pradhan will function as Pradhan till
further orders. The charge sheet against
Sri Shambhoo Narain Singh will follow.

(Sd.) S. M. Abbas,
P.C.S.,

Sub-Divisional Officer, Sadar,
Faizabad."

3. The validity of this order is being
challenged in these proceedings. It is the
common case of both the parties that the
suspension ordered thereunder is merely
a suspension pending enquiry and is not
a punishment imposed under S. 95 (1) (g).

The question for decision is whether the
appellant had the competence to place
the respondent under suspension pending
enquiry into the charges levelled against
the respondent. The impugned order
was challenged before a single judge of
the Allahabad High Court by means of
a petition under Article 226 of the Con-
stitution. The learned single judge dis-
missed that petition but in appeal the
appellate bench upheld the contention of
the respondent and quashed the same
holding that Section 95 (1) (g) did not em-
power the appellant to pass the impugned
order. It is the correctness of that con-
clusion that is in issue in this appeal.

4. *To repeat the respondent is an*
elected Pradhan. His rights and duties
are regulated by the Act. He is not a
Government servant though he has to be
deemed as a public servant within the
meaning of Section 21 of the Indian Penal
Code in view of Section 28 of the Act.
He is not a subordinate of the Sub-Divi-
sional Officer or even of the Government.
It is true that the Act has conferred on
the State Government certain powers of
control and supervision over the Gaon
Sabhas and its office-bearers. These
powers are enumerated in Section 95.
Under Section 95 (1) (g) power is con-
ferred on the Government to suspend or
remove a member of a Gaon Panchayat
or joint committee (Bhumi Prabandhak
Samiti) or an office-bearer of a Gaon Sabha
or a Panch, Sahayak Sarpanch or Sar-
panch of a Nyaya Panchayat if the condi-
tions mentioned therein are satisfied. But
that power is admittedly a power to
punish. No specific power to suspend a
Pradhan pending enquiry into the charges
levelled against him has been conferred
on the State Government. This much is
conceded. In view of Section 96A the
power conferred on the Government
under Section 95 can be delegated to any
officer or authority subordinate to it sub-
ject to such conditions and restrictions as
the Government may deem fit to impose.
The State Government's power under Sec-
tion 95 (1) (g) has been delegated to Sub-
Divisional Officers. Therefore if the State
Government is held to have power to
suspend an office-bearer of a Gaon Sabha
pending enquiry into the charges levelled
against him that power must be held to
have been delegated to the Sub-Divisional
Officers. Therefore the essential question
is whether the State Government has
power to make the impugned order.

5. *A faint attempt was made to show*
that the relationship between the State

Government and the Pradhans is that of master and servants and that being so the State Government has competence to require Pradhans not to discharge their functions as Pradhans during the pendency of an enquiry into the charges made against them. It was urged that if the court is pleased to hold that the relationship between the State Government and the Pradhans is that of a master and the servants then the appellant could call into aid the rule laid down by this Court in *Management of Hotel Imperial, New Delhi v. Hotel Workers' Union*, (1960) 1 SCR 476 = (AIR 1959 SC 1342); *T. Cajee v. U. Jormonik Siem*, 1961-1 SCR 750 = (AIR 1961 SC 276); *R. P. Kapur v. Union of India*, 1964-5 SCR 431 = (AIR 1964 SC 787) and *Balwant Rai Rati-lal Patel v. State of Maharashtra*, 1968-2 SCR 577 = (AIR 1968 SC 800). This is a wholly untenable contention. A Pradhan cannot be considered as a servant of the Government. He is an elected representative. There is no contractual relationship between him and the Government much less the relationship of master and servant. As mentioned earlier his rights and duties are those laid down in the Act. Therefore the rule laid down in the above cited decisions is wholly inapplicable to the facts of this case. In this case there is no question of suspending a servant from performing the duties of his office even though the contract of service is subsisting. In the case of a master and his servant it is a well established right of the master to give directions to his servant relating to his duties. That power includes within itself the right to direct the servant to refrain from performing his duties but that does not absolve the liability of the master to pay the remuneration contracted to be paid to the servant unless otherwise provided in the contract, even during the period the servant is required not to perform his duties.

6. The Gaon Sabha is the creature of a statute. Its powers and duties as well as the powers and duties of its officers are all regulated by the Act. Hence no question of any inherent power arises for consideration—see *Sm. Hira Devi v. District Board, Shahjahanpur*, (1952) SCR 1122 = (AIR 1952 SC 362).

7. The only other contention advanced is that power claimed should be held to be an essential power for the proper discharge of the conferred power. It was urged that without such a power, charges

framed against any office-bearer cannot be properly inquired into as he may utilise his office to interfere with the course of enquiry and the possibility of his continuing to misuse his office during the pendency of the enquiry cannot be ruled out.

8. It is well recognised that where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means as are essentially necessary to its execution. But before implying the existence of such a power the court must be satisfied that the existence of that power is absolutely essential for the discharge of the power conferred and not merely that it is convenient to have such a power. We are not satisfied that the power to place under suspension an officer is absolutely essential for the proper exercise of the power conferred under Section 95 (1) (g). It cannot be said that the power in question cannot be properly exercised without the power to suspend pending enquiry. The mere possibility of interference with the course of enquiry or of further misuse of powers are not sufficient to enlarge the scope of a statutory power. If it is otherwise the mere power to punish an offender would have been held sufficient to arrest and detain him pending enquiry and trial. There would have been no need to confer specific power to arrest and detain persons charged with offences before their conviction.

9. The unsustainability of the contention of the appellant would become obvious on an examination of the various provisions of the Act. Under the impugned order, the appellant had directed the Up-Pradhan to officiate as Pradhan during the suspension of the respondent. Our attention has not been invited to any provision either in the Act or in the rules framed thereunder under which the appellant could have made such an order. If he could not have made that order, as in our opinion he could not have, then the question arises as to who could discharge the functions of a Pradhan when he is placed under suspension pending enquiry of the charges levelled against him. Absence of a provision providing for such a contingency is a clear indication of the absence of the power contended for.

10. For the reasons mentioned above, we agree with the Appellate Bench of the High Court that the impugned order was made without the authority of law. That is also the view taken by the Allahabad High Court in *Babu Nandan v. Sub-Divisional Officer, Salempur*, AIR 1966 All

158. We accordingly dismiss this appeal with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 143
(V 57 C 33)

(From Gujarat)*.

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Takhetray Shivdattray Mankad, Appellant v. State of Gujarat, Respondent.

Civil Appeal No. 409 of 1966, D/- 9-4-1969.

Civil Services — Saurashtra Covenanted State Services (Superannuation Age) Rules (1955), Rule 3 (i) — Bombay Civil Service Rules (1959), Rule 161 (c) (2) (ii) (1) — Public servant governed by Saurashtra Rules (1955) — His compulsory retirement under Bombay Rules before attaining age of 55 years, after States reorganisation — Not valid — Spl. Civil Appln. No. 827 of 1961, D/- 11-7-1963 (Guj), Reversed — Such retirement amounts to removal — Article 311 (2) applies — (Constitution of India, Articles 309, 311 (2)) — (States Reorganisation Act (1956), Sec. 115 (7) Proviso) — (Civil P. C. (1908), Preamble — Interpretation of Statutes).

A Government servant, whose retirement was governed by Rule 3 (i) of the Saurashtra Covenanted State Services (Superannuation Age) Rules (1955), could not, on reorganisation of the States, be compulsorily retired before reaching the age of 55 years, under Rule 161 of the Bombay Civil Service Rules (1959). Compulsory retirement of such servant under Rule 161 of the Bombay Rules (1959) amounted to variation of service condition to his disadvantage which could not be allowed under the proviso to S. 115 (7) of the States Reorganisation Act (1956). Spl. Civil Appln. No. 827 of 1961, D/- 11-7-1963 (Guj), Reversed. (Para 7)

Rule 3 (i) of the Saurashtra Rules (1955) does not give power to the Government to retire a servant compulsorily before he reaches the age of 55 years. As there is no minimum period of service fixed after which a servant can be compulsorily retired, retirement of a servant under Rule 3 (i) of Saurashtra Rules (1955) be-

*(Spl. Civil Appln. No. 827 of 1961, D/- 11-7-1963—Guj.)

fore attaining 55 years of age would tantamount to dismissal or removal under Article 311 (2) of the Constitution. For efficient administration it is necessary that public servants should enjoy a sense of security of tenure and that the termination of service of a public servant under a rule which does not lay down a reasonably long period of qualified service is in substance removal under Art. 311 (2). The principle is that the rule relating to compulsory retirement of a Government servant must not only contain the outside limit of superannuation but there must also be a provision for a reasonably long period of qualified service which must be indicated with sufficient clarity. To give an example, if 55 years have been specified as the age of superannuation and if it is sought to retire the servant even before that period it should be provided in the rule that he could be retired after he has attained the age of 50 years or he has put in service for a period of 25 years. AIR 1964 SC 600 and AIR 1964 SC 1585, Foll. (Para 6)

Consequently, Rule 3 (i) of the Saurashtra Rules will have to be declared invalid if the expression "unless for special reasons otherwise directed by Government" is so construed as to give a power to order compulsory retirement even before attaining the age of 55 years. It is well known that a law or a statutory rule should be so interpreted as to make it valid and not invalid. If this expression is confined to the construction that it gives power to the Government to allow a Government servant to remain in service even beyond the age of 55 years for special reasons the rule will not be rendered invalid. (Para 7)

Cases Referred: Chronological Paras

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| (1964) AIR 1964 SC 600 (V 51) = | |
| 1964-5 SCR 683, Moti Ram Deka v. General Manager, N. E. F. Railways Maligaon Pandu | 6 |
| (1964) AIR 1964 SC 1585 (V 51) = | |
| 1964-7 SCR 587, Gurdev Singh Sidhu v. State of Punjab | 6 |
| (1960) AIR 1960 SC 1305 (V 47) = | |
| 1961-1 SCR 88, Dalip Singh v. State of Punjab | 6 |
| (1958) AIR 1958 SC 232 (V 45) = | |
| 1958 SCR 1052, P. Balakotaiah v. Union of India | 6 |
| (1957) AIR 1957 SC 892 (V 44) = | |
| 1958 SCR 571, State of Bombay v. Saubhagchand M. Doshi | 6 |
| (1954) AIR 1954 SC 680 (V 41) = | |
| 1955-1 Lab LJ (SC) 55, Bhola- | |

nath J. Thakur v. State of Saurashtra 3

Mr. R. Gopalakrishnan, Advocate, for Appellant; M/s. G. L. Sanghi, S. K. Dholakia and R. N. Sachthey, Advocates, for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave from a judgment of the Gujarat High Court dismissing a petition under Article 226 of the Constitution by which the order, retiring the appellant from service before he had attained the age of 55 years, had been challenged.

2. The appellant had joined the service of the erstwhile State of Junagadh on August 1, 1934. That State merged into the State of Saurashtra on January 20, 1949. The appellant continued to remain in the service of that State having been confirmed as an Executive Engineer on September 24, 1956. On the merger of Saurashtra in the new bilingual State of Bombay on November 1, 1956, the appellant was absorbed in the service of the said State. On the bifurcation of the State of Bombay on May 1, 1960, he was assigned to the State of Gujarat and was absorbed as a permanent Executive Engineer there. On October 12, 1961 the State of Gujarat made an order retiring the appellant from the service with effect from January 12, 1962. On that date he had not attained the age of 55 years but he was about 53 years old. This order was made in exercise of the powers conferred by Rule 161 of the Bombay Civil Service Rules 1959. The order of retirement was challenged by the appellant by means of a writ petition which was dismissed.

3. It is common ground that when the appellant was in the service of the erstwhile State of Junagadh his conditions of service were governed by the Junagadh State Pension and Parvashi Rules which had been made by the ruler of the State who exercised sovereign legislative powers. According to those rules the age of superannuation was 60 years. Before the inclusion of the Junagadh State in the State of Saurashtra the Rajpramukh had promulgated an Ordinance called the Saurashtra State Regulation of Government Ordinance 1948. By Section 4 of that Ordinance all the laws in force in the covenanting States prior to their integration were continued in force in the State of Saurashtra until repealed or amended under Section 5. Notwithstand-

ing this the Saurashtra Government adopted and applied the Bombay Civil Service Rules which were then in force in the State of Bombay by an order dated September 23, 1948. This court in *Bhola-nath J. Thakur v. State of Saurashtra*, AIR 1954 SC 680 held that the Rules as regards the age of superannuation which prevailed in the covenanting State which in that case was the State of Wadhwan continued to govern those government servants who had come from that State and had been absorbed in the services of the State of Saurashtra. In view of that decision the State of Saurashtra made the Saurashtra Covenanting State Services (Superannuation Age) Rules, 1955, hereinafter called the "Saurashtra Rules" in exercise of the power conferred by Article 309 of the Constitution. Rule 3 (i) provided;

"A Government servant shall, unless for special reasons otherwise directed by Government, retire from service on his completing 55 years of age."

4. After the integration of the Saurashtra State into the State of Bombay a resolution was passed by the Government on January 7, 1957 applying the old Bombay Civil Service Rules to Saurashtra area. On July 1, 1959 the Bombay Civil Service Rules 1959, hereinafter called the "Bombay Rules" were promulgated under Article 309 of the Constitution. Clause (c) (2) (ii) (1) of Rule 161 is as follows:

"Except as otherwise provided in this Sub-clause, Government servants in the Bombay Service of Engineers, Class I must retire on reaching the age of 55 years, and may be required by the Government to retire on reaching the age of 50 years, if they have attained to the rank of Superintending Engineer."

It was under this rule that the order retiring the appellant was made.

5. In the High Court the writ petition filed by the appellant was heard and disposed of with two other similar petitions in which identical questions had been raised. A number of points were raised in the High Court but it is unnecessary to refer to them because the questions on which the present appeal can be disposed of are only two: (1) Whether the appellant was governed by the Saurashtra Rules or the Bombay Rules and (2) even if the Saurashtra Rules were applicable could the retirement of the appellant be ordered before he had attained the age of 55 years. The High Court rightly looked at the provisions of Section 115 (7) of the States Reorganisation Act, 1956. It is provided thereby that nothing in the

section shall be deemed to effect after the appointed day the operation of the provisions of Chapter I of Part XIV of the Constitution in relation to the determination of the conditions of service of persons serving in connection with the affairs of the Union or any State. The proviso is important and lays down that the conditions of service applicable immediately before the appointed day to the case of any person referred to in sub-section (1) or sub-section (2) (of Sec. 115) shall not be varied to his disadvantage except with the previous approval of the Central Government. The case of the appellant fell within the proviso and it had, therefore, to be determined whether the conditions of service applicable to the appellant immediately before the appointed day which admittedly were contained in the Saurashtra Rules had been varied to his disadvantage, and if so, whether the approval of the Central Government had been obtained. It was conceded before the High Court by the learned Advocate General, who appeared for the State, that no previous approval of the Central Government had been obtained to vary the conditions of service of those public servants who were serving in the State of Saurashtra until November 1, 1956. The High Court in this situation proceeded to decide whether by the application of Rule 161 of the Bombay Rules the conditions of service of the appellant contained in the Saurashtra Rules had been varied to his disadvantage. It was argued on behalf of the appellant that the expression "unless for special reasons otherwise directed by Government" in Rule 3 (i) of the Saurashtra Rules provided for extension of the age of superannuation beyond 55 years and not for reduction thereof. The Advocate-General had argued that what was meant by the aforesaid words was that Government could for special reasons, retire a Government servant before he had attained the age of 55 years which was the normal superannuation age. If that was so Rule 161 (c) (2) (ii) (1) of the Bombay Rules could not be regarded as having varied the conditions of service contained in the Saurashtra Rules to the disadvantage of the Government servants. The High Court was of the view that while framing the Saurashtra Rules the draftsmen who must have been well aware of the then Bombay Civil Service Rules which were in the same terms as R. 161 of the Bombay Rules could not have framed the clause in such manner as to

introduce an element of discrimination between Executive Engineers who had been absorbed from a Covenanting State and those who had been appointed or recruited directly by the State Government. In the opinion of the High Court even under the Saurashtra Rules retirement could be ordered before a person had attained the age of 55 years. It was, therefore, held that the conditions in Rule 161 (c) (2) (ii) of the Bombay Rules had not been shown to be less advantageous or disadvantageous to the appellant than the conditions in Rule 3 (i) of the Saurashtra Rules by which the appellant was governed until November 1, 1956. In this manner the proviso to Section 115 (7) of the States Reorganisation Act 1956 did not stand in the way of the applicability of the Bombay Rules.

6. We find it difficult to concur with the view of the High Court. Rule 3 (i) of the Saurashtra Rules, if construed or interpreted in the manner in which it has been done by the High Court, would bring it into direct conflict with the law laid down by this Court in *Moti Ram Deka v. General Manager, N. E. F. Railways Maligaon, Pandu*, 1964 (5) SCR 683=(AIR 1964 SC 600), which is a judgment of a bench of seven judges of this Court. One of the matters which came up for consideration was the effect of a service rule which permitted compulsory retirement without fixing the minimum period of service after which the rule could be invoked. According to the observations of Venkatarama Ayyar, J., in *State of Bombay v. Saubhagchand M. Doshi*, 1958 SCR 571=(AIR 1957 SC 892) the application of such a rule would be tantamount to dismissal or removal under Article 311 (2) of the Constitution. There were certain other decisions of this Court which were relevant on this point, viz., *P. Balakotaiah v. Union of India*, 1958 SCR 1052=(AIR 1958 SC 232) and *Dalip Singh v. State of Punjab*, 1961-1 SCR 88=(AIR 1960 SC 1305). All these decisions were considered in *Moti Ram Deka's case*, 1964-5 SCR 683=(AIR 1964 SC 600) and the true legal position was stated in the majority judgment at p. 726 (of SCR)=(at p. 617 of AIR) thus:

"..... We think that if any Rule permits the appropriate authority to retire compulsorily a civil servant without imposing a limitation in that behalf that such civil servant should have put in a minimum period of service, that Rule would be invalid and the so-called re-

retirement ordered under the said Rule would amount to removal of the civil servant within the meaning of Article 311 (2)."

In *Gurdev Sing Sidhu v. State of Punjab*, 1964-7 SCR 587=(AIR 1964 SC 1585), it was pointed out that the only two exceptions to the protection afforded by Article 311 (2) were,—(1) where a permanent public servant was asked to retire on the ground that he had reached the age of superannuation which was reasonably fixed (2) that he was compulsorily retired under the Rules which prescribed the normal age of superannuation and provided a reasonably long period of qualified service after which alone compulsory retirement could be valid. The basis on which this view has proceeded is that for efficient administration it is necessary that public servants should enjoy a sense of security of tenure and that the termination of service of a public servant under a rule which does not lay down a reasonably long period of qualified service is in substance removal under Article 311 (2). The principle is that the rule relating to compulsory retirement of a Government servant must not only contain the outside limit of superannuation but there must also be a provision for a reasonably long period of qualified service which must be indicated with sufficient clarity. To give an example, if 55 years have been specified as the age of superannuation and if it is sought to retire the servant even before that period it should be provided in the rule that he could be retired after he has attained the age of 50 years or he has put in service for a period of 25 years.

7. Now Rule 3 (i) of the Saurashtra Rules will have to be declared invalid if the expression "unless for special reasons otherwise directed by Government" is so construed as to give a power to order compulsory retirement even before attaining the age of 55 years. It is well known that a law or a statutory rule should be so interpreted as to make it valid and not invalid. If this expression is confined to what was argued before the High Court, namely, that it gives power to the Government to allow a Government servant to remain in service even beyond the age of 55 years for special reasons the rule will not be rendered invalid and its validity will not be put in jeopardy. So construed it is apparent that the appellant could not have been retired compulsorily under the Saurashtra Rules before he had attained

the age of 55 years. By applying the Bombay rule his conditions of service were varied to his disadvantage because he could then be compulsorily retired as soon as he attained the age of 50 years. As the previous approval of the Central Government was not obtained in accordance with the proviso to Section 115 (7) of the States Reorganisation Act 1956, the Bombay rule could not be made applicable to the appellant.

8. Counsel for the State pressed us to look into certain documents for the purpose of finding out whether prior approval of the Central Government was obtained in the matter of varying the conditions of service of the appellant by applying the Bombay rules. But none of these documents were referred to before the High Court and in the presence of a clear concession by the learned Advocate General we see no justification for acceding to such a request.

9. In this view of the matter this appeal must succeed and it is hereby allowed with costs in this Court. It is declared that the appellant was entitled to remain in service until he attained the age of 55 years and that the impugned order directing his retirement was invalid and ineffective.

Appeal allowed.

AIR 1970 SUPREME COURT 146 (V 57 C 34)

(From Madras: (1964) 2 Mad LJ 206)

S. M. SIKRI, R. S. BACHAWAT AND
V. RAMASWAMI, JJ.

K. R. Chinna Krishna Chettiar, Appellant v. Sri Ambal & Co., and another, Respondents.

Civil Appeal No. 749 of 1966, D/- 14-4-1969.

(A) Trade and Merchandise Marks Act (1958), S. 12 (1) — Registration of trade mark — Likelihood of deception with existing trade mark — Criteria to decide — Striking phonetic resemblance between distinctive words of existing and proposed trade marks — Proposed trade mark cannot be registered.

Whether, if the proposed trade mark is used in a normal and fair manner and if similarly fair and normal user is assumed of the existing registered marks, will there be such a likelihood of deception that the proposed mark ought not to be allowed to

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be registered is a question which has to be decided on a comparison of the competing marks as a whole and their distinctive and essential features. (1950) 67 R. P. C. 209, Ref. to. (Para 9)

Where a dealer sells snuff under a registered trade-mark and the word "Ambal" is the distinctive and essential feature of that trade-mark and that word fixes itself in the recollection of an average buyer with imperfect recollection, another dealer also dealing in snuff cannot be allowed to get the trade mark registered, of which the word "Andal" is a distinguishing feature, as there is a striking similarity and affinity of sound between the words "Ambal" and "Andal". (Para 9)

The resemblance between the two marks must be considered with reference to the ear as well as the eye and ocular comparison is not always the decisive test. Therefore, even if there be no visual resemblance between the two marks, that does not matter when there is a close affinity of sound between the words which are distinctive features of the two marks. (1942) 59 RPC 127 & (1951) 63 RPC 103, Ref. to. (Para 10)

Merely because the distinctive words used in both the marks have distinctive meanings it cannot be said that the phonetic resemblance does not lead to confusion, when it is likely that majority of the customers are not capable of understanding the fine distinction between the meanings of the two words. (1913) 30 RPC 363, Disting. (Para 13)

(B) Trade and Merchandise Marks Act (1958), S. 12 (1) — Registration of trade mark — Similarity with the existing trade mark — Registrar's opinion that there was no deceptive similarity between two marks — Having an expert knowledge in the matter his opinion should not be lightly disturbed — Where, however, there is concurrent finding of two courts below that there was deceptive similarity, the finding is binding in appeal under Article 136 of the Constitution — Onus is on appellant to prove that finding is erroneous — He must satisfy that conditions of S. 12 (1) are satisfied. (Para 7)

Cases Referred: Chronological Paras
(1951) 68 RPC 103, De'cor'dova v. Vick Chemical Co. 12
(1950) 67 RPC 209, In the matter of Broadhead's Application for Registration of a Trade Mark 9
(1942) 59 RPC 127=1942-1 All ER 615, Coca Cola Co., of Canada v. Pepsi Cola Co., of Canada Ltd. 11

(1913) 30 RPC 363, Application by Thomas A. Smith Ltd. to Register a trade mark

13

Mr. A. K. Sen, Senior Advocate, (M/s. K. Jayaram and R. Thiagarajan, Advocates, with him), for Appellant; Mr. M. C. Chagla, Senior Advocate (M/s. N. K. Anand and M. P. Rao, Advocates and Mr. O. C. Mathur, Advocate of M/s. J. B. Dadachanji and Co., with him), for Respondent No. 1.

The following Judgment of the Court was delivered by

BACHAWAT, J.—The appellant is the sole proprietor of a trading concern known as Radha and Co. The respondents Ambal and Co., are a partnership firm. The respondents as also the appellant are manufacturers and dealers in snuff carrying on business at Madras and having business activities inside and outside the State of Madras. On March 10, 1958 the appellant filed application No. 183961 for registration of a trade mark in class 34 in respect of "snuff manufactured in Madras". The respondent filed a notice of opposition. The main ground of opposition was that the proposed mark was deceptively similar to their registered trade marks. The respondents were the proprietors of the registered marks Nos. 126808 and 146291. Trade mark No. 126808 consists of a label containing a device of a goddess Sri Ambal seated on a globe floating on water enclosed in a circular frame with the legend "Sri Ambal parimala snuff" at the top of the label, and the name and address "Sri Ambal and Co., Madras" at the bottom. Trade mark No. 146291 consists of the expression "Sri Ambal". The mark of which the appellant seeks registration consists of a label containing three panels. The first and the third panels contain in Tamil, Devanagari, Telgu and Kannada the equivalents of the words "Sri Andal Madras Snuff". The centre panel contains the picture of goddess Sri Andal and the legend "Sri Andal."

2. Sri Andal and Sri Ambal are separate divinities. Sri Andal was a vaishnavite woman saint of Srivilliputtur village and was deified because of her union with Lord Ranganatha. Sri Ambal is the consort of Siva or Maheshwara.

3. The respondents have been in the snuff business for several decades and have used the word Ambal as part of their mark for more than half a century. The

question in issue is whether the proposed mark is deceptively similar to the respondents' marks. "Mark" as defined in Section 2 (j) of the Trade and Merchandise Marks Act, 1958 includes "a device, brand, heading, label, ticket, name, signature, word, letter or numeral or any combination thereof". Section 12 (1) provides that "save as provided in sub-section (3), no trade mark shall be registered in respect of any goods or description of goods which is identical with or deceptively similar to a trade mark which is already registered in the name of a different proprietor in respect of the same goods or description of goods." The Registrar of Trade Marks observed:—

"In a composite mark the distinctive words, appearing on it play an important part. Words always talk more than devices, because it is generally by the word part of a composite mark that orders will be given. Apart from that, the opponents have a registered mark consisting of the expression Sri Ambal. I have, therefore, to determine whether the expression Sri Andal is deceptively similar to Sri Ambal."

4. He held, "the sound of 'Ambal' does not so nearly resemble the sound of 'Andal', in spite of certain letters being common to both the marks, as to be likely to cause confusion or deception among a substantial number of persons."

5. The respondents filed an appeal in the Madras High Court. Jagadishan J., observed:

"It is settled law that a trade mark comprehends not merely the picture, design or symbol but also its descriptive name. A copy of colourable imitation of the name would constitute an infringement of the mark containing the name. Nobody can abstract the name or use a phonetical equivalent of it and escape the charge of piracy of the mark pleading that the visual aspect of his mark is different from the mark of the person opposing its registration."

6. He held:—

"The words, Ambal and Andal, have such great phonetic similarity that they are undistinguishable having the same sound and pronunciation. In whatever way they are uttered or spoken, slowly or quickly, perfectly or imperfectly, meticulously or carelessly and whoever utters them, a foreigner or a native of India, wherever they are uttered in the noisy market place or in a calm and secluded

area, over the phone or in person, the danger of confusion between the two phonetically allied names is imminent and unavoidable."

Accordingly, he allowed the appeal and dismissed the appellant's application for registration of the trade mark. The appellant filed a letters patent appeal. The Divisional Bench of the High Court dismissed the appeal. The learned Registrar and the two Courts below concurrently found that the appellant failed to prove honest concurrent use so as to bring his case within Section 12 (3). The present appeal has been filed by the appellant after obtaining special leave.

7. The Registrar was of the view that the appellant's mark was not deceptively similar to the respondents' trade marks. He has expert knowledge of such matters and his decision should not be lightly disturbed. But both the Courts have found that he was clearly wrong and held that there is a deceptive similarity between the two marks. In an appeal under Article 136 of the Constitution the onus is upon the appellant to show that the concurrent finding of the Courts below is erroneous. The appellant must satisfy the Court that the conditions of Section 12 (1) have been satisfied. If those conditions are not satisfied his mark cannot be registered.

8. Now the words "Sri Ambal" form part of trade mark No. 126808 and are the whole of trade mark No. 146291. There can be no doubt that the word "Ambal" is an essential feature of the trade marks. The common "Sri" is the subsidiary part. Of the two words "Ambal" is the more distinctive and fixes itself in the recollection of an average buyer with imperfect recollection.

9. The vital question in issue is whether, if the appellant's mark is used in a normal and fair manner in connection with the snuff and if similarly fair and normal user is assumed of the existing registered marks will there be such a likelihood of deception that the mark ought not to be allowed to be registered? (see In the matter of Broadhead's Application for registration of a trade mark, 1950-67 RPC 209). It is for the Court to decide the question on a comparison of the competing marks as a whole and their distinctive and essential features. We have no doubt in our mind that if the proposed mark is used in a normal and fair manner the mark would come to be known by its distinguishing feature "Andal". There is a striking similarity and affinity of sound

between the words "Andal" and "Ambal". Giving due weight to the judgment of the Registrar and bearing in mind the conclusions of the learned Single Judge and the Divisional Bench, we are satisfied that there is a real danger of confusion between the two marks.

10. There is no evidence of actual confusion, but that might be due to the fact that the appellant's trade is not of long standing. There is no visual resemblance between the two marks, but ocular comparison is not always the decisive test. The resemblance between the two marks must be considered with reference to the ear as well as the eye. There is a close affinity of sound between Ambal and Andal.

11. In the case of Coca-Cola Co. of Canada v. Pepsi Cola Co. of Canada Ltd., 1942-59 RPC 127, it was found that cola was in common use in Canada for naming the beverages. The distinguishing feature of the mark cocacola was coca and not cola. For the same reason the distinguishing feature of the mark Pepsi Cola was Pepsi and not cola. It was not likely that any one would confuse the word Pepsi with coca. In the present case the word "Sri" may be regarded as in common use. The distinguishing feature of the respondent's mark is Ambal while that of the appellant's mark is Andal. The two words are deceptively similar in sound.

12. The name Andal does not cease to be deceptively similar because it is used in conjunction with a pictorial device. The case of Decordova v. Vick Chemical Coy., 1951-68 RPC 103 is instructive. From the Appendix printed at page 270 of the same volume it appears that Vick Chemical Coy. were the proprietors of the registered trade mark consisting of the word "Vaporub" and another registered trade mark consisting of a design of which the words "Vicks Vaporub Salve" formed a part. The appendix at page 226 shows that the defendants advertised their ointment as "Karsote vapour Rub". It was held that the defendants had infringed the registered marks. Lord Radcliffe said: "..... a mark is infringed by another trader if, even without using the whole of it upon or in connection with his goods, he uses one or more of its essential features."

13. Mr. Sen stressed the point that the words Ambal and Andal had distinct meanings. Ambal is the consort of Lord Siva and Andal is the consort of Ranganatha. He said that in view of the distinct ideas conveyed by the two words a

mere accidental phonetic resemblance could not lead to confusion. In this connection he relied on Venkateswaran's Law of Trade and Merchandise Marks, 1963 Ed., page 214, Kerly's Law of Trade Marks and Trade Names, 9th Ed., page 465, Article 852 and the decision, Application by Thomas A. Smith Ltd., to Register a trade mark, 1913-30 RPC 363. In that case Neville, J., held that the words "limit" and "summit" were words in common use, each conveying a distinctly definite idea that there was no possibility of any one being deceived by the two marks; and there was no ground for refusing registration. Mr. Sen's argument loses sight of the realities of the case. The Hindus in the south of India may be well aware that the words Ambal and Andal represent the names of two distinct Goddesses. But the respondent's customers are not confined to Hindus alone. Many of their customers are Christians, Parsees, Muslims and persons of other religious denominations. Moreover, their business is not confined to south of India. The customers who are not Hindus or who do not belong to the south of India may not know the difference between the words Andal and Ambal. The words have no direct reference to the character and quality of snuff. The customers who use the respondent's goods will have a recollection that they are known by the word Ambal. They may also have a vague recollection of the portrait of a benign Goddess used in connection with the mark. They are not likely to remember the fine distinctions between a Vaishnavite Goddess and a Shivaite deity.

14. We think the judgment appealed from is right and should be affirmed. We are informed that the appellant filed another application No. 212575 seeking registration of labels of which the expression "Radha's Sri Andal Madras Snuff" forms a part. The learned Registrar has disposed of the application in favour of the appellant. But we understand that an appeal is pending in the High Court. It was argued that there was no phonetic similarity between Sri Ambal and Radha's Sri Andal and the use of the expression Radha's Sri Andal was not likely to lead to confusion. The Divisional Bench found force in this argument. But as the matter is sub judice we express no opinion on it.

15. In the result, the appeal is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 150
(V 57 C 35)**M. HIDAYATULLAH, C. J., J. M. SHELAT, V. BHARGAVA, K. S. HEGDE AND A. N. GROVER, JJ.****A. K. Kraipak and others, Petitioners v. Union of India and others, Respondents.**
Writ Petns. Nos. 173 to 175 of 1967.**(A) Civil Services — All India Services Act (1951), S. 3 — Section is not ultra vires the Constitution and its validity cannot be challenged in view of AIR 1959 SC 512 — Constitution of India, Art. 245.**
(Para 11)**(B) Constitution of India, Art. 226 — Administrative or quasi-judicial power — Matters to be considered in determining — Dividing line between two powers has become thin.**

The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. In a welfare State like India which is regulated and controlled by the rule of law it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power. (1967) 2 QB 864, Ref. to.

(Para 13)

With the increase of the power of the administrative bodies it has become necessary to provide guidelines for the just

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exercise of their power. To prevent the abuse of that power and to see that it does not become a new despotism, courts are gradually evolving the principles to be observed while exercising such powers. In matters like these, public good is not advanced by a rigid adherence to precedents. New problems call for new solutions. It is neither possible nor desirable to fix the limits of a quasi-judicial power.

(Para 14)

(C) Constitution of India, Art. 226 — Natural Justice — Rules of — Scope and object of — Applicability to administrative inquiry — Change in concept of natural justice in recent years indicated — Since aim of both quasi-judicial as well as administrative inquiries is to arrive at a just decision these rules should apply to both — What particular rule will apply in a given case will depend upon various factors.

The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. (Para 20)

In the past only two rules were recognised but in course of time many more subsidiary rules came to be added to these rules. Till very recently it was the opinion of the Courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice there is no reason why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry.

(Para 20)

The rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the

facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. AIR 1969 SC 198, Rel. on

(Para 20)

(D) Constitution of India, Art. 226 — Administrative authority like a selection Board — Violation of rules of natural justice — Bias — Selection made by Board one of members of which is a candidate, is vitiated — Special Selection Board constituted under Regulation 3 of Indian Forest Service (Initial Recruitment) Regulations (1966) framed under Rule 3 of Indian Forest Service (Recruitment) Rules (1966) — One member of Board was himself a candidate for selection — Though he had not taken part in deliberations of Board at time of his own selection he had taken part throughout while making selections of other candidates including his rival candidates — Conflict between interest and duty of such member — Reasonable likelihood of bias — Selection list prepared by such Board under Regulation 5 is vitiated and the final recommendations made by U. P. S. C. on its basis must also be vitiated — (1967) 2 QB 864, Ref. to. Writ Petn. No. 237 of 1966, D/- 4-5-1967 (SC), Dist.

(Paras 15 & 21)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 198 (V 56) = Civil Appeal No. 990 of 1968, D/- 15-7-1968, Suresh Koshy George v. University of Kerala 20
(1968) Civil Appeal No. 1464 of 1968, D/- 21-11-1968 = 1969-3 SCC 308, Purtabpore Co. Ltd. v. Cane Commr. of Bihar 14
(1967) AIR 1967 SC 1269 (V 54) = 1967-2 SCR 625, State of Orissa v. Dr. (Miss.) Binapani Dei 19
(1967) Writ Petn. No. 237 of 1966, D/- 4-5-1967 (SC), Sumer Chand Jain v. Union of India 22
(1967) 1967-2 QB 617, In re, H. K. (An Infant) 17
(1967) 1967-2 QB 864, Reg. v. Criminal Injuries Compensation Board; Ex parte Lain 13, 21
(1959) AIR 1959 SC 512 (V 46) = (1959) Supp (1) SCR 792, D. S. Garewal v. State of Punjab 11

- (1953) 1953 NZLR 366, New Zealand and Dairy Board v. Okita Co-operative Dairy Co. Ltd. 14
(1952) 1952-2 QB 413 = (1952) 1 All ER 480, Reg v. Manchester Legal Aid Committee, Ex parte R. A. Brand and Co. Ltd. 13
(1939) 1939-2 KB 651 = 108 LJKB 657, Rex v. Boycott, Ex parte, Keasley 13
(1928) 1928-1 KB 291 = 96 LJKB 347, Rex v. Postmaster General, Ex parte Carmichael 13

Mr. A. K. Sen, Senior Advocate (Mr. E. C. Agrawala, Advocate, with him), for Petitioners (In W. P. No. 173 of 1967); M/s. Frank Anthony, E. C. Agrawala and A. T. M. Sampat, Advocates, for Petitioners (In W. P. No. 174 of 1967); Mr. C. K. Daphtary, Senior Advocate (M/s. E. C. Agrawala, A. T. M. Sampat, S. R. Agarwala and Champat Rai, Advocates with him), for Petitioners (In W. P. No. 175 of 1967); Mr. Niren De, Attorney-General for India and Mr. N. S. Bindra, Senior Advocate (Mr. R. N. Sachthey, Advocate, with them), for Respondents Nos. 1 to 6 (In all the petitions); Mr. H. R. Gokhale Senior Advocate (Mr. Harbans Singh, Advocate with him), for Respondents Nos. 7 and 26 (In all the Petitions).

The following Judgment of the Court was delivered by

HEGDE, J.: These petitions are brought by some of the Gazetted Officers serving in the forest department of the State of Jammu and Kashmir. Some of them are serving as Conservators of Forests, some as Divisional Forest Officers and others as Assistant Conservators of Forests. All of them feel aggrieved by the selections made from among the officers serving in the forest department of the State of Jammu and Kashmir to the Indian Forest Service, a service constituted in 1966 under Section 3 (1) of the All India Services Act, 1951 and the rules framed thereunder. Hence they have moved this Court to quash Notification No. 3/24/66-A-15(IV), dated the 29th July 1967 issued by the Government of India, Ministry of Home Affairs, as according to them the selections notified in the said notification are violative of Articles 14 and 16 of the Constitution and on the further ground that the selections in question are vitiated by the contravention of the principles of natural justice. They are also challenging the vires of Section 3 of the All India Services Act, Rule 4 of the rules

framed under that Act and Regulation 5 of the Indian Forest Service (Initial Recruitment) Regulations 1966, framed under the aforementioned Rule 4.

2. Section 2 (A) of the All India Services Act, 1951 authorises the Central Government to constitute three new All India Services including the Indian Forest Service. Section 3 provides that the Central Government shall after consulting the Government of the States concerned including that of the State of Jammu and Kashmir to make rules for the regulation of recruitment and the conditions of service of persons appointed to those All India Services. Sub-section (2) of Section 2 prescribes that all rules made under that section "shall be laid for not less than fourteen days before Parliament as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as Parliament may make on a motion made during the session in which they are so laid."

3. In pursuance of the power given under Section 3, rules for the recruitment to the Indian Forest Service were made in 1966-Indian Forest Service (Recruitment) Rules 1966. The only rule relevant for our present purpose is Rule 4 (1) which reads:

"As soon as may be after the commencement of these rules, the Central Government may recruit to the service any person from amongst the members of the State Forest Service adjudged suitable in accordance with such Regulations as the Central Government may make in consultation with the State Governments and the Commission."

4. The Commission referred to in the above rule is the Union Public Service Commission. The Proviso to that sub-rule is not relevant for our present purpose. We may next come to the Regulations framed under Rule 4 (1). Those Regulations are known as the Indian Forest Service (Initial Recruitment) Regulations, 1966. They are deemed to have come into force on July 1, 1966. Regulation 2 defines certain expressions, Regulation 3 provides for the constitution of a special selection board. It says that for the purpose of making selection to any State cadre, the Central Government shall constitute a special selection board consisting of the Chairman of the Union Public Service Commission or his nominee, the Inspector General of Forests of the Government of India, an officer of

the Government of India not below the rank of Joint Secretary, the Chief Secretary to the State Government concerned or the Secretary of that Government dealing with the forests and the Chief Conservator of Forests of the State Government concerned. Regulation 4 prescribes the conditions of eligibility. That Regulation contemplates the formation of a service in the senior scale and a service in the junior scale. Regulation 5 is important for our present purpose. It deals with the preparation of the list of suitable candidates. It reads:

"(1) The Board shall prepare, in the order of preference, a list of such officers of State Forest Service who satisfy the conditions specified in regulation 4 and who are adjudged by the Board suitable for appointment to posts in the senior and junior scales of the Service.

(2) The list prepared in accordance with sub-regulation (1) shall then be referred to the Commission for advice, by the Central Government along with:—

(a) the records of all officers of State Forest Service included in the list;

(b) the records of all other eligible officers of the State Forest Service who are not adjudged suitable for inclusion in the list, together with the reasons as recorded by the Board for their non-inclusion in the list; and

(c) the observations, if any, of the Ministry of Home Affairs on the recommendations of the Board.

(3) On receipt of the list, along with the other documents received from the Central Government the Commission shall forward its recommendations to that Government."

5. Regulation 6 stipulates that the officers recommended by the Commission under sub-rule (3) of Regulation 5 shall be appointed to the service by the Central Government subject to the availability of vacancies in the State cadre concerned.

6. In pursuance of the Regulation mentioned above, the Central Government constituted a special selection board for selecting officers to the Indian Forest Service in the senior scale as well as in the junior scale from those serving in the forest department of the State of Jammu and Kashmir. The nominee of the Chairman of the Union Public Service Commission, one M. A. Venkataraman was the Chairman of the Board. The other members of the board were the Inspector General of Forests of the Government of India, one of the Joint Secretaries in the

Government of India, the Chief Secretary to the State Government of Jammu and Kashmir and Naqishbund, the Acting Chief Conservator of Forests of Jammu and Kashmir.

7. The selection board met at Srinagar in May 1967, and selected respondents 7 to 31 in Writ Petition No. 173 of 1967. The cases of respondents Nos. 32 to 37 were reserved for further consideration. The selections in question are said to have been made solely on the basis of the records of officers. Their suitability was not tested by any examination, written or oral. Nor were they interviewed. For several years before that selection the adverse entries made in the character rolls of the officers had not been communicated to them and their explanation called for. In doing so quite clearly the authorities concerned had contravened the instructions issued by the Chief Secretary of the State. Sometime after the afore-mentioned selections were made, at the instance of the Government of India, the adverse remarks made in the course of years against those officers who had not been selected were communicated to them and their explanations called for. Those explanations were considered by the State Government and on the basis of the same, some of the adverse remarks made against some of the officers were removed. Thereafter the selection board reviewed the cases of officers not selected earlier as a result of which a few more officers were selected. The selections as finally made by the Board were accepted by the Commission. On the basis of the recommendations of the Commission, the impugned list was published. Even after the review Basu, Baig and Kaul were not selected. It may also be noted that Naqishbund's name is placed at the top of the list of selected officers.

8. Naqishbund had been promoted as Chief Conservator of Forests in the year 1964. He is not yet confirmed in that post. G. H. Basu, Conservator of Forests in the Kashmir Forest Service who is admittedly senior to Naqishbund had appealed to the State Government against his supersession and that appeal was pending with the State Government at the time the impugned selections were made. M. I. Baig and A. N. Kaul, Conservators of Forests also claim that they are seniors to Naqishbund but that fact is denied by Naqishbund. Kaul had also appealed against his alleged supersession but it is alleged that appeal had been rejected by the State Government.

9. Naqishbund was also one of the candidates seeking to be selected to the All India Forest Service. We were told and we take it to be correct that he did not sit in the selection board at the time his name was considered for selection but admittedly he did sit in the board and participate in its deliberations when the names of Basu, Baig and Kaul, his rivals were considered for selection. It is further admitted that he did participate in the deliberations of the board while preparing the list of selected candidates in order of preference as required by Regulation 5.

10. The selection board was undoubtedly a high powered body. That much was conceded by the learned Attorney-General who appeared for the Union Government as well as the State Government. It is true that the list prepared by the selection board was not the last word in the matter of the selection in question. That list along with the records of the officers in the concerned cadre selected as well as not selected had to be sent to the Ministry of Home Affairs. We shall assume that as required by Regulation 5, the Ministry of Home Affairs had forwarded that list with its observations to the Commission and the Commission had examined the records of all the officers afresh before making its recommendation. But it is obvious that the recommendations made by the selection board should have weighed with the Commission. Undoubtedly the adjudging of the merits of the candidates by the selection board was an extremely important step in the process.

11. It was contended before us that Section 3 of the All India Services Act, rule 4 of the rules framed thereunder and Regulation 5 of the Indian Forest Service (Initial Recruitment) Regulations 1966 are void as those provisions confer unguided, uncontrolled and uncanalised power on the concerned delegates. So far as the vires of Section 3 of the Indian Administrative Act are concerned, the question is no more *res integra*. It is concluded by the decision of this Court in *D. S. Garewal v. State of Punjab*, (1959) Supp 1 SCR 792 = (AIR 1959 SC 512). We have not thought it necessary to go into the question of the vires of Rule 4 and Regulation 5 as we have come to the conclusion that the impugned selections must be struck down for the reasons to be presently stated.

12. There was considerable controversy before us as to the nature of the

power conferred on the selection board under Rule 4 read with Regulation 5. It was contended on behalf of the petitioners that that power was a quasi-judicial power whereas the case for the contesting respondents was that it was a purely administrative power. In support of the contention that the power in question was a quasi-judicial power emphasis was laid on the language of Rule 4 as well as Regulation 5 which prescribe that the selections should be made after adjudging the suitability of the officers belonging to the State service. The word 'adjudge' we were told means "to judge or decide". It was contended that such a power is essentially a judicial power and the same had to be exercised in accordance with the well accepted rules relating to the exercise of such a power. Emphasis was also laid on the fact that the power in question was exercised by a statutory body and a wrong exercise of that power is likely to affect adversely the careers of the officers not selected. On the other hand it was contended by the learned Attorney-General that though the Selection board was a statutory body, as it was not required to decide about any right, the proceedings before it cannot be considered quasi-judicial; its duty was merely to select officers who in its opinion were suitable for being absorbed in the Indian Forest Service. According to him the word 'adjudge' in Rule 4 as well as Regulation 5 means "found worthy of selection".

13. The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. In a welfare State like ours it is inevitable that the organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a require-

ment to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power. The following observations of Lord Parker, C. J. in *Reg. v. Criminal Injuries Compensation Board*; *Ex parte Lain*, 1967-2 QB 864 at p. 881 are instructive.

"With regard to Mr. Bridge's second point I cannot think that Atkin L. J. intended to confine his principle to cases in which the determination affected rights in the sense of enforceable rights. Indeed, in the *Electricity Commissioners* case, the rights determined were at any rate not immediately enforceable rights since the scheme laid down by the commissioners had to be approved by the Minister of Transport and by resolutions of Parliament. The commissioners nevertheless were held amenable to the jurisdiction of this court. Moreover, as can be seen from *Rex v. Postmaster-General*; *Ex parte Carmichael*, 1928-1 KB 291 and *Rex v. Boycott*; *Ex parte Keasley*, 1939 2 KB 651 the remedy is available even though the decision is merely a step as a result of which legally enforceable rights may be affected.

The position as I see it is that the exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined. They have varied from time to time being extended to meet changing conditions. At one time the writ only went to an inferior court. Later its ambit was extended to statutory tribunals determining a *lis inter partes*. Later again it extended to cases where there was no *lis* in the strict sense of the word but where immediate or subsequent rights of citizen were affected. The only constant limits throughout were that it was performing a public duty. Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is from the agreement of the parties concerned.

Finally, it is to be observed that the remedy has now been extended, see *Reg. v. Manchester Legal Aid Committee* *Ex parte R. A. Brand and Co. Ltd.*, 1952-2 QB 313, to cases in which the decision

of an administrative officer is only arrived at after an inquiry or process of a judicial or quasi-judicial character. In such a case this court has jurisdiction to supervise that process.

We have as it seems to me reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially. Looked at in this way the board in my judgment comes fairly and squarely within the jurisdiction of this court. It is, as Mr. Bridge said, 'a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the bounty of the Crown'. It is clearly, therefore, performing public duties."

14. The Court of Appeal of New Zealand has held that the power to make a zoning order under Dairy Factory Supply Regulation 1936 has to be exercised judicially, see *New Zealand and Dairy Board v. Okita Co-operative Dairy Co. Ltd.*, 1958 NZLR 366. This Court in *Purtapbore Co. Ltd. v. Cane Commissioner of Bihar*, Civil Appeal No. 1464 of 1968, D/- 21-11-1968 (SC) held that the power to alter the area reserved under the Sugar-Cane (Control) Order, 1966 is a quasi-judicial power. With the increase of the power of the administrative bodies it has become necessary to provide guidelines for the just exercise of their power. To prevent the abuse of that power and to see that it does not become a new despotism, Courts are gradually evolving the principles to be observed while exercising such powers. In matters like these public good is not advanced by a rigid adherence to precedents. New problems call for new solutions. It is neither possible nor desirable to fix the limits of a quasi-judicial power. But for the purpose of the present case we shall assume that the power exercised by the selection board was an administrative power and test the validity of the impugned selections on that basis.

15. It is unfortunate that Naqishbund was appointed as one of the members of the selection board. It is true that ordinarily the Chief Conservator of Forests in a State should be considered as the most appropriate person to be in the selection board. He must be expected to know his officers thoroughly, their weaknesses as well as their strength. His

opinion as regards their suitability for selection to the All India Service is entitled to great weight. But then under the circumstances it was improper to have included Naqishbund as a member of the selection board. He was one of the persons to be considered for selection. It is against all canons of justice to make a man judge in his own cause. It is true that he did not participate in the deliberations of the committee when his name was considered. But then the very fact that he was a member of the selection board must have had its own impact on the decision of the selection board. Further admittedly he participated in the deliberations of the selection board when the claims of his rivals particularly that of Basu was considered. He was also party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the selection board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney-General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct. It was in the interest of Naqishbund to keep out his rivals in order to secure his position from further challenge. Naturally he was also interested in safeguarding his position while preparing the list of selected candidates.

16. The members of the selection board other than Naqishbund, each one of them separately, have filed affidavits in this Court swearing that Naqishbund in no manner influenced their decision in making the selection. In a group deliberation each member of the group is bound to influence the others, more so, if the member concerned is a person with special knowledge. His bias is likely to operate in a subtle manner. It is no wonder that the other members of the selection board are unaware of the extent to which his opinion influenced their conclusions. We are unable to accept the contention that in adjudging the suitability of the candidates the members of

the board did not have any mutual discussion. It is not as if the records spoke of themselves. We are unable to believe that the members of selection board functioned like computers. At this stage it may also be noted that at the time the selections were made, the members of the selection board other than Naqishbund were not likely to have known that Basu had appealed against his supersession and that his appeal was pending before the State Government. Therefore, there was no occasion for them to distrust the opinion expressed by Naqishbund. Hence the board in making the selections must necessarily have given weight to the opinion expressed by Naqishbund.

17. This takes us to the question whether the principles of natural justice apply to administrative proceedings similar to that with which we are concerned in these cases. According to the learned Attorney-General those principles have no bearing in determining the validity of the impugned selections. In support of his contention he read to us several decisions. It is not necessary to examine those decisions as there is a great deal of fresh thinking on the subject. The horizon of natural justice is constantly expanding. The question how far the principles of natural justice govern administrative enquiries came up for consideration before the Queens Bench Division in *re H. K. (An Infant)*, 1967-2 QB 617 at p. 630. Therein the validity of the action taken by an Immigration Officer came up for consideration. In the course of his judgment Lord Parker, C. J. observed thus:

"But at the same time, I myself think that even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply,

which in a case such as this is merely a duty to act fairly. I appreciate that in saying that it may be said that one is going further than is permitted on the decided cases because heretofore at any rate the decisions of the courts do seem to have drawn a strict line in these matters according to whether there is or is not a duty to act judicially or quasi-judicially."

18. In the same case Blain, J. observed thus:

"I would only say that an immigration officer having assumed the jurisdiction granted by those provisions is in a position where it is his duty to exercise that assumed jurisdiction whether it be administrative, executive or quasi-judicial, fairly, by which I mean applying his mind dispassionately to a fair analysis of the particular problem and the information available to him in analysing it. If in any hypothetical case, and in any real case, this court was satisfied that an immigration officer was not so doing, then in my view mandamus would lie."

19. In *State of Orissa v. Dr. (Miss) Binapani Dei*, 1967-2 SCR 625 = (AIR 1967 SC 1269) Shah, J. speaking for the Court, dealing with an enquiry made as regards the correct age of a government servant, observed thus:

"We think that such an enquiry and decision were contrary to the basic concept of justice and cannot have any value. It is true that the order is administrative in character, but even an administrative order which involves evil consequences as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State....."

20. The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules, namely (1) no one shall be a judge in his own cause (*Nemo debet esse iudex propria causa*), and (2) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or un-

reasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is not questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George v. University of Kerala*, Civil Appeal No. 990 of 1968, D/- 15-7-1968 = (AIR 1969 SC 198) the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the frame-work of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case.

21. It was next urged by the learned Attorney-General that after all the selection board was only a recommendatory body. Its recommendations had first to be considered by the Home Ministry and thereafter by the U.P.S.C. The final recommendations were made by the U.P. S.C. Hence grievance of the petitioners have no real basis. According to him while considering the validity of administrative actions taken, all that we have to see is whether the ultimate decision is just or not. We are unable to agree with the learned Attorney-General that the recommendations made by the selection board were of little consequence. Looking at the composition of the board and the nature of the duties entrusted to

it we have no doubt that its recommendations should have carried considerable weight with the U.P.S.C. If the decision of the selection board is held to have been vitiated, it is clear to our mind that the final recommendations made by the Commission must also be held to have been vitiated. The recommendations made by the Union Public Service Commission cannot be disassociated from the selections made by the selection board which is the foundation for the recommendations of the Union Public Service Commission. In this connection reference may be usefully made to the decision in 1967-2 QB 864 (*supra*).

22. It was next urged by the learned Attorney-General that the mere fact that one of the members of the Board was biased against some of the petitioners cannot vitiate the entire proceedings. In this connection he invited our attention to the decision of this Court in *Sumer Chand Jain v. Union of India*, Writ Petn. No. 237 of 1966, D/- 4-5-1967 (SC). Therein the Court repelled the contention that the proceedings of a departmental promotion committee were vitiated as one of the members of that committee was favourably disposed towards one of the selected candidates. The question before the Court was whether the plea of mala fides was established. The Court came to the conclusion that on the material on record it was unable to uphold that plea. In that case there was no question of any conflict between duty and interest nor any member of the departmental promotion committee was a judge in his own case. The only thing complained of was that one of the members of the promotion committee was favourably disposed towards one of the competitors. As mentioned earlier in this case we are essentially concerned with the question whether the decision taken by the board can be considered as having been taken fairly and justly.

23. One more argument of the learned Attorney-General remains to be considered. He urged that even if we are to hold that Naqishbund should not have participated in the deliberations of the selection board while it considered the suitability of Basu, Baig and Kaul, there is no ground to set aside the selection of other officers. According to him it will be sufficient in the interest of justice if we direct that the cases of Basu, Baig and Kaul be reconsidered by a Board of which Naqishbund is not a member. Pro-

ceeding further he urged that under any circumstance no case is made out for disturbing the selection of the officers in the junior scale. We are unable to accept either of these contentions. As seen earlier Naqishbund was a party to the preparation of the selection list in order of preference and that he is shown as No. 1 in the list. To that extent he was undoubtedly a judge in his own case, a circumstance which is abhorrent to our concept of justice. Now coming to the selection of the officers in the junior scale service, the selections to both the senior scale service as well as junior scale service were made from the same pool. Every officer who had put in a service of 8 years or more, even if he was holding the post of an Assistant Conservator of Forests was eligible for being selected for the senior scale service. In fact some Assistant Conservators have been selected for the senior scale service. At the same time some of the officers who had put in more than eight years of service had been selected for the junior scale service. Hence it is not possible to separate the two sets of officers.

24. For the reasons mentioned above these petitions are allowed and the impugned selections set aside. The Union Government and the State Government shall pay the costs of the petitioners.

Petitions allowed.

AIR 1970 SUPREME COURT 158
(V 57 G 36)

(From Madhya Pradesh)*

**S. M. SIKRI, R. S. BACHAWAT AND
V. RAMASWAMI, JJ.**

Ram Gopal Chaturvedi, Appellant v.
State of Madhya Pradesh, Respondent.

Civil Appeal No. 712 of 1966, D/- 29-4-1969.

(A) Constitution of India, Article 136 — New point — Contention that Rule 12 of M. P. Government Servants (Temporary and Quasi-Permanent Service) Rules 1960 being framed without consulting State Public Service Commission and High Court was unconstitutional — Contention raising mixed questions of law and fact — Not raised in High Court — Not allowed to be raised for first time in Supreme Court. (Para 4)

*(Misc. Petn. No. 272 of 1964, D/- 27-7-1964—M. P.)

KM/KM/D350/69/LGC/D

(B) Civil Services — Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules 1960, Rule 12 — Not violative of Articles 14 and 16 of Constitution — (Constitution of India, Articles 14, 16).

Rule 12 of the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960 is not violative of Articles 14 and 16 of the Constitution. Rule 12 applies to all temporary government servants who are not in quasi-permanent service. All such government servants are treated alike. The argument that Rule 12 confers an arbitrary and unguided discretion is devoid of any merit. The services of a temporary government servant may be terminated on one month's notice whenever the government thinks it necessary or expedient to do so for administrative reasons. It is impossible to define beforehand all the circumstances in which the discretion can be exercised. The discretion is necessarily left to the government.

(Para 5)

(C) Civil Services — Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960, Rule 12 — Temporary Civil Judge — Services are subject to relevant rules and can be terminated on one month's notice under Rule 12 — It is immaterial that the advertisement inviting applications for temporary posts of Civil Judges did not specifically mention that their services could be so terminated. (Para 6)

(D) Constitution of India, Art. 136 — New point — Question that services of temporary Civil Judge could not be terminated on one month's notice as his confirmation was recommended by High Court after expiry of probationary period held could not be allowed to be raised for first time in appeal before Supreme Court. (Para 6)

(E) Constitution of India, Article 320 (3) (c) — Provisions not mandatory — Do not confer any right on public servant — Absence of consultation with State Public Service Commission, in terminating his services does not afford him a cause of action — Hence the order, terminating his services cannot be said to be invalid on that ground. AIR 1957 SC 912, Foll.

(Para 7)

(F) Constitution of India, Article 311 — Temporary Civil Judge — State Government, having regard to resolution passed by High Court, terminating his services — Order not casting stigma on his character or integrity nor visiting him

with any evil consequences — Order not passed by way of punishment — Provisions of Article 311, held not attracted.

(Para 8)

(G) Constitution of India, Articles 226 and 311 — Termination of services of temporary Civil Judge — Order neither involving any element of punishment nor depriving him of any vested right to any office — No question of following principles of natural justice arises: AIR 1967 SC 1269 and (1964) AC 40, Disting.

(Para 10)

(H) Constitution of India, Articles 235 and 311 — M. P. Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960, Rule 12 — Termination of services of temporary Civil Judge, by State Government upon recommendation of High Court is valid.

The High Court is vested with the control over the subordinate judiciary. AIR 1966 SC 447, Foll.

(Para 11)

Where the High Court finds that a temporary Civil Judge is not a fit person to be retained in service, it can properly ask the government to terminate his service and if following the advice tendered by the High Court, the government terminates his services under Rule 12 of the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960, the termination is valid.

(Para 11)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 1089 (V 55) = 9
- 1968 Lab IC 1286, State of Punjab v. Sukh Raj Bahadur
- (1967) AIR 1967 SC 1269 (V 54) = 10
- (1967) 2 SCR 625, State of Orissa v. Binapani Dei
- (1966) AIR 1966 SC 447 (V 53) = 11
- (1966) 1 SCR 771, State of W. B. v. N. N. Bagchi
- (1964) 1964 AC 40 = (1963) 2 All ER 66, Ridge v. Baldwin 10
- (1957) AIR 1957 SC 912 (V 44) = 7
- 1958 SCR 533, State of U. P. v. M. L. Srivastava

Mr. S. C. Chaturvedi, Miss K. Mehta and Mr. M. V. Goswami, Advocates, for Appellant; Mr. I. N. Shroff, Advocate, for Respondent.

The following judgment of the Court was delivered by

BACHAWAT, J.— The appellant was a temporary Civil Judge in Madhya Pradesh. On March 14, 1961 an order was issued in the name of the Governor of Madhya Pradesh State that the appellant "is appointed temporarily, until

further orders, as Civil Judge". Rule 12 of the Madhya Pradesh Government Servants' (Temporary and Quasi-Permanent Service) Rules, 1960 provided:—

"12(a). Subject to any provision contained in the order of appointment or in any agreement between the government and the temporary government servant, the service of a temporary government servant who is not in quasi-permanent service shall be liable to termination at any time by notice in writing given either by the government servant to the appointing authority or by the appointing authority to the Government servant:

Provided that the services of any such government servant may be terminated forthwith by payment to him of a sum equivalent to the amount of his pay plus allowances for the period of the notice, or as the case may be, for the period by which such notice falls short of one month or any agreed longer period; Provided further that the payment of allowances shall be subject to the conditions under which such allowances are admissible.

(b) The periods of such notice shall be one month unless otherwise agreed between the Government and the Government servant."

2. On March 25, 1964 an order was issued by and in the name of the Governor terminating the appellant's services. The order stated:—

"The service of Shri Ram Gopal Chaturvedi, temporary Civil Judge, Waidhan, are terminated with effect from the 1st June 1960, forenoon."

The appellant filed a writ petition in the Madhya Pradesh High Court for quashing the order dated March 25, 1964. The High Court summarily dismissed the petition. It held that the impugned order was not by way of punishment and that the appellant's services were liable to be terminated under the aforesaid rule 12 on one month's notice. The appellant has filed the present appeal after obtaining special leave.

3. The appellant was a temporary government servant and was not in quasi-permanent service. His services could be terminated on one month's notice under Rule 12. There was no provision in the order of appointment or in any agreement that his services could not be so terminated.

4. Counsel for the appellant submitted that Rule 12 was unconstitutional as it was framed without consulting the State Public Service Commission and the

High Court. The contention raises mixed questions of law and fact. It was not raised in the High Court, and we indicated in the course of arguments that the appellant could not be allowed to raise it in this Court for the first time.

5. Counsel next submitted that Rule 12 was violative of Articles 14 and 16 of the Constitution. There is no merit in this contention. Rule 12 applies to all temporary government servants who are not in quasi-permanent service. All such government servants are treated alike. The argument that Rule 12 confers an arbitrary and unguided discretion is devoid of any merit. The services of a temporary government servant may be terminated on one month's notice whenever the government thinks it necessary or expedient to do so for administrative reasons. It is impossible to define before-hand all the circumstances in which the discretion can be exercised. The discretion was necessarily left to the government.

6. It was argued that the appellant's services could not be terminated on one month's notice as (a) his confirmation was recommended by the High Court after the expiry of the probationary period and (b) the advertisement dated September 9, 1960 inviting applications for the temporary posts of civil judges did not specifically mention that their services could be so terminated. The point that the High Court had recommended the appellant's confirmation was not raised in the High Court and cannot be allowed to be raised in this Court for the first time. The appellant's services were subject to the relevant rules and could be terminated on one month's notice under R. 12. It is immaterial that the advertisement did not specifically mention that his services could be so terminated.

7. It was argued that the impugned order was invalid as it was passed without consulting the State Public Service Commission under Article 320 (3) (c) of the Constitution. There is no merit in this contention. The case of *State of U. P. v. M. L. Srivastava*, 1958 SCR 533 = (AIR 1957 SC 912) decided that the provisions of Article 320(3) (c) were not mandatory and did not confer any rights on the public servant and that the absence of consultation with the State Public Service Commission did not afford him a cause of action.

8. It was next argued that the impugned order was passed by way of punish-

ment without giving the appellant an opportunity to show cause against the proposed action and was therefore violative of Article 311 of the Constitution. In this connection, counsel for the appellant drew our attention to the statement of case filed on behalf of the respondent. It appears that there were complaints that the appellant was associating with a young girl named Miss Laxmi Surve against the wishes of her father and other members of her family. The Chief Justice of Madhya Pradesh made inquiries into the matter and on February 19, 1954 he admonished the appellant for this disreputable conduct. On his return to Jabalpur on February 28, 1964 the Chief Justice dictated the following note:—

"During my recent visit to Gwalior, I probed into the matter of Shri R. G. Chaturvedi, Special Magistrate (Motor Vehicles) Gwalior, giving shelter to a girl named Kumari Laxmi Surve, the daughter of a Chowkidar employed in the J. C. Mills Gwalior; the enquiry made by me revealed that Shree Chaturvedi has been associating with this girl for over a year and his relations with her are not at all innocent. He is sheltering and supporting Miss Surve against the wishes of her father and other members of her family. This is evident from the fact that on 14th December 1963, when the girl was at the residence of Shri Chaturvedi and when her younger brother came to take her back, his house was stormed by a mob of 300 to 400 persons. A report of this incident was also recorded in the *Roznamcha-Am of Lashkar Kotwali*. The statement published by Miss Surve in some newspapers published from Gwalior explaining her action and her relations with her parents is significant. In that statement Miss Surve gave her address as 'C/o Shri Chaturvedi'. That the statement is one inspired by Shri Chaturvedi is obvious enough. Shri Chaturvedi is still maintaining the girl. Shri Chaturvedi did not enjoy good reputation at Morena and Kolaras where he was posted before his posting at Gwalior. Shri Bajpai, District Judge, Gwalior also informed me that Shri Chaturvedi was not honest and that in collaboration with the Traffic Inspector he has taken money from accused persons in many cases under the Motor Vehicles Act."

No charge-sheet was served on the appellant nor was any departmental inquiry held against him. On March 10, 1964 the Madhya Pradesh High Court passed a resolution that the State Government

should terminate the appellant's services. Having regard to this resolution the State Government passed the impugned order dated March 25, 1964. On the face of it, the order did not cast stigma on the appellant's character or integrity nor did it visit him with any evil consequences. It was not passed by way of punishment and the provisions of Article 311 were not attracted.

9. It was immaterial that the order was preceded by an informal inquiry into the appellant's conduct with a view to ascertain whether he should be retained in service. As was pointed out in the State of Punjab v. Sukh Raj Bahadur, AIR 1968 SC 1089 at p. 1095:

"An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution."

10. It was next argued that the impugned order was in violation of the principles of natural justice and in this connection reliance was placed on the decision of this Court in State of Orissa v. Dr. Miss Binapani. Dei, (1967) 2 SCR 625 = (AIR 1967 SC 1269) and Ridge v. Baldwin, 1964 AC 40. In Binapani's Case, (1967) 2 SCR 625=(AIR 1967 SC 1269) (supra) the appellant was an assistant surgeon in the Orissa medical service. The State Government accepted the date of birth given by her on joining the service. Later the government refixed the date of her birth on ex parte inquiry and passed an order compulsorily retiring her. The Court held that its order was invalid and was liable to be quashed. The appellant as the holder of an office in the medical service had the right to continue in service. According to the rules made under Art. 309 she could not be removed from the office before superannuation except for good and sufficient reasons. The ex parte order was in derogation of her vested rights and could not be passed without giving her an opportunity of being heard. In the present case, the impugned order did not deprive the appellant of any vested right. The appellant was a temporary government servant and had no right to hold the office. The State Government had the right to terminate his services under Rule 12 without issuing any notice to the appellant to show cause against

the proposed action. In 1964 AC 40 (supra) the House of Lords by a majority held that the order of dismissal of a chief constable on the ground of neglect of duty without informing him of the charge made against him and giving him an opportunity of being heard was in contravention of the principles of natural justice and was liable to be quashed. Section 191 of the Municipal Corporations Act, 1882 provided that the watch committee might at any time suspend and dismiss any borough constable whom they thought negligent in the discharge of his duty or otherwise unfit for the same. The chief constable had the right to hold his office and before depriving him of this right the watch committee was required to conform to the principles of natural justice. The order of dismissal visited him with the loss of office and involved an element of punishment for the offences committed. In the present case, the impugned order did not involve any element of punishment nor did it deprive the appellant of any vested right to any office.

11. It was next argued that the State Government blindly followed the recommendations of the High Court. We find no merit in this argument. The State Government properly followed those recommendations. The High Court is vested with the control over the subordinate judiciary, see State of West Bengal v. N. N. Bagchi, (1966) 1 SCR 771 = (AIR 1966 SC 447.) If the High Court found that the appellant was not a fit person to be retained in service, it could properly ask the government to terminate his services. Following the advice tendered by the High Court, the government rightly terminated his services under Rule 12.

12. In the result, the appeal is dismissed. There will be no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 161
(V 57 C 37)

(From Bombay)*

J. C. SHAH AND G. K. MITTER, JJ.
Meghraj and others, Appellants v. Mst. Bayabai and others, Respondents.
Civil Appeal No. 608 of 1966 D/- 30-4-1969.

*(First Appeal No. 80 of 1964, D/- 30-11-1964 — Bom. at Nag.)

KM/KM/D354/69/DVT/D

(A) Civil P. C. (1908), O. 21, R. 1 — Payment of decretal amount in Court by mortgagor — Its appropriation towards interest first and then towards principal is normal rule unless the mortgagee was informed that payment was towards principal and the mortgagee agreed to it — (Contract Act (1872), S. 60).

The normal rule in the case of a debt due with interest is that any payment made by the debtor is in the first instance to be applied towards satisfaction of interest and thereafter to the principal.

(Para 6)

Where the mortgagors made no payments under the decree directly to the mortgagees but from time to time made deposits in the Court under O. 21, R. 1 and in depositing some of the amounts they stated that the payments were towards the principal due, but there was no evidence on the record that the mortgagees were informed that the amounts were deposited towards the principal due, nor was there evidence that the mortgagees accepted the amount towards the principal, the amounts so paid could be appropriated first towards interest and then towards principal due. Unless the mortgagees were informed that the mortgagors had deposited the amount only towards the principal and not towards the interest, and the mortgagees agreed to withdraw the money from the Court accepting the conditional deposit, the normal rule that the amounts deposited in Court should first be applied towards satisfaction of the interest and costs and thereafter towards the principal would apply. It is for the mortgagors to prove an agreement, contrary to normal rule. It cannot also be said that it is the privilege of the debtor to impose conditions subject to which any payment is to be made by the mortgagor, and the mortgagee is bound to accept the condition. AIR 1922 PC 233, Rel. on. (Paras 4, 6, 8)

(B) Debt Laws — M. P. Money Lenders Act (13 of 1934), S. 9 — Interest awarded in decree not exceeding principal — Aggregate of amounts paid from time to time exceeding the loan — No contravention of S. 9. (Para 10)

Cases Referred: Chronological Paras (1922) AIR 1922 PC 233 (V 9)=

48 Ind App 150, Venkatadri Appa

Row v. Parthasarathi Appa Row 5, 6

(1898) 1898-2 QB 460=67 LJQB 851,

Parr's Banking Co. v. Yates 5

Mr. G. L. Sanghvi, Advocate and Mr. J. B. Dadachanji, Advocate, of M/s. J. B.

Dadachanji and Co., for Appellants; Dr. W. S. Barlingay, Senior Advocate (M/s. R. Mahalingier and Ganpat Rai, Advocates with him), for Respondent (No. 6); M/s. B. D. Sharma and S. P. Nayar, Advocates, for Respondent (No. 11).

The following Judgment of the Court was delivered by

SHAH, J.— Seth Haroon and Sons a firm had ten partners. The Hindu undivided family of Jethmal Ramkaran mortgaged a house belonging to it to Seth Haroon and Sons to secure repayment of Rs. 40,000 due at the foot of an account. Seth Haroon and Sons filed suit No. 12-A of 1936 for recovery of their dues by sale of the mortgaged house. On December 28, 1940, a decree was passed in the suit by the Additional District Judge. The case was carried in appeal to the High Court of Nagpur. But the appeal was dismissed subject to a slight modification to be presently noticed. An appeal was carried against the decree to this Court. During the pendency of the appeal to this Court, nine out of ten members of Seth Haroon and Sons migrated to Pakistan and were declared evacuees. By an order passed by this Court on March 28, 1958, the Custodian of Evacuee Property was impleaded as a party respondent in the appeal filed by the mortgagors. This Court dismissed the appeal on August 8, 1958. Thereafter the 6th plaintiff Mohammad Ayyub — the only member of the firm who had not migrated — for himself and as agent of the evacuees under a general power of attorney applied for a decree absolute for sale. The Custodian of Evacuee Property resisted the application filed by Mohammad Ayyub. Ultimately by the order passed by the High Court of Bombay the Custodian of Evacuee Property was joined as a party to the application. The Court however observed that the respective rights of the Custodian of Evacuee Property and the partners of Seth Haroon and Sons were not decided in that proceeding.

2. Diverse contentions were raised by the mortgagors; they contended, inter alia that on proper account being taken nothing was due by them on the mortgage, that interest was wrongly calculated at the rate of 4 per cent per annum, that the claim for recovery of costs was barred by the law of limitation and that interest could not be awarded on costs. The learned Trial Judge substantially rejected the contentions raised by the mortgagors and passed a decree for Rs. 34,612.81 be-

ing the aggregate of Rs. 33,866.51 as principal and Rs. 746.30 as interest. An appeal filed against that order was summarily dismissed by the High Court. With special leave, this appeal is preferred by the mortgagors.

3. Counsel for the mortgagors contended that on a proper account of the monies paid by them in satisfaction of the dues under the mortgage decree, the mortgage was satisfied and the mortgagees were overpaid. Counsel contended that from time to time payments were made by the mortgagors with specific directions that the amounts paid were to be credited towards the principal and not towards interest and if the amounts so paid were in the first instance credited towards the principal, it would be found that the mortgage dues had been overpaid. Now the learned Trial Judge observed that Exts. 44 to 55 relied upon by the mortgagors were silent as to any specific directions that the amounts paid in Court were to be appropriated only towards the principal. Counsel for the appellant has invited our attention to certain applications made at the time of making deposits in Court, in which it was recited that the amounts were being deposited towards the principal. Relying upon these recitals it was urged that the Trial Court was in error in holding that there were no directions for appropriation of payments towards the principal. We have not thought it necessary to ascertain the total number of applications in which recitals were made by the mortgagors at the time of making part payments towards the principal, because on the view we take, these recitals, without more, do not assist the claim of the mortgagors.

4. Under the preliminary decree an amount of Rs. 42,430-2-6 was declared due upto June 23, 1941 towards principal and interest. The mortgagors made no payments under the decree directly to the mortgagees. But from time to time they claim to have made deposits in the Court under Order 21, Rule 1 of the Code of Civil Procedure, and in depositing some of the amounts they stated that the payments were towards the principal due. But there is no evidence on the record that the mortgagees were informed that the amounts were deposited towards the principal due, nor is there evidence that the mortgagees accepted the amounts towards the principal. For quite a long time the mortgagees did not withdraw the amount lying in Court. Unless the

mortgagees were informed that the mortgagors had deposited the amount only towards the principal and not towards the interest, and the mortgagees agreed to withdraw the money from the Court accepting the conditional deposit, the normal rule that the amounts deposited in Court should first be applied towards satisfaction of the interest and costs and thereafter towards the principal would apply.

5. In Venkatadri Appa Row v. Parthasarathi Appa Row, 48 Ind App 150 = (AIR 1922 PC 233) the Judicial Committee of the Privy Council observed that upon taking an account of principal and interest due, the ordinary rule with regard to payments by the debtor unappropriated either to principal or interest is that they are first to be applied to the discharge of interest. Lord Buckmaster delivering the judgment of the Board observed:

"There is a debt due that carries interest. There are moneys that are received without a definite appropriation on the one side or on the other, and the rule which is well established in ordinary cases is that in those circumstances the money is first applied in payment of interest and then when that is satisfied in payment of the capital. That rule is referred to by Rigby, L. J., in the case of Parr's Banking Co. v. Yates (1898 (2) QB 460) in these words: "The defendant's counsel relied on the old rule that does, no doubt, apply to many cases; namely, that, where both principal and interest are due, the sums paid on account must be applied first to interest. That rule, where it is applicable, is only common justice. To apply the sums paid to principal where interest has accrued upon the debt, and is not paid, would be depriving the creditor of the benefit to which he is entitled under his contract."

6. Counsel for the appellant contended that in Venkatadri Appa Row's case, 48 Ind App 150 = (AIR 1922 PC 233) there was no specific appropriation by the debtor, whereas in the present case there is specific direction by the debtor. But the normal rule is that in the case of a debt due with interest any payment made by the debtor is in the first instance to be applied towards satisfaction of interest and thereafter to the principal. It was for the mortgagors to plead and prove an agreement—that the amounts which were deposited in Court by the mortgagors were accepted by the mortgagees subject to a condition imposed by the mort-

gagors. In the present case there is no evidence which supports the contention raised by counsel for the appellant.

7. Counsel urged that, in any event, when an account was finally submitted by the mortgagees they were aware of the fact that certain amounts were paid in Court and they knew that those amounts were paid conditionally and when the mortgagees withdrew the amounts deposited in Court they must be deemed to have accepted the conditions subject to which the amounts were deposited. But the account submitted by the mortgagees shows clearly that they had given credit for the amounts deposited towards the interest and costs in the first instance and the balance only towards the principal. The account submitted by the mortgagees clearly negates the plea of the mortgagees.

8. An argument somewhat faintly suggested before us that it is the privilege of the debtor to impose conditions subject to which any payment is to be made by the mortgagor, and the mortgagee is bound to accept the condition needs no serious consideration.

9. It was next urged that the decree was passed by the Trial Court awarding interest at the rate of 3 per cent per annum and the order of the High Court in appeal modifying the original decree by awarding interest at the rate of 4 per cent was erroneous. Under the decree of the Trial Court interest was awarded at 3 per cent. In appeal interest was awarded by the High Court at 4 per cent. Thereafter by a modification in an application for correction of the decree interest at 4 per cent per annum was awarded from August 12, 1941 to November 10, 1946. It was urged, relying upon the order modifying the rate of interest, that from November 11, 1946 the mortgagees were entitled only to interest at the rate of 3 per cent. There is no substance in that contention also. The High Court by order dated August 10, 1946, observed:

"A preliminary decree for the sale shall be drawn accordingly and the defendants (the appellant) are given three months' time from today to pay off the decretal amount. The amount shall carry interest at the rate of 3 per cent per annum from the date of suit to 11-8-1941 and at the rate of 4 per cent per annum from 12-8-1941 to the date of satisfaction."

Apparently the decree drawn up by the High Court was not consistent with the directions given in the judgment, and an

application was made to rectify certain mistakes in the decree. One of the grounds urged in support of the application was that interest should have been computed only on the principal out of the total of Rs. 35,299-1-6. The Court rejected the application holding that the Trial Court had decreed the claim of the mortgagees and that interest was payable on Rupees 35,299-1-6 and the High Court had confirmed the decree holding that the amount of Rs. 35,299-1-6 was principal. The High Court observed that it was not relevant to consider whether that decision was right, because there was no application for review of judgment. They then directed that "the interest will accordingly be calculated on Rs. 35, 299-1-6 at 3 per cent from October 5, 1936 till August 11, 1941 and at 4 per cent from August 12, 1941 till November 10, 1946. This comes to Rs. 50,810-4-6. The decree will be amended accordingly." Relying upon this direction, counsel for the appellants contended that the High Court by order dated March 31, 1947, restored for the period after November 10, 1946, the rate of interest as originally awarded by the Court of First Instance. We are unable to hold that the direction is capable of that interpretation. By directing that interest at the rate of 4 per cent from August 12, 1941 to November 10, 1946 shall be calculated on Rs. 35,299-1-6, it was not, and could not be, intended by the High Court that interest after November 10, 1946, was to be awarded only at the rate of 3 per cent. No such application was made by the debtors. It was apparently contended that the amount of Rs. 35, 299-1-6 as claimed by the plaintiffs in the original suit included interest, and interest could be computed on the amount which formed the principal. The High Court, in view of the decree passed by the Trial Court and confirmed by it, declined to enter into that controversy and indicated the manner in which the interest was to be calculated between October 5, 1936 and November 10, 1946. The High Court did not reduce the rate of interest for the period after November 10, 1946, i. e., the date fixed for redemption of mortgage under the decree of the High Court.

10. Counsel then urged that in any event the mortgagees are not entitled to interest exceeding the principal. Reliance in this connection was placed upon the Madhya Pradesh Money Lenders Act 13 of 1934. Section 9 of that Act provides:

"Notwithstanding anything contained in any other enactment for the time being in force, no court original or appellate shall decree, in respect of any loan made before this Act comes into force, on account of arrears of interest, a sum greater than the principal of such loan."

The section prohibits the Courts from awarding interest exceeding the principal of the loan. Counsel for the appellants contends that if all the amounts deposited from time to time by the debtors be aggregated, it will appear that an amount exceeding the loan was paid. But the prohibition of the statute is against the making of a decree for arrears of interest exceeding the amount of loan. In the present case the decree awards interest amounting to Rs. 746.30, whereas the principal is Rs. 33,866.51.

II. Finally, it was contended that the Custodian of Evacuee Property is not entitled to claim a decree absolute for sale, and only Mohamad Ayyub—one of the partners in the firm of Seth Haroon and Sons—may alone be given a decree absolute in respect of his share. That contention is futile. The Court is concerned at this stage to pass a decree absolute for sale in a mortgage suit. It is not concerned to determine the respective rights of the mortgagees inter se. The mortgagees' interest is fully represented before the Court. Whether or not the Custodian of Evacuee Property is entitled to the money or that the evacuees have a subsisting interest is a matter which cannot be decided in this appeal. That was made clear by the judgment of the High Court in the application filed by the Custodian of Evacuee Property by order dated November 12, 1962, when the High Court observed:

"Time has not come yet to determine this question and it is not necessary at this stage to decide what are the respective rights of the evacuees in the property which is before the Court as between the evacuee-plaintiffs and the Custodian."

The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 165
(V 57 C 38)

(From Madras)*

M. HIDAYATULLAH, C. J., J. M. SHELAT, C. A. VAIDIALINGAM, K. S. HEGDE AND A. N. GROVER, JJ.

State of Madras, Appellant v. Davar and Co., etc., Respondents.

Civil Appeals Nos. 1462 to 1465 of 1967, D/- 20-5-1969.

Sales Tax — Central Sales Tax Act (1956), Section 5 (2) — Expression "customs frontiers of India" in Section 5 — Construction of — Arrival of imported goods in Indian harbours — Its sale long thereafter by transfer of documents of title — Sale is not in course of import and is liable to Sales Tax under Madras General Sales Tax Act — Tax Cases Nos. 29, 47, 132 and 160 of 1961 (Revn. Nos. 16, 28, 81 and 98 of 1961), D/- 17-7-1963 (Mad), Reversed.

The expression "customs frontiers of India" in Section 5 of the Central Sales Tax Act (1956) cannot be construed to mean "customs barriers". The expression must be construed in accordance with the notification issued by the Central Government under Section 3-A of the Sea Customs Act (1878) on August 6, 1955 read with the Proclamation of the President of India dated March 22, 1956. So applying the definition of 'customs frontiers' it is clear that, where the sales of the goods imported in India are effected by transfer of documents of title, long after the ships carrying goods have already reached the Indian harbours, such sales cannot be called as effected in the course of import. Consequently, such sales are not covered by Article 286 (1) (b) of the Constitution and they are not liable to be exempted from the sales tax assessed under the local Act by the State Government. Tax Cases Nos. 29, 47, 132 and 160 of 1961 (Revn. Nos. 16, 28, 81 and 98 of 1961), D/- 17-7-1963 (Mad), Reversed.
(Paras 10 and 14)

Mr. A. K. Sen Senior Advocate (Mr. A. V. Rangam, Advocate with him), for Appellant; Mr. R. Thiagarajan, Advocate for Respondent (In C. A. No. 1464 of 1967); Mr. K. Jayaram, Advocate, for Respondent (In C. A. No. 1465 of 1967).

* (Tax Cases Nos. 29, 47, 132 and 160 of 1961 (Revn. Nos. 16, 28, 81 and 98 of 1961), D/- 17-7-1963—Mad.)

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: These appeals, by special leave, by the State of Madras, are directed against the common judgment dated July 17, 1963 of the Madras High Court.

2. The short question, that arises for consideration in these appeals, is as to whether the turnover, which was the subject of consideration by the High Court, was liable for sales-tax, under the Madras General Sales Tax Act, 1959 (Act I of 1959) (hereinafter called the Madras Act). The assessees claimed that the turnover in question represented sales in the course of import and, as such, not liable to tax under the Madras Act. The State of Madras claimed that in all these cases the sale had been effected by a transfer of documents of title to the respective buyers after the ships had crossed the territorial waters and hence they were liable to tax under the Madras Act. The contention of the assessees was negatived by the Assistant Commercial Tax Officer, as also by the Appellate Assistant Commissioner of Commercial Taxes. But, on further appeal by the assessees, the Sales Tax Appellate Tribunal accepted their contention and held that the disputed turnovers were not liable to tax under the Madras Act. The revisions filed by the State against the orders of the Sales Tax Appellate Tribunal were dismissed by the High Court. Hence these appeals.

3. Though each of the respondents in these appeals is an importer of a different commodity, the pattern adopted by each of them in the matter of importing the goods concerned from foreign countries and in the matter of transferring title to the respective buyers is more or less the same. We shall therefore refer only to the facts relating to the dealings adopted by Davar and Company (hereinafter called the assessee), the respondent in Civil Appeal No. 1462 of 1967.

4. The assessee was assessed by the Assistant Commercial Tax Officer, South Madras and Chingleput, under the Madras Act on a turnover of Rs. 6,60,200.07 for the year 1957-58. It was carrying on business in timber at Madras and in the course of its business the assessee imported timber from Burma and sold it to its customers in India. Out of the turnover above-mentioned, the assessee disputed its liability to the extent of a turnover of Rs. 1,95,490.67 on the ground that the said amount represented sales in the

course of import and that such sales were not liable to tax as they were covered by Article 286 (1) (b) of the Constitution. This claim was based on the following circumstances. The respondent-assessee entered into contracts for sale of timber with a firm of merchants called Velu and Brothers (hereinafter called the buyers). The timber was to be imported from Burma. Under the contract the buyers were to pay the assessee 8 per cent. profit on the C.I.F. value of timber sold and also the sales tax and other charges and expenses. The buyers were to retire the shipping documents at least 10 days before the expected arrival of the steamer carrying the timber. The assessee imported two consignments of timber from Rangoon. The value of the first consignment was Rs. 99098.05. The ship carrying the consignment arrived at the Madras Harbour on October 17, 1957. The assessee got Rs. 1,00,000 from the buyers on October 24, 1957 and retired the documents of title, from the bank and handed over the said documents on the same date to the buyers to enable them to clear the goods. All charges and expenses by way of import duty, clearance charges etc., were paid by the buyers on behalf of the assessee. A second consignment reached Madras by ship on December 17, 1957. The assessee obtained from the buyers, on December 23, 1957 the value of this consignment after handing over to the buyers the necessary shipping documents.

5. On these facts both the Commercial Tax Officer as well as the Appellate Assistant Commissioner came to the conclusion that the sales effected by the assessee to the buyers were not sales in the course of import, but were local sales liable to tax under the Madras Act. The Sales Tax Appellate Tribunal, on the other hand, held to the contrary. The High Court has concurred with the view of the Appellate Tribunal.

6. According to the Assistant Commercial Tax Officer and the Appellate Assistant Commissioner the sale was effected by the assessee to the buyer after the consignment of timber had come into the Madras Port and in consequence there was no intention to transfer the property in the goods to the buyers before they were cleared from the customs frontier and hence the sales could not be considered to be sales in the course of import. The Appellate Tribunal took the view that the sale by the assessee to the buyers had been effected by transferring the docu-

ments of title relating to the goods, before the goods crossed the customs barrier and before the import became complete. Therefore, according to the Tribunal, the sales should be treated as being in the course of import and, in consequence, not liable for tax under the Madras Act.

7. On the facts stated above, the parties were not in dispute; but, before the High Court, the State raised the contention that the sales in question were not sales in the course of import as the documents of title were handed over by the assessee to the buyers after the ship had crossed the 'territorial waters'. According to the State, the expression 'customs frontier', occurring in Section 5 (2) of the Central Sales Tax Act, 1956 (Act LXXIV of 1956) (hereinafter called the Central Act) is coterminous with the extent of the 'territorial waters' of India, as fixed by the Proclamation, dated March 22, 1956 issued by the President of India. That is, according to the State, the import is complete when the ship carrying the goods from a foreign port enters the territorial waters and any sale by the importer, by transfer of documents of title to the goods subsequent to such entry will not amount to a sale in the course of import. According to the assessee, 'customs frontiers' in Section 5 (2) of the Central Act, must be treated as analogous to 'customs barriers' and, so read, the position would be that a sale effected by transfer of documents of title before the goods cross the 'customs barrier' would not be liable to tax under the Madras Act.

8. The High Court has, after a reference to various decisions of this Court as to when a sale can be considered to be in the course of import or export, held that the 'customs frontiers' as laid down by this Court does not mean any geographical features like land or coast or limits of territorial waters, but only the operation of the machinery of the Customs Department consisting of levy and collection of duty and clearance of the goods. The High Court further held that it would be proper to construe the words 'customs frontiers' as 'customs barriers' in the Central Act. In this view the High Court held that as the sale had been effected by transfer of title to the goods before they entered the customs barrier, the sale was not liable to tax under the Madras Act.

9. On behalf of the appellant-State Mr. A. K. Sen, learned counsel, urged that

the view of the Madras High Court construing the words 'customs frontiers' as 'customs barriers' in the Central Act was erroneous. According to the learned counsel, on the admitted facts the sales in all these cases had been effected by transfer of the documents of title long after the sales had ceased to be in the course of import. This contention, on behalf of the State, was resisted by Mr. Thiagarajan and Mr. K. Jaya Ram, appearing for the respondent in Civil Appeals Nos. 1464 and 1465 of 1967, respectively.

10. We are of the view that the judgment of the Madras High Court cannot be sustained and the expression 'customs frontiers' in Section 5 of the Central Act cannot be construed to mean 'customs barriers'. Article 286 (1) places a ban on the State imposing or authorising the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place outside the State or in the course of import of goods into or export of goods out of the territory of India. Clause (2) of Article 286 gives power to the Parliament, by law, to formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in Clause (1). Accordingly Parliament has enacted the Central Act. Section 5 of that Act lays down the conditions under which a sale or purchase of goods can be said to take place in the course of import or export. Subsections (1) and (2) deal with sale or purchase of goods in the course of export and sale or purchase of goods in the course of import, respectively. As we are concerned with a sale in the course of import, the relevant provision is subsection (2) of Section 5, which is as follows:

"5 (2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."

11. In this case, the claim made by the assessee for exemption from tax liability is on the ground that the sale was effected by transfer to the buyer of documents of title to the goods. Under Section 5 (2) of the Central Act, in order to treat the sale as one in the course of import, the documents of title must have been transferred before the goods have crossed the customs frontiers of India.

The question is what does the expression 'customs frontiers' of India, in Section 5 of the Central Act, mean? To answer this question, it is necessary to refer to certain Proclamations made by the President of India and Notifications issued by the Central Government under S. 3-A of the Sea Customs Act, 1878 (Act VIII of 1878) (hereinafter called the Act).

12. The President of India has issued a Proclamation, dated March 22, 1956 and that contains a declaration as to the extent of the territorial waters of India. That Proclamation has been published with the notification of the Government of India in the Ministry of External Affairs, No. S.R.O. 669, dated March 22, 1956 and is as follows:

"S.R.O. 669.—The following proclamation by the President is published for general information:

PROCLAMATION

"Whereas international law has always recognised that sovereignty of a State extends to a belt of sea adjacent to its coast;

And whereas international practice is not uniform as regards the extent of this sea-belt commonly known as the territorial waters of the State, and consequently it is necessary to make a declaration as to the extent of the territorial waters of India;

I, Rajendra Prasad, President of India, in the Seventh Year of the Republic, do hereby proclaim that, notwithstanding any rule of law or practice to the contrary which may have been observed in the past in relation to India or any part thereof, the territorial waters of India extend into the sea to a distance of six nautical miles measured from the appropriate base line."

RAJENDRA PRASAD
President."

On September 30, 1967 another Proclamation was issued by the President of India and published with the notification of the Government of India in the Ministry of External Affairs, No. F. L/111 (1)/67 dated September 30, 1967. By this Proclamation the earlier Proclamation of March 22, 1956 has been superseded and the territorial waters of India have been declared to extend into the sea to a distance of twelve nautical miles measured from the appropriate base line. But in the present appeals, we are concerned only with the earlier Proclamation dated March 22, 1956.

13. Section 3-A of the Act gives power to the Central Government, to define, by

notification in the Official Gazette, the 'customs frontiers' of India. By virtue of the powers conferred by this section, the Central Government (Ministry of Finance, Revenue Division) had issued a notification, No. 25-Customs, dated April 1, 1950, defining the 'customs frontiers' of India; but it is not necessary to consider the definition contained in this notification, as it has been superseded by the issue of a fresh Notification, No. S.R.O. 1683 dated August 6, 1955. The later notification, issued by the Ministry of Finance (Revenue Division), Customs, which is relevant for the present purpose, is as follows:

New Delhi, the 6th August, 1955.

S.R.O. 1683.—In exercise of the powers conferred by Section 3-A of the Sea Customs Act, 1878 (VIII of 1878), and in supersession of the notification of the Government of India in the Ministry of Finance (Revenue Division) No. 25-Customs, dated the 1st April 1950, the Central Government hereby defines the customs frontiers of India as the boundaries of the territory, including territorial waters of India.

Sd/-

Jt. Secretary".

14. The expression 'customs frontiers of India' in Section 5 of the Central Act, in our opinion, must be construed in accordance with the notification issued by the Central Government under Sec. 3-A of the Act, on August 6, 1955 read with the Proclamation of the President of India dated March 22, 1956. So applying the definition of 'customs frontiers' it is clear that, in the instant case, the sales were effected by transfer of documents of title long after the goods had crossed the customs frontiers of India. We have already stated that the ships carrying the goods in question were all in the respective harbours within the State of Madras when the sales were effected by the assesseees by transfer of documents of title to the buyers. If so, it follows that the claim made by the assesseees that the sales in question were sales in the course of import, has been rightly rejected by the assessing authority. Unfortunately, though various aspects seem to have been pressed before the High Court by the State of Madras, this notification of August 6, 1955, issued by the Government of India, defining the 'customs frontiers' of India, was not brought to the notice of the High Court.

15. In the result, the common order dated July 17, 1963 of the Madras High

Court is set aside and the appeals allowed. In the circumstances of the case, there will be no order as to costs.

Appeals allowed.

AIR 1970 SUPREME COURT 169

(V 57 C 39)

(From Madras)*

M. HIDAYATULLAH, C. J., J. C. SHAH,
V. RAMASWAMI, G. K. MITTER AND
A. N. GROVER, JJ.

Assistant Commissioner of Urban Land Tax Madras and others etc., Appellants v. Buckingham and Carnatic Co. Ltd. etc., Respondents.

Civil Appeals Nos. 21 to 23, 46, 47, 125 and 274 of 1969, D/- 11-4-1969.

(A) Madras Urban Land Tax Act (12 of 1966), Section 1 — Act relating to taxation on lands and buildings — Competency of State Legislature to enact — Madras Urban Land Tax Act 12 of 1966 is not beyond competence of State Legislature — W. P. Nos. 387 of 1968 etc., D/- 10-4-1968 (Mad), Reversed — (Constitution of India, Arts. 245, 39 (c), 246, Schedule VII List I Entries 86, 87, 88 and List II Entries 48, 49).

In pith and substance the Madras Urban Land Tax Act 12 of 1966 in imposing a tax on urban land at a percentage of the market value is entirely within the ambit of Entry 49 of List II and within the competence of the State Legislature and does not in any way trench upon the field of legislation of Entry 86 of List I. (Para 7)

There is no warrant for the assumption that Entries 86, 88 of List I and Entry 48 of List II form a special group embodying any particular scheme. The directive principle embodied in Article 39 (c) applies both to Parliament and to the State Legislature and the Entries 86 to 88 of List I do not exclude any power of the State Legislature to implement the same principle. The legislative entries must be given a large and liberal interpretation, the reason being that the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere simplex enumeration of broad categories. Entries 86 and 87 of List I do not preclude the State Legislature from taxing capital value of lands and buildings under Entry 49 of List II.

* (Writ Petns. Nos. 387 of 1968 etc., D/- 10-4-1968—Mad.)

There is no conflict between Entry 86 of List I and Entry 49 of List II. The basis of taxation under the two entries is quite distinct. As regards Entry 86 of List I the basis of the taxation is the capital value of the asset. It is not a tax directly on the capital value of assets of individuals and companies on the valuation date. The tax is not imposed on the components of the assets of the assessee. The tax under Entry 86 proceeds on the principle of aggregation and is imposed on the totality of the value of all the assets. It is imposed on the total assets which the assessee owns and in determining the net wealth not only the encumbrances specifically charged against any item of assets, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account. In certain exceptional case, where a person owes no debts and is under no enforceable obligation to discharge any liability out of his assets, it may be possible to break up the tax which is leviable on the total assets into components and attribute a component to lands and buildings owned by an assessee. In such a case, the component out of the total tax attributable to lands and buildings may in the matter of computation bear similarity to a tax on lands and buildings levied on the capital or annual value under Entry 49, List II. But in a normal case a tax on capital value of assets bears no definable relation to lands and buildings which may or may not form a component of the total assets of the assessee. But Entry 49 of List II, contemplates a levy of tax on lands and buildings or both as units. It is not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of power under Entry 86, List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability do not make the fields of legislation under the

two entries overlapping. The two taxes are entirely different in their basic concept and fall on different subject matters.

(Para 5)

(B) Constitution of India, Schedule VII, List II, Entries 49 and 45 — Taxes on lands and buildings — Scope of entries — Statute imposing tax on lands only — Falls under Entry 49 and not under Entry 45 — Madras Urban Land Tax Act (12 of 1966), falls under Entry 49.

Merely because a statute imposes tax on land alone it cannot be said that the statute does not fall under Entry 49. The legislative history of Entry 49 does not show that Entry 49 relating to tax on land and buildings cannot be separated. Before the Government of India Act, 1935 lands and buildings were taxed separately and all that was done under the Government of India Act, 1935 and the Constitution was to combine the two entries relating to land and buildings into a single entry. Entry 49 "Taxes on lands and buildings" should be construed as taxes on land and taxes on buildings and there is no reason for restricting the amplitude of the language used in the entry. Consequently, it cannot be said that as Madras Urban Land Tax Act (12 of 1966) imposes tax on lands alone it falls under Entry 45 and not Entry 49 of List II. AIR 1962 SC 1563 and AIR 1965 SC 177, Foll.

(Para 8)

(C) Madras Urban Land Tax Act (12 of 1966), Section 6 — Validity — Section 6 does not violate Article 14 or 19 (1) — W. P. Nos. 387 of 1968 etc., D/- 10-4-1968 (Mad), Reversed — Constitution of India, Articles 14, 19 (1) and 245.

It cannot be said that Section 6 violates Article 14 of the Constitution on ground that it does not provide machinery for determination of market value. The opinion which the Assistant Commissioner has to form under Section 6 is not subjective but has to be reached objectively upon the relevant evidence after following the requisite formalities laid down in the Act.

(Para 9)

It cannot, however, be said that the power to determine value of the urban land under S. 6 of the Act constitute excessive delegation of authority and so violates Articles 19 (1) and 14 of the Constitution. The power of determining the value of the urban land being judicial or quasi judicial in character the doctrine of excessive delegation of authority has no application. W. P. Nos. 387 of 1968, etc., D/- 10-4-1968 (Mad), Reversed.

(Para 10)

(D) Madras Urban Land Tax Act (12 of 1966), Section 5 — Imposition of tax on capital value of urban lands — Rate of tax is not unreasonable or confiscatory — W. P. Nos. 387 of 1968 etc., D/- 10-4-1968 (Mad), Reversed — Constitution of India Art. 19 (1) (f).

Madras Urban Land Tax Act (12 of 1966) cannot be struck down on ground that it imposes unreasonable restriction on the right to acquire, hold and dispose of property and as such is violative of Article 19 (1) (f) of the Constitution. It cannot be said that the Act by imposing a tax on the capital value at a certain rate is not correlated to the income or rateable value and, therefore, violates the requirement of reasonableness. W. P. Nos. 387 of 1968 etc., D/- 10-4-1968 (Mad), Reversed.

(Para 11)

As a general rule it may be said that so long as a tax retains its character as a tax and is not confiscatory, or extortionate the reasonableness of the tax cannot be questioned. It is not possible to put the test of reasonableness into the straight jacket of a narrow formula. The objects to be taxed, the quantum of tax to be levied, the conditions subject to which it is levied and the social and economic policies which a tax is designed to subserve are all matters of political character and these matters have been entrusted to the Legislature and not to the Courts. In applying the test of reasonableness it is also essential to notice that the power of taxation is generally regarded as an essential attribute of sovereignty and constitutional provisions relating to the power of taxation are regarded not as grant of power but as limitation upon the power which would otherwise be practically without limit.

(Para 11)

The levy of tax under the Act at 0.4 per cent of the market value of the urban land is by no means confiscatory in effect. Merely because the property tax under the Municipalities Act and the tax on urban land under the 1966 Act, both enacted under Entry 49 exhaust an unreasonably high proportion of income, it cannot be said that the charging section under the 1966 Act is unreasonable. The basis of the two taxes being different it is not permissible to club together the two taxes and complain of the cumulative burden. If the tax is on the market value of the urban land it does not admit of a complaint that it takes away an unreasonably high proportion of the income. A tax on land values and a tax

on letting value, though both are taxes under Entry 49 of List II, cannot be clubbed together in order to test the reasonableness of one or the other for the purposes of Article 19 (1). (Para 11)

Retrospective operation of the Act does not also make it unreasonable. It is not right to say as a general proposition that the imposition of tax with retrospective effect per se renders the law unconstitutional. In applying the test of reasonableness to a taxing statute it is of course a relevant consideration that the tax is being enforced with retrospective effect but that is not conclusive in itself. Taking into account the legislative history of the Act it cannot be said that there is any unreasonableness in respect of the retrospective operation of the Act. AIR 1963 SC 1667, Foll.; 73 Harward Law Rev. 692, Ref. to. (Paras 12, 14)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 59 (V 56) = 1968-2 SCJ 790, Sudhir Chandra Nawn v. Wealth, Tax, Officer, Calcutta 6
- (1966) 1966-2 Mad LJ 172 = ILR (1966) 2 Mad 604, Buckingham & Carnatic Co., Ltd. v. State of Madras 2
- (1965) AIR 1965 SC 177 (V 52) = 1964-6 SCR 666, H. R. S. Murthy v. Collector of Chittoor 8
- (1963) AIR 1963 SC 1667 (V 50) = (1964) 1 SCR 897, Rai Ramkrishna v. State of Bihar 11, 12
- (1962) AIR 1962 SC 1563 (V 49) = 1963-1 SCR 220, Jagannath Baksh Singh v. State of U. P. 8, 11
- (1961) AIR 1961 SC 552 (V 48) = (1961) 3 SCR 77, Kunnathat Thathunni Moopil Nair v. State of Kerala 11
- (1949) AIR 1949 FC 81 (V 36) = 1948 FCR 207, Ralla Ram v. Province of East Punjab 6
- (1941) AIR 1941 FC 47 (V 28) = 1940 FCR 188, Subrahmanyam Chettiar v. Muthuswami Goundari 7
- (1940) 1940 AC 513 = 109 LJPC 68, Board of Trustees of Lethbridge Irrigation District v. Independent Order of Foresters 7
- (1937) 1937 AC 863 = 106 LJPC 161, Gallagher v. Lynn 7
- (1930) 1930 AC 111 = 99 LJPC 20, Att. Gen. for Canada v. Att. Gen. for British Columbia 7
- (1889) 1899 AC 580 = 68 LJPC 118, Union Colliery Co. of British Columbia Ltd. v. Bryden 7

(1882) 7 AC 829 = 51 LJPC 77,

Russell v. The Queen 7

(1881) 7 AC 96, Citizens Insurance

Co. of Canada v. Parsons 7

Mr. S. V. Gupte, Senior Advocate (Mr. G. Ramanujam, Government Pleader, Madras High Court and Mr. A. V. Rangam, Advocate, with him), for Appellants (in C. As. Nos. 21 to 23 of 1969) and Respondents (In C. As. Nos. 46, 47, 125 and 274 of 1969); Mr. V. K. T. Chari, Senior Advocate (M/s. T. N. C. Rangarajan and D. N. Gupta, Advocates with him), for Appellants (in C. As. Nos. 46 and 57 of 1969) and Respondents (In C. As. Nos. 21 and 23 of 1969); Mr. V. K. T. Chari, Senior Advocate (M/s. A. R. Ramanathan, T. N. C. Rangarajan and R. Gopalakrishnan, Advocates with him), for Appellants (In C. A. No. 125 of 1969); Mr. K. C. Rajappa, Advocate and M/s. S. Balakrishnan and S. Laxminarasu, Advocates of M/s. Aiyar and Aiyar, for Appellant (in C. A. No. 274 of 1969); Mr. K. C. Rajappa, Advocate, M/s. S. Balakrishnan and S. Laxminarasu, Advocates of M/s. Aiyar and Aiyar and Mr. N. M. Ghatate, Advocate, for Respondents (In C. A. No. 22 of 1969).

The following Judgment of the Court was delivered by

RAMASWAMI, J.: In these appeals which have been heard together a common question of law arises for determination, namely, whether the Madras Urban Land Tax Act, 1966 (12 of 1966) is constitutionally valid.

2. In 1963 the Madras Legislature enacted the Madras Urban Land Tax Act, 1963 which came into force in the city of Madras on the 1st of July, 1963. In the Statement of Objects and Reasons of the 1963 Act it was stated that the Taxation Enquiry Commission and the Planning Commission were suggesting the need for imposing a suitable levy on lands put to non-agricultural use in urban areas. The State Government, after examining the report of the Special Officer, decided to levy a tax on urban land on the basis of market value of the land at the rate of 0.4 per cent on such market value. Section 3 of the Act of 1963 (which will be referred to as the old Act) provided that there shall be levied and collected for every fasli year commencing from the date of the commencement of the Act, a tax on urban land from every owner of urban land at the rate of 0.4 per cent of the average market value of the urban land in a sub-zone as determined

under sub-section (2) of Section 6. Section 7 provided for the determination of the highest and lowest market value in a zone. For determining the average market value, the Assistant Commissioner shall have regard to any matters specified in clauses (a) to (e) of sub-section (2) of Section 6, namely;

(a) the locality in which the urban land is situated;

(b) the predominant use to which the urban land is put, that is to say, industrial commercial or residential;

(c) accessibility or proximity to market, dispensary, hospital, railway station, educational institution, or Government offices;

(d) availability of civil amenities like water supply, drainage and lighting; and

(e) such other matters as may be prescribed.

The constitutional validity of Act 34 of 1963 was challenged and in *Buckingham and Carnatic Co. Ltd. v. State of Madras*, 1966-2 Mad LJ 172 a Division Bench of the Madras High Court held that the impugned Act fell under Entry 49, List II of Schedule VII to the Constitution and was within the legislative competence of the State Legislature. But the Act was struck down on the ground that Art. 14 of the Constitution was violated, because the charging section of the Act levied the tax on urban land not on the market value of such urban land but on the average value of the lands in the locality known as a sub-zone. The new Act (Act 12 of 1966) was passed by the State Legislature after the decision of the Madras High Court. In the new Act provisions relating to fixation of average market value in the sub-zone were omitted. Instead, Section 5 of the new Act provides that there shall be levied and collected from every year commencing from the date of the commencement of the Act a tax on each urban land from the owner of such urban land at the rate of 0.4 per cent of the market value of such urban land. Section 2 (10) defines "owner" as follows:

"Owner" includes—

(i) any person (including a mortgagee in possession) for the time being receiving or entitled to receive, whether on his own account or as agent, trustee, guardian, manager or receiver for another person or for any religious or charitable purposes, the rent or profits of the urban land or of the building constructed on the urban land in respect of which the word is used;

(ii) any person who is entitled to the kudiwaram in respect of any inam land; but does not include—

(a) a shortriamdar; or

(b) any person who is entitled to the melwaram in respect of any inam land but in respect of which land any other person is entitled to the kudiwaram.

Explanation.—For the purposes of Clause (9) and Clause (10) inam land includes lakhiraj tenures of land and shrotri-am land.

Section 2 (13) defines 'land' to mean any land which is used or is capable of being used as a building site and includes garden or grounds, if any, appurtenant to a building but does not include any land which is registered as wet in the revenue accounts of the Government and used for the cultivation of wet crops."

3. Section 6 states: "For the purposes of this Act, the market value of any urban land shall be estimated to be the price which in the opinion of the Assistant Commissioner, or the Tribunal, as the case may be, such urban land would have fetched or fetch, if sold in the open market on the date of the commencement of this Act."

Section 7 provides for the submission of returns by the owner of urban land and reads:

"Every owner of urban land liable to pay urban land tax under this Act shall, within a period of one month from the date of the publication of the Madras Urban Land Tax Ordinance, 1966 (Madras Ordinance III of 1966) in the Fort St. George Gazette, furnish to the Assistant Commissioner having jurisdiction a return in respect of each urban land containing the following particulars, namely:—

(a) name of the owner of the urban land,

(b) the extent of the urban land,

(c) the name of the division or ward and the street, survey number and sub-division number of the land and other particulars of such urban land, and

(d) the amount which in the opinion of the owner is the market value of the urban land."

Section 10 deals with the procedure for the determination of the market value by the Assistant Commissioner and states:

"(1) Where a return is furnished under Section 7 the Assistant Commissioner shall examine the return and made such enquiry as he deems fit. If the Assistant Commissioner is satisfied that the particulars mentioned therein are correct and complete he shall, by order in writing

determine the market value of the urban land and the amount of urban land tax payable in respect of such urban land.

(2) (a) Where on examination of the return and after the enquiry the Assistant Commissioner is not satisfied that the particulars mentioned therein are correct and complete he shall serve a notice on the owner either to attend in person or at his office on a date to be specified in the notice or to produce or cause to be produced on that date any evidence on which the owner may rely in support of his return.

(b) The Assistant Commissioner after hearing such evidence as the owner may produce in pursuance of the notice under Clause (a) and such other evidence as the Assistant Commissioner may require on any specified points shall, by order in writing, determine the market value of the urban land and the amount of urban land tax payable in respect of such urban land.

(c) Where the owner has failed to attend or produce evidence in pursuance of the notice under Clause (a) the Assistant Commissioner shall, on the basis of the enquiry made under Clause (a), by order in writing determine the market value of the urban land and the amount of urban land tax payable in respect of such urban land."

Section 11 enacts:

"(1) Where the owner of urban land has failed to furnish the return under Section 7 and the Assistant Commissioner has obtained the necessary information under Section 9 he shall serve a notice on the owner in respect of each urban land specifying therein—

(a) the extent of the urban land,

(b) the amount which, in the opinion of the Assistant Commissioner is the correct market value of the urban land, and direct him either to attend in person at his office on a date to be specified in the notice or to produce or cause to be produced on that date any evidence on which the owner may rely.

(2) After hearing such evidence, as the owner may produce and such other evidence as the Assistant Commissioner may require on any specified points, the Assistant Commissioner shall, by order in writing, determine the market value of the urban land and the amount of urban land tax payable in respect of such urban land.

(3) Where the owner has failed to attend or to produce evidence in pursuance of the notice under sub-section (1) the Assistant Commissioner shall, on the basis

of the information obtained by him under Section 9, by order in writing determine the market value of the urban land and the amount of the urban land tax payable in respect of such urban land." Section 20 provides for an appeal to the Tribunal from the orders of the Assistant Commissioner:

"(1) (a) Any assessee objecting to any order passed by the Assistant Commissioner under Section 10 or 11 may appeal to the Tribunal within thirty days from the date of the receipt of the copy of the order.

(b) Any person denying his liability to be assessed under this Act may appeal to the Tribunal within thirty days from the date of the receipt of the notice of demand relating to the assessment:

Provided that no appeal shall lie under Clause (a) or Clause (b) of this sub-section unless the urban land tax has been paid before the appeal is filed.

(2) The Commissioner may, if he objects to any order passed by the Assistant Commissioner under Section 10 or 11, direct the Urban Land Tax Officer concerned to appeal to the Tribunal against such order, and such appeal may be filed within sixty days from the date of the receipt of the copy of the order by the Commissioner.

(3) The Tribunal may admit an appeal after the expiry of the period referred to in Clause (a) or Clause (b) of sub-sec. (1) or in sub-section (2), as the case may be, if it is satisfied that there was sufficient cause for not presenting it within that period.

(4) An appeal to the Tribunal under this section shall be in the prescribed form and shall be verified in the prescribed manner and shall be accompanied by such fee as may be prescribed.

(5) The Tribunal may after giving both parties to the appeal an opportunity of being heard, pass such orders thereon, as it thinks fit and shall communicate any such orders to the assessee and to the Commissioner in such manner as may be prescribed."

Section 30 confers powers of revision in the Board of Revenue and is to the following effect:

"(1) The Board of Revenue may, either on its own motion or on application made by the assessee in this behalf, call for and examine the records of any proceeding under this Act (not being a proceeding in respect of which an appeal lies to the Tribunal under Section 20) to satisfy

itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein and if, in any case, it appears to the Board of Revenue that any such decision or order should be modified, annulled, reversed or remitted for reconsideration, it may pass orders accordingly:

Provided that the Board of Revenue shall not pass any order under this subsection in any case, where the decision or order is sought to be revised by the Board of Revenue on its own motion, if such decision or order had been made more than three years previously:

Provided further that the Board of Revenue shall not pass any order under this section prejudicial to any party unless he has had a reasonable opportunity of making his representations." Section 33 states:

"(1) The Tribunal, the Board of Revenue, the Commissioner, the Assistant Commissioner, or the Urban Land Tax Officer or any other officer empowered under this Act shall, for the purposes of this Act, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (Central Act V of 1908), when trying a suit in respect of the following matters, namely:—

(a) enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses;

and any proceeding before the Tribunal the Board of Revenue, the Commissioner, the Assistant Commissioner, the Urban Land Tax Officer or any other officer empowered under this Act shall be deemed to be a judicial proceeding within the meaning of Ss. 193 and 228 and for the purposes of Section 196, of the Indian Penal Code (Central Act XLV of 1860).

(2) In any case in which an order of assessment is passed ex parte under this Act, the provisions of the Code of Civil Procedure, 1908 (Central Act V of 1908), shall apply in relation to such order as it applies in relation to a decree passed ex parte by a Court."

4. The validity of the new Act was challenged in a group of writ petitions before the Madras High Court on various constitutional grounds. By a common judgment dated the 10th April, 1968 a Full Bench of five Judges overruled all

the contentions of the petitioners with regard to the legislative competence of the Madras Legislature to enact the new Act. However, the Full Bench by a majority of 4 to 1 struck down Section 6 of the new Act as being violative of Articles 14, 19 (1) (f) of the Constitution. The State of Madras and other respondents to the writ petitions (hereinafter called the respondents for the sake of convenience) filed appeals Nos. 21 to 23 of 1969 under a certificate granted by the High Court under Articles 132 and 133 (1) (a), (b) and (c) of the Constitution. The writ petitioners (hereinafter called the petitioners) have filed C. As. Nos. 46, 47, 125 and 274 of 1969 against the same judgment on a certificate granted by the High Court under Article 132 of the Constitution.

5. The first question to be considered in these appeals is whether the Madras Legislature was competent to enact the legislation under Entry 49 of List II of Schedule VII of the Constitution which reads: "Taxes on lands and buildings." It was argued on behalf of the petitioners that the impugned Act fell under Schedule VII, List I, Entry 86 that is "Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies." The argument of Mr. V. K. T. Chari may be summarised as follows:

The impugned Act was, both in form and substance, taxation of capital and was hence beyond the competence of the State Legislature. To tax on the basis of capital or principal value of assets was permissible to Parliament under List I, Entries 86 and 87 and to State under Entry 48 of List II. Taxation of capital was the appropriate method provided for effecting the directive principle under Article 39 of the Constitution, namely, to prevent concentration of wealth. Article 366 (9) contains a definition of 'estate duty' with reference to the principal value. Entry 86 of List I (Taxes on capital value of assets exclusive of agricultural land) and Entry 88 (Duties in respect of succession to such property) form a group of entries the scheme of which is to carry out the directive principle of Article 39 (c). The Constitution indicated that capital value or principal value shall be the basis of taxation under these entries and, therefore, the method of taxation of capital or principal value was prohibited even to Parliament in respect of other taxes and to the State except in respect of Estate Duty on agricultural

land. Such in effect is the argument of Mr. V. K. T. Chari. But in our opinion there is no warrant for the assumption that entries 86, 88 of List I and Entry 48 of List II form a special group embodying any particular scheme. The directive principle embodied in Article 39 (c) applies both to Parliament and to the State Legislature and it is difficult to conceive how entries 86 to 88 of List I would exclude any power of the State Legislature to implement the same principle. The legislative entries must be given a large and liberal interpretation, the reason being that the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere simplex enumeration of broad categories. We see no reason, therefore, for holding that the Entries 86 and 87 of List I preclude the State Legislature from taxing capital value of lands and buildings under Entry 49 of List II. In our opinion there is no conflict between Entry 86 of List I and Entry 49 of List II. The basis of taxation under the two entries is quite distinct. As regards Entry 86 of List I the basis of the taxation is the capital value of the asset. It is not a tax directly on the capital value of assets of individuals and companies on the valuation date. The tax is not imposed on the components of the assets of the assessee. The tax under Entry 86 proceeds on the principle of aggregation and is imposed on totality of the value of all the assets. It is imposed on the total assets which the assessee owns and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account. In certain exceptional cases, where a person owes no debts and is under no enforceable obligation to discharge any liability out of his assets it may be possible to break up the tax which is leviable on the total assets into components and attribute a component to lands and buildings owned by an assessee. In such a case the component out of the total tax attributable to lands and buildings may in the matter of computation bear similarity to a tax on lands and buildings levied on the capital or annual value under Entry 49, List II. But in a normal case a tax on capital value of assets bears no definable relation to lands and buildings which may or may not form a component of the total assets of the assessee. But Entry 49 of List II, contemplates a levy of tax on

lands and buildings or both as units. It is not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of power under Entry 86, List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not make the fields of legislation under the two entries overlapping. The two taxes are entirely different in their basic concept and fall on different subject matters.

6. In *Ralla Ram v. Province of East Punjab* 1948 FCR 207 = (AIR 1949 FC 81) the Federal Court held that the tax levied by Section 3 of the Punjab Urban Immoveable Property Tax Act, 17 of 1940 on buildings and lands situated in a specified area at such rate not exceeding twenty per cent of the annual value of such buildings and lands, as the Provincial Government may by notification in the official Gazette direct in respect of each such rating area was not a tax on income, but was a tax on lands and buildings within the meaning of item No. 42 of List II of the Seventh Schedule of the Government of India Act, 1935. In that case it was contended that under the provisions of the Punjab Act the basis of the tax was the annual value of the buildings and since the same basis was used in the Income-tax Act for determining the income from property and generally speaking the annual value is the fairest standard for measuring income and, in many cases, is indistinguishable from it, the tax levied by the impugned Act was in substance a tax on income. The Court pointed out that the annual value is not necessarily actual income, but is only a standard by which income may be measured and merely because the Income-tax Act had adopted the annual value as the standard for determining the income, it did not follow that, if the same standard is employed as a measure for any other tax, that latter tax becomes also a tax on income. It was held by the Court that in substance

the property tax levied by Section 3, Punjab Urban Immoveable Property Tax Act, 1940 fell within item 42 of the Provincial List and was not a tax on income falling within item 54 of the Federal List although the basis of the tax was the annual value of the building. The same view has been expressed by this Court in *Sudhir Chandra Nawn v. Wealth-tax Officer Calcutta*, AIR 1969 SC 59 wherein it was held that the power to levy tax on lands and buildings under Entry 49 of List II did not trench upon the power conferred on Parliament by Entry 88 of List I and, therefore, the enactment of the Wealth Tax Act by Parliament was not *ultra vires*.

7. The problem in this case is the problem of characterisation of the law or classification of the law. In other words the question must be asked: what is the subject matter of the legislation in its "pith and substance" or in its true nature and character for the purpose of determining whether it is legislation with respect to Entry 49 of List II or Entry 86 of List I. In *Gallagher v. Lynn* 1937 AC 863 at p. 870 the principle is stated as follows:

"It is well established that you are to look at the true nature and character of the legislation, the pith and substance of the legislation. If on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object e. g., to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, e. g., direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed 'in respect of the forbidden subject'."

In the case of *Subrahmanyam Chettier v. Muttuswami Goundan*, 1940 FCR 188 at p. 201 = (AIR 1941 FC 47 at p. 51), Sir Maurice Gwyer, C. J. said:

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that

blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance', or its 'true nature and character,' for the purpose of determining whether it is legislation with respect to matters in this list or in that: *Citizens Insurance Company of Canada v. Parsons*, 1881-7 AC 96; *Russell v. The Queen*, 1882-7 AC 829; *Union Colliery Co. of British Columbia v. Bryden*, 1899 AC 580; *Att. Gen. for Canada v. Att. Gen. for British Columbia*, 1930 AC 111; *Board of Trustees of Lethbridge Irrigation District v. Independent Order of Foresters* 1940 AC 513. In my opinion this rule of interpretation is equally applicable to the Indian Constitution Act."

For the reasons already expressed we hold that in pith and substance the new Act in imposing a tax on urban land at a percentage of the market value is entirely within the ambit of Entry 49 of List II and within the competence of the State Legislature and does not in any way trench upon the field of legislation of Entry 86 of List I.

8. It was then said that as Entry 49 of List II provides for taxes on lands and buildings, the impugned Act which imposes tax on lands alone cannot be held to fall under that entry. It was submitted that when the legislature taxed land deliberately the legislation fell under List II of Entry 45 i. e., "land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights and alienation of revenues" and not under Entry 49 of that List. The legislative history of Entry 49 of List II does not however lend any support to this argument. Before the Government of India Act, 1935 lands and buildings were taxed separately and all that was done under the Government of India Act, 1935 and the Constitution was to combine the two entries relating to land and buildings into a single entry. Section 45-A of the Government of India Act, 1919 provided for making rules under the Act for the devolution of authority in respect of provincial subjects to local Governments, and for the allocation of revenues or other moneys to those Governments. The Government of India by a notification

dated December 16, 1920 made rules under that provision called the "Scheduled Tax Rules". These Rules contained two schedules. The first Schedule contained eight items of tax or fee. The Legislative Council of a Province may without obtaining the previous sanction of the Governor General make and take into consideration any law imposing for the purposes of the local Government any tax included in Schedule I. Schedule II contained eleven items of tax. In making a law imposing or authorising any local authority to impose for the purposes of such local authority any tax in Schedule II, the Legislative Council required no previous sanction of the Governor General. In Schedule II, item No. 2 was tax on land or land values and item 3 was a tax on buildings. In the Government of India Act, 1935 the two entries were combined and List II, Entry 42 is "Taxes on lands and buildings and hearths and Windows". The legislative history of Entry 49, List II does not, therefore, lend any support to the argument that Entry 49 of List II relating to tax on land and buildings cannot be separated. On the other hand we are of opinion that Entry 49 "Taxes on lands and buildings" should be construed as taxes on land and taxes on buildings and there is no reason for restricting the amplitude of the language used in the Entry. This view is also borne out by authorities. In *Raja Jagannath Baksh Singh v. The State of U. P.* 1963-1 SCR 220 = (AIR 1962 SC 1563) the question at issue was whether the tax imposed by the U. P. Government on land holdings under the U. P. Large Land Holdings Tax Act, 1957 (U.P. Act 31 of 1957) was constitutionally valid. It was held that the legislation fell under Entry 49 of List II and the tax on land would include agricultural land also. Similarly in *H. R. S. Murthy v. Collector of Chittoor*, 1964-6 SCR 666 = (AIR 1965 SC 177) it was held that the land cess imposed under Sections 78 and 79 of the Madras District Boards Act (Mad. Act No. XIV of 1920) and Mines and Minerals Regulation and Development) Act (Act 67 of 1957) was a tax on land falling under Entry 49 of the State List. We are of opinion that the argument of Mr. V. K. T. Chari on this aspect of the case must be rejected.

9. We proceed to consider the argument that no machinery is provided for determining the market value and the provisions of the new Act, therefore,

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violate Article 14 of the Constitution. The argument was stressed by Mr. V. K. T. Chari that the guidance given under the 1963 Act has been dispensed with and the Assistant Commissioner is not bound to take into account, among other matters, the sale price of similar sites, the rent fetched for use and occupation of the land the principles generally adopted in valuing land under the Land Acquisition Act and the compensation awarded in recent land acquisition proceedings. We see no justification for this argument. The procedure for determining the market value and assessment of urban land is described in Chapter III of the new Act. Section 6 provides that the market value of the urban land "shall be estimated to be the price which in the opinion of the Assistant Commissioner, or the Tribunal, as the case may be, such urban land would have fetched or fetch, if sold in the open market on the date of the commencement of this Act". It was said on behalf of the petitioners that the opinion which the Assistant Commissioner has to form is purely subjective and may be arbitrary. We do not think that this contention is correct. Having regard to the language and context of Section 6 of the new Act we consider that the opinion which the Assistant Commissioner has to form under that section is not subjective but should be reached objectively upon the relevant evidence after following the requisite formalities laid down in Sections 7 to 11 of the new Act. Instead of the Assistant Commissioner classifying the urban land and determining the market value in a zone, the present Act requires a return to be submitted by the owner mentioning the amount which, in the opinion of the owner, is the market value of the urban land. On receipt of the return, if the Assistant Commissioner is satisfied that the particulars mentioned are correct and complete, he may determine the market value as given by the owner of the land. If he is not satisfied with the return, he shall serve a notice to the owner asking him to attend his office with the relevant evidence in support of his return. After hearing the owner and considering the evidence produced, the Assistant Commissioner may determine the market value. In case the owner fails to attend or fails to produce the evidence, the Assistant Commissioner is empowered to assess the market value on the basis of an enquiry made by him. Section 11 pre-

scribes the procedure for determining the market value when the owner fails to furnish a return as required under Section 7. The section requires the Assistant Commissioner to serve a notice on the owner specifying amongst other things the amount, which in the opinion of the Assistant Commissioner, is the correct market value and directing the owner to attend in person at his office on a date specified in the notice or to produce any evidence on which the owner may rely. After hearing such evidence as the owner may produce and considering such other evidence as may be required, the Assistant Commissioner may fix the market value. The proceeding before the Assistant Commissioner is judicial in character and his opinion regarding the market value is reached objectively on all the materials produced before him. Section 20 provides for an appeal by the assessee objecting to the determination of the market value made by the Assistant Commissioner to a Tribunal within thirty days from the date of the receipt of the copy of the order. The Act requires that the Tribunal shall consist of one person only who shall be a judicial officer not below the rank of a Subordinate Judge. By Section 30, the Board of Revenue is empowered either on its own motion or on application made by the assessee in this behalf, to call for and examine the records of any proceedings under the Act (not being a proceeding in respect of which an appeal lies to the Tribunal under Section 20), to satisfy itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein, and if it appears to the Board of Revenue that any such decision or order should be modified, annulled, reversed or remitted for reconsideration, it may pass order accordingly. Section 32 enables the urban land tax officer, or the Assistant Commissioner, or the Board of Revenue or the Tribunal to rectify any error apparent on the face of the record at any time within three years from the date of any order passed by him or it. Section 33 confers power on the Assistant Commissioner to take evidence, to require discovery and production of documents and to receive evidence on affidavit etc. Thus, the Act envisages a detailed procedure regarding submission of returns, the making of an assessment after hearing objections and a right to appeal to higher authorities. We are hence un-

able to accept the contention of the petitioners that the provisions of Section 6 of the new Act are violative of Article 14 of the Constitution.

10. It is necessary to state that the High Court decided the case in favour of the respondents mainly on the ground that investment of the power to determine value of the urban land under S. 6 of the Act constituted excessive delegation of authority and so violative of Articles 19 (1) and 14 of the Constitution. (see the judgment of Veeraswami J. who pronounced the main judgment in the High Court.) But Mr. V. K. T. Chari did not support this line of reasoning in his arguments before this Court. On the other hand learned counsel conceded that the power of determining the value of the urban land being judicial or quasi-judicial in character the doctrine of excessive delegation of authority had no application.

11. We pass on to consider the next contention raised on behalf of the petitioners namely that the Act should be struck down as an unreasonable restriction on the right to acquire, hold and dispose of property and as such violative of Article 19(1) (f) of the Constitution. It was argued that the test of reasonableness would be that the tax should not be so high as to make the holding of the property or the carrying on of the activity (business or profession) which is subject to taxation, uneconomic according to accepted rates of yield. In this connection it was said that the new Act by imposing a tax on the capital value at a certain rate was not correlated to the income or rateable value and, therefore, violates the requirement of reasonableness. We are unable to accept the proposition put forward by Mr. Chari. It is not possible to put the test of reasonableness into the strait-jacket of a narrow formula. The objects to be taxed, the quantum of tax to be levied, the condition subject to which it is levied and the social and economic policies which a tax is designed to subserve are all matters of political character and these matters have been entrusted to the Legislature and not to the Courts. In applying the test of reasonableness it is also essential to notice that the power of taxation is generally regarded as an essential attribute of sovereignty and constitutional provisions relating to the power of taxation are regarded not as grant of power but as

limitation upon the power which would otherwise be practically without limit. It was observed by this Court in *Rai Ramkrishna v. State of Bihar*, AIR 1963 SC 1667 at p. 1673.

"It is of course true that the power of taxing the people and their property is an essential attribute of the Government and Government may legitimately exercise the said power by reference to the objects to which it is applicable to the utmost extent to which Government thinks it expedient to do so. The objects to be taxed so long as they happen to be within the legislative competence of the Legislature can be taxed by the Legislature according to the exigencies of its needs, because there can be no doubt that the State is entitled to raise revenue by taxation. The quantum of tax levied by the taxing statute, the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the Legislature, and in dealing with the contention raised by a citizen that the taxing statute contravenes Article 19 Courts would naturally be circumspect and cautious. Where for instance it appears that the taxing statute is plainly discriminatory, or provides no procedural machinery for assessment and levy of the tax, or that it is confiscatory, Courts, would be justified in striking down the impugned statute as unconstitutional. In such cases, the character of the material provisions of the impugned statute is such that the Court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the Legislature for achieving its confiscatory purposes. This is illustrated by the decision of this Court in the case of *Kunath Thathunni Moopil Nair v. State of Kerala*, AIR 1961 SC 552 where a taxing statute was struck down because it suffered from several fatal infirmities. On the other hand, we may refer to the case of AIR 1962 SC 1563 where a challenge to the taxing statute on the ground that its provisions were unreasonable was rejected and it was observed that unless the infirmities in the impugned statute were of such a serious nature as to justify its description as a colourable exercise of legislative power, the Court would uphold a taxing statute."

As a general rule it may be said that so long as a tax retains its character as a tax and is not confiscatory, or extortionate the reasonableness of the tax cannot be questioned. Mr. Chari submitted that the

existing property tax under S. 100 of the City Municipal Corporation Act and the tax on urban lands under the new Act both enacted under Entry 49 of the State List, one of them imposing a tax on the capital value of urban lands and the other on the annual value of lands and buildings exhaust an unreasonably high proportion of income. For instance, it is pointed out that in W. P. No. 2835 of 1967 the annual income on property was Rs. 6,000 and the proposed market value for the lands alone comes to Rs. 10,40,000. The urban land tax at 0.4 per cent of the market value is Rs. 4,160 and the income-tax at the rate applicable to the petitioner was Rs. 1,234. The total tax burden in the aggregate under the three heads was Rs. 6,794, which exceeds the rental income. In W. P. No. 3686 of 1967 the municipal annual value was Rs. 4,095, the property tax was Rs. 1,098 and the urban land tax at 0.4 per cent was Rs. 1,523. The proportion of the two taxes together to yearly or annual municipal value worked out to Rs. 62.5 per cent. It was, therefore, said that the taxes put together would practically exhaust the total income and the charging section in the new Act was unreasonable. The answer to the contention is that the charge is on the market value of the urban land and not on the annual letting value on which the municipal property tax is based. The basis of the two taxes being different it is not permissible to club together the two taxes and complain of the cumulative burden. If the tax is on the market value of the urban land as it is in this case it does not admit of a complaint that it takes away an unreasonably high proportion of the income. A tax on land values and a tax on letting value, though both are taxes under Entry 49 of List II, cannot be clubbed together in order to test the reasonableness of one or the other for the purposes of Article 19 (1). But so far as the new Act is concerned we consider that the levy at 0.4 per cent of the market value of the urban land is by no means confiscatory in effect. It was also pointed out by Mr. V. K. T. Chari that in certain cases the market value of the urban land was arrived at by applying what is known as the contractor's method not to the building which stands on the land whose value is ascertained by that means but to some other building on a different land taken for comparison. It was said that it was difficult enough for a man to apply the contractor's method of valuation to his

building which could be done by a competent architect after taking into account all measurements. But it is absolutely an impossible task to check up or make objections to the contractor's method applied to another man's property which cannot be trespassed upon. It was said that the contractor's method was the last resort in valuation when a building has to be valued apart from the land and that it was a wrong application of the formula to use it to value the land without the building particularly when valuation of land can be made by applying the principles of the Land Acquisition Act. But this argument has no bearing on the constitutional validity of the charging section or the machinery provisions of the Act. It is, however, open to the writ petitioners to challenge the validity of the particular valuation in any particular case by way of an appeal under a statute or to move the High Court for grant of writ under Article 226 of the Constitution.

12. The impugned Act provides for the retrospective operation of the Act. Section 2 states that except Sections 19, 47 and 48, other sections shall be deemed to have come into force in the City of Madras on the 1st day of July, 1963 and Sections 19 and 47 shall be deemed to have come into force in the city of Madras on the 21st May, 1966. It also provides that Section 48 shall come into force on the date of the publication of the Act in the Fort St. George Gazette. Section 6 enacts that the market values of the urban lands shall be estimated to be the price which in the opinion of the Assistant Commissioner or the Tribunal such urban land would have fetched or fetch if sold in the open market on the date of the commencement of the Act, that is, from 1st July, 1967. The urban land tax is, therefore, payable from 1st July, 1963. It is contended on behalf of the petitioners that the retrospective operation of the law from 1st July, 1963 would make it unreasonable. We are unable to accept the argument of the petitioners as correct. It is not right to say as a general proposition that the imposition of tax with retrospective effect per se renders the law unconstitutional. In applying the test of reasonableness to a taxing statute it is of course a relevant consideration that the tax is being enforced with retrospective effect but that is not conclusive in itself. Taking into account the legislative history of the present Act we are of opinion that there is

no unreasonableness in respect of the retrospective operation of the new Act. It should be noticed that the Madras Act of 1963 came into force on 1st July, 1963 and provided for the levy of urban land tax at the same rate as that provided under the new Act. The enactment was struck down as invalid by the judgment of the Madras High Court which was pronounced on the 25th March, 1966. The legislature by giving retrospective effect to Madras Act 12 of 1966 that the urban land must be taxed on the date on which the 1963 Act came into force cured the defect from which the earlier Act was suffering. In *Rai Ramkrishna's case*, AIR 1963 SC 1667 the question at issue was whether the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961 (17 of 1961) was violative of Article 19 (5) and (6) of the Constitution for the reason that it was made retrospective with effect from 1st April, 1950. It appears that the Bihar Finance Act, 1950 levied a tax on passengers and goods carried by public service motor vehicles in Bihar. In an appeal arising out of a suit filed by the passengers and owners of goods in a representative capacity, the Supreme Court pronounced on the 12th December, 1960 a judgment declaring Part III of the said Act unconstitutional. Thereafter an Ordinance, namely, Bihar Ordinance No. 2 of 1961 was issued on the 1st of August, 1961 by the State of Bihar. By this Ordinance, the material provisions of the earlier Act of 1950 which had been struck down by this Court were validated and brought into force retrospectively from the date when the earlier Act had purported to come into force. Subsequently, the provisions of the said Ordinance were incorporated in the Act, namely, the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961 which was duly passed by the Bihar Legislature and received the assent of the President on 23rd September, 1961. As a result of the retrospective operation of this Act, its material provisions were deemed to have come into force on April 1, 1950, that is to say, the date on which the earlier Act of 1950 had come into force. The appellants challenged the validity of this Act of 1961. Having failed in their writ petition before the High Court, the appellants came to this Court and the argument was that the retrospective operation prescribed by Section 1 (3) and by a part of Sec. 23 (b) of the Act so completely altered the cha-

acter of the tax proposed to be retrospectively recovered that it introduced a serious infirmity in the legislative competence of the Bihar Legislature itself. The argument was rejected by this Court and it was held that having regard to the relevant facts of the case the restrictions imposed by the said retrospective operation were reasonable in the public interest under Article 19 (5) and (6) and also reasonable under Article 304 (b) of the Constitution. In our opinion the ratio of this decision applies to the present case where the material facts are of a similar character.

13. In this context a reference may be made to a recent review of retroactive legislation in the United States of America:

"It is necessary that the legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called 'small repairs'. Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall since, had the legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus, the interest in the retroactive curing of such a defect in the administration of government outweighs the individual's interest in benefiting from the defect.....The Court has been extremely reluctant to override the legislative judgment as to the necessity for retrospective taxation, not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of government among those who benefit from it. Indeed, as early as 1935 one commentator observed that "arbitrary retroactivity" may continueto rear its head in tax briefs, but for practical purposes, in this field, it is as dead as wager of law."

(Charles B. Hochman in 73 Harvard Law Review 692 at p. 705).

14. In view of the legislative background of the present case we are of opinion that the imposition of the tax retrospectively from 1st July, 1963 cannot be said to be an unreasonable restriction. We, therefore, reject the argument of the petitioners on this aspect of the case.

15. For these reasons we hold that the Madras Urban Land Tax Act, 1966, must be upheld as constitutional-

ly valid. We accordingly set aside the judgment of the Madras High Court dated the 10 April, 1968 and order that writ petitions filed by the petitioners should be dismissed. In other words C. As. 21 to 23 are allowed and C. As. 46, 47, 125 and 274 are dismissed. There will be no order with regard to costs of these appeals.

Order accordingly.

AIR 1970 SUPREME COURT 181 (V 57 C 40)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Digyadarsan Rajendra Ramdassji Varu,
Appellant v. State of Andhra Pradesh and
another, Respondents.

Writ Petition No. 347 of 1968, D/- 26-3-1969.

(A) Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (17 of 1966), S. 46, Cls. (a) to (h) — Section is not violative of Art. 19 (1) (f) or Art. 14 of Constitution.

Section 46 of the Act is not violative of Art. 19 (1) (f) of the Constitution.

(Para 6)

It is true that previously under the Andhra Pradesh (Andhra Area) Hindu Religious and Charitable Endowments Act (1951), the Commissioner could only institute a suit in a Court for removing a Mathadhipati whereas under Sec. 46 of the Act of 1966 the power is given to the Commissioner instead of the Court to make an inquiry into or try the allegations or charges against the Mahant and order his removal if such charges are established. A procedural change of this nature cannot be regarded as contravening either Art. 19 (1) (f) or Art. 14 of the Constitution. The procedure which has been laid down makes all the proceedings before the Commissioner quasi-judicial. This is particularly so when the provisions of Section 104 of the Act are kept in view. Moreover if any order of removal is made that can be challenged in a Court of law and there is a further right of appeal to the High Court.

(Para 6)

As regards Art. 19 (1) (f) it has to be seen whether the restrictions which have been imposed by the impugned provisions of the Act are reasonable and are in the interest of the general public. The grounds on which his removal as Matha-

KM/KM/B810/69/BNP/D

dhapati can be ordered have been specifically provided and no exception can be taken to them. (Para 7)

Similarly, the suspension of a Mathadhipati, during the inquiry is a necessary and reasonable part of the procedure which has been prescribed by Sec. 46. If he is allowed to function during the pendency of an inquiry the entire purpose of the inquiry might be defeated. The Mathadhipati, may, during the pendency of the inquiry, do away with most of the evidence or tamper with the books of account or otherwise commit acts of misappropriation and defalcation in respect of the properties of the math. It is essential, therefore, in these circumstances to make a provision for suspending him till the inquiry concludes and an order is made either exonerating him or directing his removal. AIR 1954 SC 282 & AIR 1963 SC 966, Rel. on. (Para 8)

(B) Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (17 of 1966), Ss. 46, 47 — Provisions under, not in contravention of Art. 26 of Constitution.

Sections 46 and 47 of the Act of 1966 do not contravene Art. 26 of the Constitution. (Para 9)

The freedom of religion in the Constitution is not confined to religious beliefs only; it extends to religious practice as well subject to the restrictions which the Constitution itself has laid down. Under Art. 26 (b), therefore, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion and no outside authority has any jurisdiction to interfere with its decision in such matters. Moreover under Article 26(d) it is the fundamental right of a religious denomination or its representative to administer its property in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under Clause (d) of Article 26. AIR 1954 SC 282, Rel. on. (Para 9)

There is nothing in Sections 46 and 47 which empowers the Commissioner to interfere with the autonomy of the reli-

gious denomination in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion the denomination professes or practises. Section 47 of the Act deals only with a situation where there is a temporary vacancy in the office of the mathadhipati by reason of any dispute in regard to the right of succession to the office or the other reasons stated therein as also because the mathadhipathi has been suspended pending an inquiry under Sec. 46. Its provisions do not take away the right of administration from the hands of a religious denomination altogether and vest it for all times in a person or authority who is not entitled to exercise that right under the customary rule and custom prevailing in the math. (Para 10)

(C) Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (17 of 1966), Ss. 46, 47 — Suspension of Mathadhipathi pending enquiry into serious charges against him — Assistant Commissioner appointed as day to day administrator — There is no violation of Art. 25 — (Constitution of India, Art. 25).

A mathadhipathi was placed under suspension and the Asstt. Commissioner was appointed as day-to-day administrator because of the enquiry which was pending against the former in which serious charges of misappropriation and defalcation of trust funds and of leading an immoral life were being investigated. It was not established that the mathadhipathi was prohibited or debarred from professing, practising and propagating his religion:

Held, that there was no violation of Art. 25 of the Constitution. The mere fact that the entire math was being guarded by police constables did not mean that the Mathadhipati could not be allowed to enter the math premises and exercise the fundamental right conferred by Art. 25 (1) of the Constitution. AIR 1954 SC 282, Disting. (Para 10)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 105 (V 55)=
1967-3 SCR 891, Secy., Home
(Endowments), Andhra Pradesh v.
Digyadarsam Rajindra Ram Dasjee 2
(1963) AIR 1963 SC 966 (V 50)=
(1963) Supp 2 SCR 302, H. H.
Sudhundra Thirtha Swamiar v.
Commr. for Hindu Religious and
Charitable Endowments, Mysore 5, 6
(1954) AIR 1954 SC 282 (V 41)=
1954 SCR 1005, Commr., Hindu

Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar 5, 9, 10

M/s. Kanak Ghosh and B. Datta, Advocates, for Appellant; Mr. P. Ram Reddy, Senior Advocate, (M/s. A. V. V. Nair and P. Parameshwar Rao, Advocates with him), for Respondents.

The following Judgment of the Court was delivered by

GROVER, J.— This is a petition under Article 32 of the Constitution challenging, inter alia, the constitutionality of Ss. 46 and 47 of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966 (Act No. 17 of 1966), hereinafter called the "Act" and for issuance of a writ in the nature of mandamus or other appropriate writs and directions to the Commissioner of Hindu Religious and Charitable Endowments, hereinafter called the "Commissioner", prohibiting him from exercising his powers or taking action under the aforesaid sections.

2. The petitioner claims to be the Mathadhipathi of Shri Swami Hathiranji Math Tripathi-Thirumalla in the State of Andhra Pradesh. It is stated that this institution was founded several centuries ago and is one of the renowned Maths in India. Hundreds of Sadhus visit the Math throughout the year and it is the duty of the Mahant as its religious head to provide the visiting Sadhus with food and shelter and to perform all religious duties with regard to the celebration of Hindu festivals, propagation of the cult of Shri Swami Hathiranji and performance of other religious functions. It is alleged that Mahant Chettandoss, the previous incumbent died on March 18, 1962. On March 24, 1962 the Commissioner took charge of the Math and its properties under Section 53 of the Andhra Pradesh (Andhra Areas) Hindu Religious and Charitable Endowments Act, 1951, (Act No. 19 of 1951), hereinafter referred to as the "Repealed Act". The petitioner filed a suit on March 26, 1962 in the court of the Subordinate Judge, Chittoor for a declaration that he was the rightful successor. The Commissioner was impleaded as a party to the suit. He also filed a revisional application under Section 92 of the Repealed Act to the State Government. The Government disposed of the revisional application on June 5, 1962. It appointed the petitioner as the interim Mahant subject to certain conditions which need not be mentioned. Before this order was made the petitioner with-

drew the suit filed by him in April 1962. Devendradoss, who was another claimant but who was a minor, filed a writ petition in the High Court challenging the above order of the Government but the same was rejected by the Division Bench. Devendradoss then filed certain suits for a declaration of his title. On August 22, 1964, the Commissioner made an order directing the petitioner to show cause why the previous order appointing him as an interim Mahant be not recalled. According to the petitioner this was done because the State Government started claiming, contrary to the rule and custom which prevailed in the Math, that the amounts received on account of Padakanukas (personal offerings) should be paid to the Government and not taken by the Mahant. This order was challenged by the petitioner by means of a writ petition in the High Court. The High Court issued a stay order which was later on clarified to mean that the State Government was free to take such further action under the Act as it considered necessary. On September 9, 1965 the State Government framed charges against the petitioner and directed him to furnish his explanation. The petitioner was placed under suspension with immediate effect. It was further directed that the Assistant Commissioner, Tirupathi should take charge of the Math and its affairs. Meanwhile another claimant Bhagwantdoss filed a suit on September 29, 1965, claiming title to the gaddi in his own right. The writ petition which had been filed by the petitioner was allowed by the High Court on November 8, 1966. The matter ultimately came up in appeal to this Court, the judgment being reported in Secretary, Home (Endowments), Andhra Pradesh v. Digyadarsan Rajindra Ram Dasjee, 1967-3 SCR 891=(AIR 1968 SC 105). The judgment of the High Court was affirmed. The High Court had held that the petitioner had succeeded to the office of the Mahant on the death of Chettandoss on March 18, 1962 in his own right. This Court concurred in that view and observed that the mere circumstance that the Government had also passed an order appointing him as the interim Mahant could not take away his right to function as a trustee on the basis of his original right. It followed that the Government had no jurisdiction to pass an order placing him under suspension as that virtually amounted to a removal of the trustee of the Math which could only be done in the manner

provided by Section 52 of the Repealed Act.

3. The Act received the assent of the President on December 6, 1966 and was enforced with effect from January 27, 1967. On May 30, 1967 the petitioner filed a petition under Article 226 of the Constitution in the High Court for declaring the present impugned provisions of the Act as ultra vires. That petition was dismissed in limine as premature. An appeal to the Letters Patent Bench failed. On coming to know that certain orders were going to be passed against the petitioner whereby charges on various matters were to be preferred and an inquiry made and that the suspension of the petitioner from Mahantship was going to be ordered, the present petition was filed under Article 32 of the Constitution in October 1968. In this petition, apart from challenging the provisions of the Act a case of mala fide action has been sought to be made out against the respondent. In the order which was made by the Government on November 18, 1968, as many as 14 charges have been preferred against the petitioner and his suspension has been duly ordered. The Assistant Commissioner, Endowments Department has been directed to attend to the day-to-day administration of the Math temporarily and its Endowments until the disposal of the inquiry.

4. Now the Act has been enacted to consolidate and amend the law relating to the administration and governance of charitable and Hindu religious institutions and endowments in the State of Andhra Pradesh. Chapter I contains the definitions of various expressions used in the Act including the word "Commissioner". Chapter II provides for the appointment of Commissioner, Joint Commissioners etc., and give their powers and functions. Chapter III deals with administration and management of charitable and Hindu religious institutions and endowments. Chapter IV provides for registration of such institutions and endowments. Section 42 in Chapter V defines the word "mathadhipathi" to mean any person whether known as Mahant or by any other name, in whom the administration of a Math or specific endowment attached to a math is vested. Sections 46 and 47 are in the following terms:

"46. (1) The Commissioner may suo motu or on an application of two or more persons having interest, initiate proceedings for removing a mathadhipathi or a

trustee of a specific endowment attached to a Math, if he—

- (a) is of unsound mind;
- (b) is suffering from any physical or mental defect or infirmity which renders him unfit to be a mathadhipathi or such trustee;
- (c) has ceased to profess the Hindu religion or the tenets of the math;
- (d) has been sentenced for any offence involving moral turpitude, such sentence not having been reversed;
- (e) is guilty of breach of trust or misappropriation in respect of any of the properties of the math;
- (f) commits persistent and wilful default in the exercise of his powers or performance of his functions under this Act;
- (g) violates any of the restrictions imposed or practices enjoined by the custom, usage or the tenets of the math, in relation to his personal conduct, such as celibacy, renunciation and the like;
- (h) leads an immoral life.

(2) The Commissioner shall frame a charge on any of the grounds specified in sub-section (1) against the mathadhipathi or trustee concerned and give him an opportunity of meeting such charge, of testing the evidence adduced and of adducing evidence in his favour. After considering the evidence adduced and other material before him, the Commissioner may, by order exonerate the mathadhipathi or trustee, or remove him. Every such order shall state the charge framed against the mathadhipathi or the trustee, his explanation and the finding on such charge together with the reasons therefor:

Provided that in the case of a math or specific endowment attached thereto whose annual income exceeds rupees one lakh, the order of removal passed by the Commissioner against the mathadhipathi or trustee shall not take effect unless it is confirmed by the Government.

(3) Pending the passing of an order under sub-section (2) the Commissioner may suspend the mathadhipathi or the trustee.

(4) (a) Any mathadhipathi or trustee aggrieved by an order passed by the Commissioner under sub-section (2) may, within ninety days from the date of receipt of such order, institute a suit in the Court against such order.

(b) An appeal shall lie to the High Court within ninety days from the date of a decree or order of the Court in such suit.

47. (1) Where a temporary vacancy occurs in the office of the mathadhipathi

and there is dispute in regard to the right of succession to such office; or where the mathadhipathi is a minor and has no guardian fit and willing to act as guardian, or where the mathadhipathi is under suspension under sub-section (3) of Section 46, the Commissioner shall, if he is satisfied after making an inquiry in this behalf that an arrangement for the administration of the math and its endowments or of the specific endowments, as the case may be, is necessary, make such arrangement as he thinks fit until the disability of the mathadhipathi ceases or another mathadhipathi succeeds to the office as the case may be.

(2) In making any such arrangement, the Commissioner shall have due regard to the claims, if any, of the disciples of the math.

(3)
Section 83 confers powers on the Government to call for and examine the record of the Commissioner in respect of any proceedings not being a proceeding in respect of which a suit or an appeal or application or reference to a Court is provided by the Act, to satisfy themselves as to the regularity of such proceedings or the correctness, legality or propriety of any decision or order passed therein and if in any case, it appears to the Government that such decision or order should be modified, annulled, reversed or remitted for consideration they may pass orders accordingly. Under Section 104 where a Commissioner makes an inquiry or hears an appeal under the Act, the inquiry has to be made and the appeal has to be heard as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits or the hearing of appeals and the provisions of the Indian Evidence Act and the Indian Oaths Act have also been made applicable.

5. Learned Counsel for the petitioner has assailed the constitutionality of Section 46 although he has sought to read Section 47 along with it so as to establish that the combined effect of the provisions contained in both the sections would be hit by Articles 14, 19 (1) (f), 25, 26 and 31 of the Constitution. Before the submissions, which have been made, are examined reference may be made to Commissioner, Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar, 1954 SCR 1005=(AIR 1954 SC 282) in which the constitutionality of various pro-

visions of the repealed Act was challenged. That case related to the Shirur Math which was one of the 8 maths situate at Udipi in the district of South Kanara. The Hindu Religious Endowments Board functioning under the Madras Hindu Religious Endowments Act 1927 had taken action to frame a scheme for the administration of the affairs of the math. The challenge in the courts was confined to the constitutional validity of the repealed Act. B. K. Mukherjea, J., (as he then was) dealt exhaustively with the rights of a Mahant to hold office as well as enjoy the property of the institution. The following observations at pp. 1019, 1020 (of SCR)=(at pp. 288-289 of AIR) are noteworthy:

"As said above, the ingredients of both office and property, of duties and personal interest are blended together in the rights of a Mahant and the Mahant has the right to enjoy this property or beneficial interest so long as he is entitled to hold his office. To take away this beneficial interest and leave him merely to the discharge of his duties would be to destroy his character as a Mahant altogether. It is true that the beneficial interest which he enjoys is appurtenant to his duties and as he is in charge of a public institution, reasonable restrictions can always be placed upon his rights in the interest of the public. But the restrictions would cease to be reasonable if they are calculated to make him unfit to discharge the duties which he is called upon to discharge. A Mahant's duty is not simply to manage the temporalities of a Math. He is the head and superior of spiritual fraternity and the purpose of Math is to encourage and foster spiritual training by maintenance of a competent line of teachers who could impart religious instructions to the disciples and followers of the Math and try to strengthen the doctrines of the particular school or order, of which they profess to be adherents. This purpose cannot be served if the restrictions are such as would bring the mathadhipathi down to the level of a servant under the State department. It is from this standpoint that the reasonableness of the restrictions should be judged."

It was held that the Mahant was entitled to claim the protection of Art. 19 (1) (f). The same Shirur Math figured in another case which came up to this court and the decision in which is reported in H. H. Sudhundra Thirtha Swamiar v. Commissioner for Hindu Religious and Charitable Endowments, Mysore, (1963) Supp 2 SCR

302 = (AIR 1963 SC 966). There the constitutionality of Section 52 (1) (f) of the repealed Act, as amended, was unsuccessfully assailed. The scheme of that section was similar to Section 92 of the Code of Civil Procedure. The Commissioner or any two or more persons having interest or having obtained the consent in writing of the Commissioner could institute a suit in the court to obtain a decree for removing a trustee of a math or a specific endowment attached to a math for any one or more reasons given in Cls. (a) to (f) which were similar to Clauses (a) to (f) of sub-section (1) of Section 46 of the Act. Whereas previously the Commissioner could only institute a suit in a court, he has now been empowered under the Act by Section 46 to initiate proceedings himself for removing a mathadipathi on the grounds mentioned in clauses (a) to (h). Clauses (g) and (h) are new and sub-section (2) gives the procedure for making the inquiry. If the mathadipathi is aggrieved by the order made by the Commissioner, he has been given the right to institute a suit against such order in the Court by sub-section (4). The difference, in other words, is that previously the removal could be ordered only by the court but under Section 46 the Commissioner can order the removal after following the procedure laid down and his order is final except that it can be challenged by means of a suit by the mathadhipathi. It also requires confirmation by the Government where the annual income of the math exceeds rupees one lakh. An additional power has been conferred on the Commissioner by sub-section (3) to suspend the mathadhipathi pending the passing of an order under sub-section (2).

6. The view which was taken in the above case was that Section 52 (1) (f) of the repealed Act did not in effect seek to cut down the authority of the Mahant which was traditionally recognized and that the said provision which authorised the institution of a suit for removal of a Mahant where he was found to have wasted the property of the math or applied such funds or property for purposes wholly unconnected with the institution did not amount to an unreasonable restriction upon the exercise of the rights of the Mahant. On behalf of the petitioner a strenuous attempt has been made to show that Section 46 of the Act is quite different from its counterpart contained in the repealed Act, namely, Sec-

tion 52 and that the powers which have been conferred are clearly violative of the fundamental right to hold the office of the Mahant as also the property of the math. In H. H. Sudhundra Thirtha Swamiar's case, (1963) Supp 2 SCR 302 = (AIR 1963 SC 966) it has been emphasised that the Mahant by virtue of his office is under an obligation to discharge the duties as a trustee and is answerable as such. He enjoys large powers for the benefit of the institution of which he is the head. He is to incur expenditure for the math i. e. for carrying on the religious worship for the disciples and for maintaining the dignity of his office but the property is attached to the office and the Mahant cannot incur expenditure for personal luxury or objects incongruous with his position as a Mahant. Keeping all this in view it is difficult to see how the provisions of Section 46 would be violative of Article 19 (1) (f) of the Constitution. The grounds on which his removal as mathadhipathi can be ordered have been specifically provided and no exception has been or can be taken to them. The main attack is based on the power given to the Commissioner instead of the court to make an inquiry into or try the allegations or charges against the Mahant and order his removal if such charges are established. It is not possible to see how a procedural change of this nature can be regarded as contravening either Article 19 (1) (f) or Article 14 of the Constitution which is the other Article which has been pressed into service. The procedure which has been laid down makes all the proceedings before the Commissioner quasi-judicial. This is particularly so when the provisions of Section 104 of the Act are kept in view. Moreover if any order of removal is made that can be challenged in a court of law and there is a further right of appeal to the High Court. Learned counsel for the petitioner had finally to build his argument on the provisions of sub-section (3) which give power to the Commissioner to suspend the mathadhipathi during the pendency of an inquiry and before any order in the matter of removal is made. It is pointed out that such suspension would seriously interfere with the numerous duties which a mathadhipathi has to perform as the head of a spiritual fraternity. The petitioner, in this manner, has been debarred from not only managing the institution but also from carrying out the essential work which according to the tenets and custom of the fraternity he is

under an obligation to do. For instance he cannot look after the Sadhus and other disciples who constantly visit the math and come for religious instruction there nor can he preside over religious functions and other periodical festivities which are held in the seat of the math. Thus, it is urged, that there is a clear violation of Article 19 (1) (f) which guarantees the petitioner's right to hold and enjoy the property, apart from the interference with his right to practice and propagate religion and manage the affairs of the math in matters of religion which rights are guaranteed by Articles 25 and 26 of the Constitution.

7. As regards Article 19 (1) (f) it has to be seen whether the restrictions which have been imposed by the impugned provisions of the Act are reasonable and are in the interest of the general public. There can be little or no doubt that if a mathadhipathi is of an unsound mind or suffers from any physical or mental defect or infirmity or has ceased to profess Hindu religion or the tenets of the math or if his case falls within Cls. (d) to (h) of Section 46 (1) his removal would be in the interest of the general public. A mathadhipathi cannot possibly perform his duties either as a spiritual or a temporal head nor can he properly administer or manage the trust property if he falls within the categories mentioned in Cls. (a) to (d) or has been guilty of breach of trust or wilful default etc. or leads an immoral life [vide clauses (e) to (h) of Section 46 (1)]. Even under the Civil Procedure Code his removal could have been ordered in proceedings under Section 92 for similar reasons.

8. The suspension of a mathadhipathi, during the inquiry, is a necessary and reasonable part of the procedure which has been prescribed by Section 46. If he is allowed to function during the pendency of an inquiry the entire purpose of the enquiry might be defeated. The mathadhipathi, may, during the pendency of the inquiry, do away with most of the evidence or tamper with the books of account or otherwise commit acts of misappropriation and defalcation in respect of the properties of the math. It is essential, therefore, in these circumstances to make a provision for suspending him till the inquiry concludes and an order is made either exonerating him or directing his removal.

9. On the question whether Ss. 46 and 47 of the Act contravene Articles 25 and

26, a good deal of reliance has been placed on the observations in the first Shirur Math case, 1954 SCR 1005 = (AIR 1954 SC 282). Mukherjea, J. (as he then was) delivering the judgment of the court had examined the scope of the language of Articles 25 and 26. It was indicated by him that freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practice as well subject to the restrictions which the Constitution itself has laid down. Under Article 26 (b), therefore, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion and no outside authority has any jurisdiction to interfere with its decision in such matters. Moreover under Article 26 (d) it is the fundamental right of a religious denomination or its representative to administer its property in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. It was further laid down that a law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under Clause (d) of Article 26. Now under Section 47 of the Act where a mathadhipathi is under suspension the Commissioner can make such arrangement as he thinks fit for the administration of the math until another mathadhipathi succeeds to the office and in making such arrangement he has to have due regard to the claims of the disciples of the math. It is maintained on behalf of the petitioner that the appointment of Assistant Commissioner, Endowments Department, Tirupathi as the day-to-day administrator of the math and its endowment has a two-fold effect. The first is that the complete autonomy which a religious denomination like the math in question enjoys in the matter of observance of rights and ceremonies essential to the tenets of the religion has been interfered with. The second is that the right of administration has been altogether taken away from the hands of the religious denomination by vesting it in the Assistant Commissioner. This clearly contravenes the provisions of Clauses (b) and (d) of Article 26 within the rule laid down in the first Shirur Math case, 1954 SCR 1005 = (AIR 1954 SC 282). By doing so in exercise of the

powers under Section 47 the Commissioner has also debarred the petitioner from practising and propagating religion freely which he is entitled to do under Article 25 (1).

10. The attack on the ground of violation of Article 25 (1) can be disposed of quite briefly. It has nowhere been established that the petitioner has been prohibited or debarred from professing, practising and propagating his religion. A good deal of material has been placed on the record to show that the entire math is being guarded by police constables but that does not mean that the petitioner cannot be allowed to enter the math premises and exercise the fundamental right conferred by Article 25 (1) of the Constitution. As regards the contravention of Clauses (b) and (d) of Article 26, there is nothing in Sections 46 and 47 which empowers the Commissioner to interfere with the autonomy of the religious denomination in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion the denomination professes or practises nor has it been shown that any such order has been made by the Commissioner or that the Assistant Commissioner who has been put in charge of the day-to-day affairs is interfering in such matters. Section 47 of the Act deals only with a situation where there is a temporary vacancy in the office of the mathadhipathi by reason of any dispute in regard to the right of succession to the office or the other reasons stated therein as also because the mathadhipathi has been suspended pending an inquiry under Section 46. Its provisions do not take away the right of administration from the hands of a religious denomination altogether and vest it for all times in a person or authority who is not entitled to exercise that right under the customary rule and custom prevailing in the math. In the first Shirur Math case, 1954 SCR 1005 = (AIR 1954 SC 282) Section 56 of the repealed Act before its amendment by Act 12 of 1954 was struck down as power had been given to the Commissioner to require the trustee to appoint a manager for the administration of the secular affairs of the institution and the Commissioner himself could also make the appointment. It was pointed out that this power could be exercised at the mere option of the Commissioner without any justifying necessity whatsoever and no pre-requisites like mismanagement of pro-

perty or maladministration of trust funds were necessary to enable the trustee to exercise such drastic power. The effect of the section really was that the Commissioner was at liberty, at any moment, to deprive the Mahant of his right to administer the trust property even if there was no negligence or maladministration on his part. Such a restriction was held to be opposed to the provisions of Article 26 (d) of the Constitution. Section 47 of the Act is not in pari materia with Section 56 of the repealed Act. On the contrary Section 47 indicates quite clearly the conditions and situations in which the Commissioner can appoint someone to carry on the administration of the math and its endowments. In the present case, the Assistant Commissioner has been appointed as a day-to-day administrator because of the inquiry which is pending against the petitioner and in which serious charges of misappropriation and defalcation of trust funds and leading an immoral life are being investigated. It cannot be said that Section 47 would be hit by Article 26 (d) of the Constitution as the powers under it will be exercised, inter alia, when mismanagement of property or maladministration of trust funds are involved.

11. Counsel for the petitioner has not made any serious attempt to argue that in the view that we are inclined to take there would be any contravention of Article 31 (1) of the Constitution. He has, however, pressed for the petitioner being allowed to take the Padakanulas which are receivable by the Mahant of which he will keep an account as was directed by this court when disposing of the stay petition on December 13, 1968. Counsel for the respondent agrees to this and has also agreed to keep accounts of whatever amount is spent on feeding the sadhus and on the management of the math property. He has further given an undertaking that the inquiry which is being conducted under Section 46 of the Act will be concluded within a period of three months. It may be made clear that the Assistant Commissioner who is in charge of the day-to-day administration temporarily of the math and its endowments shall be fully entitled to take necessary steps for recovery of all debts and claims which could have been recovered by the Mahant from various debtors etc.

12. The writ petition, however, fails and it is dismissed, but in view of the

1970 Union of India v. Surjeet Singh (Ramaswami J.) (Pr. 12)-[Prs. 1-3] S. C. 189
entire circumstances we make no order (1949) AIR 1949 Cal 684 (V 36),
as to costs. Basanti Cotton Mills Ltd. v.
Dhingra Brothers 6

Petition dismissed.

AIR 1970 SUPREME COURT 189
(V 57 C 41)

(From: Punjab)*

S. M. SIKRI, R. S. BACHAWAT AND V. RAMASWAMI, JJ.

Union of India, Appellant v. Surjeet Singh Atwal, Respondent.

Civil Appeal No. 760 of 1966, D/- 22-4-1969.

(A) Arbitration Act (1940), Ss. 34, 31 (4) — Application for stay under S. 34 — Object of — Not an application in a reference under S. 31 (4) — F. A. O. No. 82-D of 1963 D/- 11-1-1965 (Punjab at Delhi), Reversed.

The application for stay under S. 34 cannot be treated as an application in a reference under S. 31 (4) of the Act. It has nothing to do with any reference. It is only intended to make an arbitration agreement effective and prevent a party from going to Court contrary to his own agreement that the dispute is to be adjudicated by a private tribunal. AIR 1953 SC 313, Expl. Case law referred to. F. A. O. No. 82-D of 1963 D/- 11-1-1965, (Punjab at Delhi), Reversed.

(Paras 5, 6)

(B) Arbitration Act (1940), Ss. 31 (4), 8, 20 — Applications under Ss. 8 and 20 — Are applications in a reference within S. 31 (4).

The applications under S. 8 and under S. 20, though clearly applications anterior to the reference, lead to a reference. Such applications are undoubtedly applications "in the matter of a reference" and may fall within the purview of S. 31 (4) of the Act.

(Para 5)

Cases Referred: Chronological Paras

- (1960) 64 Cal WN 324, Britania Building & Iron Co., Ltd. v. Govinda Chandra Bhattacharjee 6
- (1954) ILR (1954) 1 Cal 418, Choteyal Sham Lal v. Cooch Behar Oil Mills Ltd. 6
- (1953) AIR 1953 SC 313 (V 40) = 1953 SCR 878, Kumbha Mawji v. Union of India 5

* (F. A. O. No. 82-D of 1963 D/- 11-1-1965— Punjab at Delhi.)

KM/KM/C91/69/DRR/D

Dr. L. M. Singhvi, Senior Advocate, Mr. B. D. Sharma, Advocate, with him, for Appellant; M/s. M. C. Chagla and C. B. Agarwala, Senior Advocates, (M/s. Rameshwar Nath, Mahinder Narain and P. L. Vohra, Advocates of M/s. Rajinder Narain and Co., with them), for Respondent.

The following Judgment of the Court was delivered by

RAMASWAMI, J.: This appeal is brought by special leave from the judgment of the Punjab High Court dated January 11, 1965 in F. A. O. No. 82-D of 1963.

2. The said appeal was filed under S. 39 of the Arbitration Act, 1940 (hereinafter referred to as the Act) against the order of the Subordinate Judge, First Class, Delhi dated January 29, 1963 passed on an application under Section 20 of the Act by the Union of India for filing the arbitration agreement in Court and to make a reference of the dispute to the officer mentioned in the agreement.

3. In the year 1942 tenders were invited by the Union of India for construction of certain runways and roads in an aerodrome at Dalbhumgarh. The tender of the respondent, Surjeet Singh Atwal, was accepted and the agreement was executed on August 19, 1944. Clause 25 of the agreement provided for the settlement of the disputes by reference to the arbitration of the Superintending Engineer of the Circle for the time being, according to law. The respondent alleged that he had completed the work entrusted to him under the contract and made a claim of Rs. 50,000 on the basis of his last bill. On the other hand the Union of India made a demand against the contractor for a sum of Rs. 5,09,164/- on the ground that the amount had been overpaid to the respondent. Ignoring the arbitration clause respondent filed a suit on the original side of the Calcutta High Court for the recovery of Rs. 50,000/-, being suit No. 531 of 1951. The Union of India made an application under Section 34 of the Act for the stay of the suit. The suit was consequently stayed and the matter was referred to the arbitration of the Superintending Engineer, Calcutta Aviation Circle, C. P. W. D. Calcutta. Before the arbitrator the Union of India made its counter-claim for a sum of Rs. 5,09,164/-. The contractor objected to

the entertainment of the counter-claim. The stay of the suit which was granted by the Calcutta High Court was later on vacated. Pending the suit of the respondent in the Calcutta High Court, the Union of India filed an application under S. 20 of the Act in the Court of the Subordinate Judge, First Class, Delhi for getting the agreement of reference filed in the Court and for making the reference of the disputes between the parties to the arbitration of the Superintending Engineer, Central Circle No. 1, C. P. W. D. Calcutta. The respondent opposed the petition mainly on the ground that the court of Subordinate Judge, First Class, Delhi had no jurisdiction to entertain the application. It was contended that the appellant had filed an application under Section 34 of the Act for stay of the suit filed in the Calcutta High Court, and, therefore any subsequent application relating to arbitration under the agreement should be filed in the Calcutta High Court. By its judgment dated January 29, 1963 the Subordinate Judge, First Class, Delhi allowed the application of the appellant and ordered that the disputes between the parties be referred to the Superintending Engineer, Calcutta Circle No. 1, C. P. W. D. The learned Subordinate Judge held that the contract of the parties was concluded at Delhi and it was signed at Delhi on behalf of the respondent and, therefore, the Delhi court had jurisdiction to try the suit. Aggrieved by the judgment of the Subordinate Judge, First Class the respondent filed an appeal under Section 39 of the Act in the Punjab High Court. By his judgment dated January 11, 1965 D. K. Mahajan J., allowed the appeal and set aside the order of the Subordinate Judge, First Class and dismissed the application of the appellant on the ground that the Delhi court had no jurisdiction to entertain an application under Section 20 of the Act.

4. The question involved in this appeal is whether the application made by the appellant under Section 34 of the Act before the Calcutta High Court was an application in a reference within the meaning of S. 31 (4) of the same Act. Section 2(c) of the Act defines "Court" thus:

"Court means a Civil Court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit but does not, except for the purpose of arbitration proceedings under Section 21, include a Small Cause Court."

Section 14 provides that the award may be filed in the court. Section 31 (1) enacts that an award may be filed in any Court having jurisdiction in the matter to which the reference relates. Sec. 31(2) provides that all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement shall be decided by the Court in which the award has been filed and by no other Court. Section 31 (3) states that all applications regarding the conduct of arbitration proceedings shall be made to the Court where the award has been filed and to no other Court. Section 31(4) reads as follows:

"Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court."

Section 34 states:

"Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings, and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

5. The conditions must be fulfilled in order to give a Court exclusive jurisdiction under Section 31 (4) of the Act. In the first place an application under the Arbitration Act must be made to the Court competent to entertain it. In the second place, the application must be made "in any reference". It was contended on behalf of the respondent that an application for stay of suit under

Section 34 of the Act was an application made "in a reference" within the meaning of Section 31 (4) of the Act. In support of this proposition reference was made to the decision of this Court in *Kumbha Mawji v. Union of India*, 1953 SCR 878=(AIR 1953 SC 313) in which it was held that the phrase "in any reference" in Section 31 (4) of the Act was comprehensive enough to cover an application first made after the arbitration is completed and a final award made and the sub-section is not confined to applications made during the pendency of the arbitration proceeding. It was pointed out that sub-section (1) of Section 31 determines the jurisdiction of the court in which an award can be filed and that sub-sections (2), (3) and (4) of Section 31 were intended to make that jurisdiction effective in three different ways (1) by vesting in one court the authority to deal with all questions regarding the validity, effect or existence of an award or an arbitration agreement, (2) by casting on the persons concerned the obligation to file all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings in one court, and (3) by vesting exclusive jurisdiction in the court in which the first application relating to the matter was filed. The context, therefore, of sub-section (4) would seem to indicate that the sub-section was not meant to be confined to applications made during the pendency of an arbitration. The necessity for clothing a single court with effective and exclusive jurisdiction, and to bring about by the combined operation of these three provisions the avoidance of conflict and scramble is equally essential whether the question arises during the pendency of the arbitration or after the arbitration is completed or before the arbitration is commenced. It was, therefore, held that the expression "in any reference" in Section 31 (4) should be construed as "in the course of a reference". Even so, we are of opinion that the application for stay of suit under Section 34 in the present case is not an application in a reference within the wider meaning given to the phrase by this Court in *Kumbha Mawji's case*, 1953 SCR 878 = (AIR 1953 SC 313) (supra). There are different sections in the Arbitration Act whereby an application is to be made even before any reference has been made. Section 8 for instance, provides for an application to invoke the power of the Court, when the parties

fail to concur in the appointment of an arbitrator to whom the reference can be made. So also Section 20 provides for an application to file the arbitration agreement in Court so that an order of reference to an arbitrator can be made. These are clearly applications anterior to the reference but they lead to a reference. Such applications are undoubtedly applications "in the matter of a reference" and may fall within the purview of Section 31 (4) of the Act even though these applications are made before any reference has taken place. But an application under Section 34 is clearly not an application belonging to the same category. It has nothing to do with any reference. It is only intended to make an arbitration agreement effective and prevent a party from going to Court contrary to his own agreement that the dispute is to be adjudicated by a private tribunal.

6. We do not, therefore, consider that an application for stay of suit under Section 34 is an application in a reference even within the wider meaning given to that phrase by this Court in *Kumbha Mawji's case*, (supra). The second condition imposed by Section 31 (4) is that the application for stay must be made to a Court competent to entertain it. It should be noticed that in Section 34 the expression "judicial authority" is used. The section provides for an application to a judicial authority before whom a legal proceeding is pending for the stay of that proceeding. An application for stay of legal proceeding to a judicial authority before whom it is pending is an application under the Arbitration Act to a judicial authority competent to entertain it. But the judicial authority need not necessarily be a Court competent under Section 2 (c) to decide the question forming the subject-matter of the reference. A party to an arbitration agreement may choose to file a suit in a Court which has no jurisdiction to go into the matter at all and merely because the defendant in such a suit has to make an application to that Court under Section 34 of the Act for the stay of the suit it cannot be said that the Court which otherwise has no jurisdiction in the matter becomes a Court within the meaning of Section 2 (c) of the Act. The view that we have expressed is borne out by the decisions of the Calcutta High Court in *Choteylal Sham-lal v. Cooch Behar Oil Mills Ltd.*, ILR

(1954) 1 Cal 418; *Britania Building & Iron Co. Ltd. v. Gobinda Chandra Bhat-tacharjee*, 64 Cal WN 324 and *Basanti Cotton Mills Ltd. v. Dhingra Brothers*, AIR 1949 Cal 684.

For these reasons we consider that the application for stay under S. 34 of the Act cannot be treated as an application in a reference under S. 31(4) of the Act. Therefore, the Subordinate Judge, First Class, Delhi was right in holding that the application under Section 20 of the Act was maintainable in his Court and for making a reference of the dispute to the arbitrator mentioned in the agreement. Accordingly we set aside the order of the Punjab High Court and restore the order of the Subordinate Judge, First Class, Delhi dated January 29, 1963 allowing the application filed by the appellant under Section 20 of the Arbitration Act, 1940. The appeal is allowed with costs.

Appeal allowed.

AIR 1970 SUPREME COURT 192 (V 57 C 42)

(From Gujarat: AIR 1968 Gujarat 124)

M. HIDAYATULLAH C. J., J. M. SHELAT, V. BHARGAVA, K. S. HEGDE AND A. N. GROVER, JJ.

Shri Prithvi Cotton Mills Ltd., etc., Appellants v. Broach Borough Municipality and others, (In both the Appeals), Respondents.

Civil Appeals Nos. 2197 and 2198 of 1966, D/- 25-4-1969.

(A) Constitution of India, Arts. 245 and 265 — Illegal collection of tax under ineffective or invalid Act — Retrospective validation of such Act by Legislature — When can be done — Pre-requisites to be complied, stated.

When a legislature sets out to validate a tax declared by a Court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to de-

clare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A Court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a Court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon courts. The legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the Court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the Courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax.

(Para 4)

(B) Municipalities — Gujarat Imposition of Taxes by Municipalities (Validation) Act 1963 (2 of 1964), S. 3 — Rates imposed and collected on lands and buildings by Rules under Section 73 of Bombay Municipal Boroughs Act (18 of 1925) — Validation of by State legisla-

ture — Competency — Section 3 of 1964 Act is validly enacted.

Section 3 of the Gujarat Imposition of Taxes by Municipalities (Validation) Act 1963 (2 of 1964) validating imposition and collection of taxes or rates by Municipalities is valid and therefore, imposition of rates under the Rules framed under S. 73 of the Bombay Municipal Boroughs Act (18 of 1925) can no longer be questioned on the ground that Section 73 spoke of a rate and the imposition was not a rate as properly understood but a tax on capital value. AIR 1968 Guj 124, Affirmed. (Para 6)

The legislature in Sec. 73 had not authorised the levy of a tax directly on lands and buildings as units of taxation but had authorised the levy of a rate, and the Rules framed under Sec. 73, putting the tax on capital value of buildings did not answer description of the impost in the Act, namely, "a rate on buildings or lands or both situate within the Municipal borough" because the word 'rate' had acquired a special meaning in legislative practice. In order to remove this illegality the Legislature exercised its powers of redefining 'rate' so as to equate it to a tax on capital value and convert the tax purported to be collected as a 'rate' into a tax on lands and buildings. It gave a new meaning to the expression 'rate', and while doing so it put out of action the effect of the decisions of the Courts to the contrary. The exercise of power by the legislature was valid because the legislature does possess the power to levy a tax on lands and buildings based on capital value thereof and in validating the levy on that basis, the implication of the use of the word 'rate' could be effectively removed and the tax on lands and buildings imposed instead. (Para 6)

The legislature possesses the competence to pass a law imposing tax on lands and buildings on the basis of a percentage of their capital value, is also clear from Sec. 99 of the Gujarat Municipal Act. For Sec. 99, which imposes tax on basis of percentage of capital value and which is enacted in exercise of legislative power under Entry 49 of List II of Schedule VII, is not invalid provision. AIR 1969 SC 59, Foll. (Para 5)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 59 (V 56)=
1968-2 SCJ 790, Sudhir Chandra
Nawn v. Wealth Tax Officer,
Calcutta

(1963) AIR 1963 SC 1742 (V 50)=
1964-2 SCR 608, Patel Gordhan-
das Hargovindas v. Municipal
Commissioner, Ahmedabad

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Mr. A. K. Sen, Senior Advocate, (Mrs. A. K. Verma and B. Datta, Advocates and Mr. Ravinder Narain, Advocate of M/s. J. B. Dadachanji and Co., with him), for Appellants (In both the Appeals); Mr. M. C. Chagla, Senior Advocate, (Mr. I. N. Shroff, Advocate, with him), for Respondents (Nos. 1 and 2) (In both the Appeals); Mr. B. Sen, Senior Advocate, (Mr. S. P. Nayar, Advocate, with him), for Respondent No. 3 (In both the Appeals).

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.:— These matters arise under Article 226 of the Constitution and are appeals by certificate granted by the High Court of Gujarat against its judgment and order, September 10, 1966. The appellant No. 1 is a Company which has spinning and weaving mills at Broach and manufactures and sells cotton yarn and cloth. Respondent No. 1 is the Broach Borough Municipality constituted under Section 8 of the Bombay Municipal Boroughs Act, 1925. In the assessments years 1961-62, 1962-63 and 1963-64 the Municipality purporting to act under S. 73 of the Bombay Municipal Boroughs Act, 1925 and the Rules made thereunder imposed a purported rate on lands and buildings belonging to the respondent at a certain percentage of the capital value. Section 73 of the Act allows the Municipality to levy "a rate on buildings or lands or both situate within the municipal borough". The Rules under the Act applied the rates on the basis of the percentage on the capital value of lands and buildings. The assessment lists were published and tax was imposed according to the rates calculated on the basis of the capital value of the property of the appellant and bills in respect of the tax were served. The writ petitions were filed to question the assessment and to get the assessment cancelled.

2. During the pendency of the writ petitions the legislature of Gujarat passed the Gujarat Imposition of Taxes by Municipalities (Validation) Act, 1963. As a result the writ petitions were amended and the Validation Act was also questioned. The appellants also filed a second writ petition questioning the validity of the Validation Act under Articles 19 (1) (f), (g) and 265 of the Constitution. By

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the order under appeal here both the writ petitions were dismissed although a certificate of fitness was granted.

3. The Validation Act was presumably passed because of the decision of this Court reported in *Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad*, 1964-2 SCR 608=(AIR 1963 SC 1742). In that case the validity of the Rules framed by the Municipal Corporation under Section 73 were called in question, particularly Rule 350A for rating open lands which provides that the rate on the area of open lands shall be levied at 1 per centum on the valuation based upon capital value. Dealing with the word 'rate' as used in these statutes, it was held by this Court that the word 'rate' had acquired a special meaning in English legislative history and practice and also in Indian legislation and it meant a tax for local purposes imposed by local authorities. The basis of such tax was the annual value of the lands or buildings. It was discussed in the case that there were three methods by which the rates could be imposed: the first was to take into account the actual rent fetched by the land or building where it was actually let; the second was, where it was not let, to take rent based on hypothetical tenancy, particularly in the case of buildings; and the third was where neither of these two modes was available, by valuation based on capital value from which annual value had to be found by applying suitable percentage which might not be the same for lands and buildings. It was held that in Section 73 the word 'rate' as used must have been used in the special sense in which the word was understood in the legislative practice of India before that date. Rule 350A which laid the rate on land at a percentage of the valuation based upon capital was therefore declared ultra vires the Act itself. In short, the word 'rate' was given a specialised meaning and was held to mean a kind of impost on the annual letting value of property, if actually let out, and on a notional letting value if the property was not let out. The legislature of Gujarat then passed the Validation Act seeking to validate the imposition of the tax as well as to avoid any future interpretation of the Act on the lines on which Rule 350A was construed. The Act came into force on January 29, 1964. After defining the expressions used in the Act and providing for its application, the Act enacted Section 3 which

concerned validation of impositions and collections of taxes or rates by Municipalities in certain cases. That section reads as follows:

"3. Validation of imposition and collection of taxes or rates by municipalities in certain cases:—

Notwithstanding anything contained in any judgment, decree or order of a Court or Tribunal or any other authority, no tax or rate assessed or purporting to have been assessed by a municipality under the relevant municipal law or any rules made thereunder on the basis of the capital value of a building or land, as the case may be, or on the basis of a percentage of such capital value, and imposed, collected or recovered by the municipality at any time before the commencement of this Act shall be deemed to have been invalidly assessed, imposed, collected or recovered by reason of the assessment being based on the capital value or the percentage of the capital value, and not being based on the annual letting value, of the building or land, as the case may be, and the imposition, collection and recovery of the tax or rate so assessed and the provisions of the rules made under the relevant municipal law under which the tax or rate was so assessed shall be valid and shall be deemed always to have been valid and shall not be called in question merely on the ground that the assessment of the tax or rate on the basis of the capital value of the building or land, as the case may be, or on the basis of a percentage of such capital value was not authorised by law; and accordingly any tax or rate, so assessed before the commencement of this Act and leviable for a period prior to such commencement but not collected or recovered before such commencement, may be collected and recovered in accordance with the relevant municipal law, and the rules made thereunder."

If this section is valid then the imposition cannot be questioned and the short question which arises in this case is as to the validity of this section. It is not denied that a legislature does possess the power to validate statutes and to pass retrospective laws. It is, however, contended that the Validation Act is ineffective in carrying out its avowed object. This is the only point which falls for consideration in these appeals.

4. Before we examine Section 3 to find out whether it is effective in its

purpose or not we may say a few words about validating statutes in general. When a legislature sets out to validate a tax declared by a Court to be illegally collected under ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A Court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a Court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon Courts. The legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the Court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the

subject-matter and whether in making the validation it removes the defect which the Courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax.

5. The inquiry in this case may begin by asking whether the legislature possesses competence to pass a law imposing a tax on lands and buildings on the basis of a percentage of their capital value. If the legislature possesses that power then it can authorise the Municipality to levy that tax. To test the proposition we may consider Section 99 which has now been enacted in the Gujarat Municipalities Act. It reads:

"99. Taxes which may be imposed.

(1) Subject to any general or special orders which the State Government may make in this behalf and to the provisions of Sections 101 and 102, a municipality may impose for the purposes of this Act any of the following taxes, namely:—

(i) a tax on buildings or lands situate within the municipal borough to be based on the annual letting value or the capital value or a percentage of capital value of the buildings or lands or both;

* * * * *

Learned counsel for the appellants did not contend that this section was outside the powers of the legislature. In fact, he could not, in view of Entry 49 of List II of the Seventh Schedule to the Constitution. That entry reads: "Taxes on lands and buildings" and a tax on lands and buildings based upon capital value falls squarely within the entry. The doubt which is created by Entry 86 of List I "Taxes on the capital value of assets", no longer exists after the decision of this Court in *Sudhir Chandra Nawn v. Wealth-tax Officer, Calcutta*, AIR 1969 SC 59. In that case the respective ambits of the two entries are explained. It is pointed out that unlike the tax contemplated by entry 49 (List II) the tax under entry 86 (List I) is not a direct tax on lands and buildings but on net assets, the components of which may be lands and buildings and other items of assets excluding such liabilities as may exist. The incidence of the tax is not on lands and buildings as units of taxation but on the net assets of which lands and buildings are only some of the components. This is not the case under entry 49 (List II) where the tax can be laid directly on lands and

buildings as units of taxation. Therefore, a tax on lands and buildings is fully within the competence of the legislature and it is open to it to authorise the municipality to levy the same tax indicating the mode of levy. This the legislature has done by indicating the different modes which may be adopted in making the levy, one such mode being a percentage of the capital value.

6. The legislature in Section 73 had not authorised the levy of a tax in this manner but had authorised the levy of a rate. That led to the discussion whether a rule putting the tax on capital value of buildings answered the description of the impost in the Act, namely, 'a rate on buildings or lands or both situate within the Municipal Borough.' It was held by this Court that it did not, because the word 'rate' had acquired a special meaning in legislative practice. Faced with this situation the legislature exercised its undoubted powers of redefining 'rate' so as to equate it to a tax on capital value and convert the tax purported to be collected as a 'rate' into a tax on lands and buildings. The legislature in the Validation Act, therefore, provided for the following matters. First, it stated that no tax or rate by which-ever name called and laid on the capital value of lands and buildings must be deemed to be invalidly assessed, imposed, collected or recovered simply on the ground that a rate is based on the annual letting value. Next it provided that the tax must be deemed to be validly assessed, imposed, collected or recovered and the imposition must be deemed to be always so authorised. The legislature by this enactment retrospectively imposed the tax on lands and buildings based on their capital value and as the tax was already imposed, levied and collected on that basis, made the imposition, levy, collection and recovery of the tax valid, notwithstanding the declaration by the Court that as 'rate,' the levy was incompetent. The legislature not only equated the tax collected to a tax on lands and buildings, which it had the power to levy, but also to a rate giving a new meaning to the expression 'rate' and while doing so it put out of action the effect of the decisions of the Courts to the contrary. The exercise of power by the legislature was valid because the legislature does possess the power to levy a tax on lands and buildings based on capital value thereof in validating the levy on that basis,

the implication of the use of the word 'rate' could be effectively removed and the tax on lands and buildings imposed instead. The tax, therefore, can no longer be questioned on the ground that Section 73 spoke of a rate and the imposition was not a rate as properly understood but a tax on capital value. In this view of the matter it is hardly necessary to invoke the 14th Clause of S. 73 which contains a residuary power to impose any other tax not expressly mentioned.

7. In our judgment these appeals possess no merit after the passing of the Validation Act and must be dismissed but in the circumstances without any order about costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 196 (V 57 C 43)

(From Labour Court (Central),
Hyderabad)*

J. M. SHELAT, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

Management of the State Bank of Hyderabad (In all the appeals), Appellant v. Vasudev Anant Bhide and others, Respondents.

Civil Appeals Nos. 1916 to 1918 of 1968,
D/- 24-4-1969.

(A) Constitution of India, Art. 136 — Plea of limitation — Plea not raised either before Labour Court or even in special leave application before Supreme Court — Plea allowed as no fresh facts had to be investigated and as matter could be dealt with as pure question of law.

(Para 17)

(B) Industrial Disputes Act (1947), Section 33C (2) — Application under — Article 137 of Limitation Act, 1963, is not applicable — No limitation is prescribed for such application — (Limitation Act (1963), Art. 137). AIR 1969 SC 1335, Disapproving (1963) 2 Lab LJ 505 (Bom) (FB), Foll.

(Para 17)

(C) Constitution of India, Art. 136 — Findings of fact — Supreme Court in exercise of its discretion will not normally enter upon pleas on questions of fact or interfere with findings of facts recorded in

*(Civil Misc. Petns. Nos. 115 of 1963 and 4 and 5 of 1965, D/- 13-5-1968, Labour Court (Central), Hyderabad.)

judgment or decision under appeal.

(Para 23)

(D) Constitution of India, Art. 136 — Mixed question of law and fact — Question as to what was status of appellants on facts found by Labour Court and whether they were entitled to supervisory special allowance — Question is not purely one of fact — Status has to be inferred as a matter of law from the facts found — Question whether inference has been correctly drawn by the Labour Court can be considered by the Supreme Court.

(Para 23)

(E) Industrial Disputes Act (1947), Sch. 3 Item 1 — Sastry Award (Bank Award) — Para 164 (b)(9) — Desai Award, Paras 5.218, 221, 231, 288, 289 — Supervisory special allowance — When can be claimed.

The scheme of both the Sastry and Desai Awards for grant of special allowance as Supervisors is that such special allowances can be drawn only when a person falls in the category of a supervisor or is found eligible to be put in that category, by whatever nomenclature such person may be designated, in view of the supervisory nature of the duties and functions assigned to him. The mere fact that a person whose duties are essentially and mainly that of a Head Cashier, for whom also a special allowance is payable under the two Awards, performs occasionally or casually or incidental to his work as a Head Cashier, duties which may be characterised as supervisory, will not entitle him to claim the higher rate of special allowance granted to a supervisor under the two Awards.

(Para 35)

Held on facts that work done by the Head Cashiers in the instant case might be considered very important, responsible and onerous, but, on the basis of the items of work claimed to be done by them, they were not entitled to the special allowance as supervisors, under category 9 of paragraph 164 (b) of the Sastry Award, or under the Desai Award. AIR 1967 SC 428 & 1961-2 Lab LJ 162 (SC) & (1963) 2 Lab LJ 365 (SC), Ref.

(Para 45)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 1335 (V 56)=
Civil Appeals Nos. 170 to 173 of
1968, D/- 20-3-1969, Town Municipal Council, Athani v. Presiding Officer, Labour Court, Hubli 17
(1968) 1968-2 Lab LJ 505=70 Bom LR 104 (FB), P. K. Porwal (Manager) v. Labour Court, Nagpur 17

- (1967) AIR 1967 SC 428 (V 54)=
1961-1 Lab LJ 18, Lloyds Bank Ltd. v. Pannalal Gupta 42
(1963) 1963-2 Lab LJ 365 (SC), Eastern Bank Ltd. v. Shivdas Vishnu Naik 44
(1961) 1961-2 Lab LJ 162=20 FJR 515 (SC), Punjab National Bank Ltd. v. Their Workmen 43

Mr. C. B. Agarwala, Senior Advocate, (M/s. K. Srinivasamurthi, B. P. Singh and Naunit Lal, Advocates, with him), for Appellant (In all the appeals); M/s. H. R. Gokhale and M. K. Ramamurthi, Senior Advocates, (Mr. Vineet Kumar, Advocate, with them), for Respondent (In C. A. No. 1916/1968); Mr. M. K. Ramamurthi, Senior Advocate, (Mrs. Shyamla Pappu, M/s. J. Ramamurthi and Vineet Kumar, Advocates, with him), for Respondent (In C. A. Nos. 1917 and 1918 of 1968).

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.:— These three appeals, by special leave by the management of State Bank of Hyderabad are directed against the common order, dated May 13, 1968, passed by the Labour Court (Central), Hyderabad, allowing applications filed by each of the respondents herein under Section 33C (2) of the Industrial Disputes Act, 1947 (Act XIV of 1947) (hereinafter called the Act.) The claim of the respondents in each of these appeals was for payment of the special allowance granted to Supervisors under what are commonly known as the Sastry and Desai Awards. The Labour Court has accepted their claims in full and the management have come up in appeal to this Court. The short question which is raised for our decision is whether the Labour Court was right in holding that the three respondents could claim the status of Supervisors entitled to the supervisory allowance under the Sastry and Desai Awards.

2. Three applications, Civil Miscellaneous Petitions Nos. 115 of 1963 and 4 and 5 of 1965 were filed by the respective respondents before the Labour Court under Section 33C (2) of the Act. As the averments contained in each of these applications were more or less common and the basis of the claim for special allowance was also the same, — we will refer to the averments made in Application No. 115 of 1963 filed by Vasudev Anant Bhide. The defence raised by the management was also the same in all the three applications.

3. In C. M. P. No. 115 of 1963 Bhide has stated that he was working as an employee under the appellant as Head Cashier, in charge of the Cash Department, at various branches from 1946 till the date of his filing the application viz., August 31, 1963 and, as such he was entitled to receive the special allowance under the Sastry Award as modified and also under the Desai Award. From 1946 to 1953 he was the Head Cashier and as such had to control and supervise the work of seven employees, including three Cashiers, one Godown-Keeper and one Chowkidar. During 1953-55 he was in charge of the Cash Department at Aurangabad Branch and as such he had to control and supervise the work of six to seven employees, including four to five Cashiers, one Godown-keeper and one Chowkidar. During 1955-58 he was Head Cashier at the Secunderabad Branch and as such he was in charge of the Cash Department and had to control and supervise the work of 28 Cashiers, one Godown-keeper and one Chowkidar working under him. Later on he was the Head Cashier in Mahaboob Nagar Branch till the date of the application and as such he was controlling and supervising the work of 9 Cashiers, 2 Godown-keepers and 3 Chowkidars.

4. In paragraph 3 of his application, Bhide sets out the duties discharged by him as Head Cashier as follows:

"1. In charge of Cash Department, which includes the checking, controlling and supervision of the work of Cashiers, Godown Keepers and Chowkidars working under him.

2. Issuing receipts to the public for payments made upto Rs. 10,000 independently, without the countersigning of the same by any other Officer with signing authority.

3. Being the Joint Custodian of the Currency Chest, Coin Depot, Safe Custody of Gold Ornaments and rental documents along with Manager or any other joint custodian and the applicant held responsible for any shortages therein, and for any omissions and commissions in this regard. It may be added here that the other Joint Custodian is allowed a Special Allowance of Rs. 50 to Rs. 75/- per month as per classification of the Bank in respect of this particular special responsibility, while the applicant is not given any special allowance for the same.

4. Verification of vernacular signatures on cheques and drafts of any value.

5. Verification, valuation and purchase of Bills from Constituents and to check up and satisfy himself that the same is supported by genuine trade and documentary bills and whether the same covers the bill amount in question. It may be noted here that this special supervisory function is not entrusted to the Head Cashiers of any other Bank.

6. Supervision and control of stocks, valuation, rates, deliveries of godown stocks, involving the work of godown-keeper throughout and also to countersign the pledge letters, delivery orders after due verification along with godown-keeper. Till 1½ years ago, the Head Cashier was also checking the physical stocks of goods pledged to the Bank and he was in charge and control of stock taking periodically. But this particular function has been stopped since about 1½ years, while the applicant is responsible and continues to attend to and discharge all other supervisory functions referred to above.

7. Countersigning the pay-in-slips for cash deposited for credit of current deposit accounts, Home saving safe accounts, Cash Credit accounts, and also on vouchers of Time Deposits, D. Ds. issued etc.

8. Procuring financial reports on parties and signing the same as Head Cashier.

9. To verify and sign the statements of Cash transactions operations in respect of currency chest sent to Reserve Bank of India, daily, weekly, monthly and periodically, along with the other joint custodian of the Currency Chest.

10. Signing all the other periodical returns, Reserve Bank Statements sent regularly, along with the other signing authority.

11. Holding the keys of Cash-in-charge, jointly with another authorised supervising officer or authority namely Manager or Accountant.

12. To be responsible for the entire working of the Cash Department and for making good any shortage due to over payment or under receipt.

13. To discharge finally all Cash receipt vouchers.

14. To arrange dispatch of insured parcels and covers containing valuables or currency notes and then get them sealed under his supervision and in the presence of the accountant, Manager or Officer-in-charge.
15. To scrutinise, check and supervise the work of Cashier and others working in the Cash Department and also the messengers working in the Department.
16. To distribute, allot and change duties to the employees working in Cash Department.
17. To get currency notes sorted and stitched into bundles under his supervision and check the same at the time of closing cash.
18. To nominate persons to be employed under the control of the Head Cashier.
19. To appoint a fit person to act for him as Head Cashier in case of his absence due to illness or otherwise, with the approval of the Head Office.
20. The Head Cashier shall be responsible for the intra omissions of any member of the Staff under his control and for the correctness and genuineness of all hundies, cheques, securities, vouchers, deeds, documents writings and signatures written in any national regional languages or character which the Head Cashier shall at any time during his employment as Head Cashier accept or deal with as correct and genuine and he shall make good to the Bank any loss or damage that may be sustained by the Bank arising from any forged instrument, or signature coming into the hands of the Head Cashier in the course of his employment as Head Cashier and shall be accepted or dealt with by him as correct and genuine.
21. Further, the Head Cashier shall enquire into and as far as possible ascertain and if required to do so truly and faithfully report in writing about the identity, credit, solvency and circumstances of all persons being subjects of Republic of India, who shall have dealings of any kind with the Bank through the agency of the Head Cashier and shall make good to the Bank all losses and expenses by reason of any negligence or default or misrepresentation in any such enquiry

or report made by the Head Cashier during the course of his employment as Head Cashier.

22. The Head Cashier shall be responsible to the Bank for the safe custody of all bullion, cash securities and other property belonging to or deposited with the Bank and for the safe and proper storing, checking and keeping in the place or places appointed for the proper custody thereof of the goods, produce and merchandise of any description whatsoever received by the Godown Keeper or Assistant Godown Keeper from time to time or brought from time to time into the Bank's godowns. He shall be liable for any loss caused to the Bank by reason of receipt of bad or base coin or money or any forged or fraudulently altered Government Currency note or notes or by reason of payment of any money or delivery of any securities for money or property, effects, goods, produce or merchandise being made to wrong persons whether owing to forgery, mistake, fraud or otherwise."

In paragraph 4 he states that apart from the heavy and important responsibilities entailing the work of Head Cashier, he was regularly supervising and controlling the work done by the employees working under him and as such he was entitled to receive the Special Allowance of Rs. 45 per month under paragraph 164 (b) (9) of the Sastry Award and Rs. 60 per month under paragraph 5.282 (18) of the Desai Award, which is the special allowance payable to supervisors. It is further stated by Bhide that he was paid only Rs. 25 per month as and by way of allowance and he claims the balance sum of Rs. 3577.57 as due to him from the appellant which is a B-class Bank under the Bank Award.

5. The management contested the claim on the following grounds. The application filed under Section 33C (2) was not maintainable and the Labour Court had no jurisdiction to entertain the same. The Labour Court had not been 'specified in this behalf by the appropriate Government' for entertaining applications under Section 33C (2) of the Act and therefore it had no jurisdiction to hear and dispose of the application. The applicant was a Head Cashier and he was being paid the special allowance due to him

under the two Awards and he was not entitled to claim the special allowance payable to a Supervisor as he was not discharging any supervisory functions. The applicant had not been controlling and supervising the work of other employees and any such incidental work that he might have been doing was only restricted to his position and duties as a Head Cashier. All the duties and functions referred to in his application were the normal functions and duties attached to the post of a Head Cashier and were within the terms of the agreement between the management and the employees such as Bhide functioning as Head Cashier. None of the duties and functions enumerated in the application bore the characteristics of being of a supervisory nature and such duties and functions were not beyond the legitimate sphere of a Head Cashier. Bhide had been doing the duties of a Head Cashier and discharging the functions also of a Head Cashier. Bhide never used to appoint nor had he appointed any person working under him; but in view of the personal responsibility and liabilities of the Head Cashier it was the practice to allow him to suggest names of persons in whom he could have trust and confidence to work under him. He neither nominated nor appointed but merely suggested names for acceptance and appointment. The appointment was actually made by other superior officers. Bhide being a Head Cashier was paid the legitimate special allowance payable to him under the two Awards and he was not entitled to claim the special allowances which were payable only to a supervisor.

6. The Labour Court, in the first instance, decided the preliminary objection raised by the management that in the circumstances mentioned by the petitioner in C. M. P. 115 of 1963 an application under Section 33C (2) was not maintainable. This objection was overruled by the Labour Court and it held that the application under Section 33C (2) was maintainable.

7. The management Bank challenged this preliminary order before the Andhra Pradesh High Court in Writ Petition No. 201 of 1964. The High Court, by its order dated August 25, 1964 upheld the order of the Labour Court on the question of jurisdiction; but it directed the Labour Court that the claim for supervisory allowance would have to be considered having due regard to the nature of the duties and functions discharged by Bhide

and the relevant provisions contained in the Sastry and Desai Awards.

8. It was after the disposal of the Petition by the High Court that the two other applications C. M. Ps. Nos. 4 and 5 of 1965 were filed before the Labour Court by Pyati and Deshpande respectively, who were also Head-Cashiers claiming the supervisory allowance under the Sastry and Desai Awards. There was a slight change made in these two applications in that the applicants stated that they were discharging as Head-Cashiers multifarious supervisory duties enumerated by them in their applications. The duties and functions mentioned by each of these applicants substantially tally with the averments made in C. M. P. 115 of 1963.

9. Pyati in his application averred that he was entitled to receive, under para 164 (b) (9) of the Sastry Award a Special Allowance of Rs. 45/- per month from April 1, 1954 till December 31, 1961 but he was paid special allowance during that period only at the rate of Rs. 25/- per month. He further claimed that for the period January 1, 1962 to December 31, 1963 he was entitled to receive the special allowance at the rate of Rs. 60/- per month under para 5.282 of the Desai Award and he was paid only a special allowance at the rate of Rs. 25/- per month. Since January 1, 1964 the Bank had been upgraded from B-class to A-class and in consequence he claimed that he was entitled to receive a special allowance of Rs. 65/- per month under the Desai Award whereas he was paid a special allowance only at the rate of Rs. 27/- per month. From November 1, 1964 he had been receiving a special allowance of Rs. 35/- per month instead of Rs. 65/-. Accordingly, Pyati claimed a sum of Rs. 4696.16 as due to him as Supervisory Special Allowance.

10. Similarly, Deshpande, in his application C. M. P. No. 5 of 1965, claimed a sum of Rs. 2028.95 as Supervisory Special Allowance under the two awards, after giving credit to the amounts of special allowance already paid to him.

11. Both these applications were also contested by the management on the ground that the applicants were not doing any supervisory work and that they had been discharging the duties and functions which appertained to each of them as Head Cashier of the Bank. The other objections raised by the Management in C. M. P. No. 115 of 1963 were also raised in respect of these two applications.

12. The three applicants gave evidence in support of their respective claims to the effect as Head Cashiers they were discharging supervisory duties and functions also. The management also let in evidence to the effect that the duties and functions discharged by these three applicants were the duties and functions attached to the office of Head Cashier and that none of the applicants was discharging any supervisory functions.

13. The Labour Court overruled all the objections raised on behalf of the management and allowed the applications filed by the Head Cashiers. Issues Nos. 2 to 5 related to the question as to whether the three Head Cashiers were entitled to claim the Supervisory Special Allowance under the Sastry and Desai Awards, the nature of the functions which they were discharging and whether such work done by them involved any work of a supervisory nature. The Labour Court held that the various Exhibits placed before it showed heavy and onerous responsibilities on the Head Cashiers and also work involving supervision. It further found that the evidence, oral and documentary, showed that the work of the Head Cashiers was partly of a highly responsible nature, partly clerical and partly of a supervisory nature. The Labour Court further held that the three applicants were discharging supervisory functions and their claims fall within the ambit of the Sastry and Desai Awards. Ultimately it found that the applicants had been doing the work alleged by them in their applications and that such work done by them involved work 'supervisory in nature'. The Labour Court therefore allowed the claims in full, as asked for in the three applications.

14. Dr. C. B. Aggarwala, learned Counsel for the appellant Bank has raised the following four contentions: (1) The Labour Court has no jurisdiction to entertain the applications under Section 33C (2) of the Act as it was not 'such Labour Court as may be specified in this behalf by the appropriate Government'. (2) The applications filed under Section 33C (2) are barred under Article 137 of the Limitation Act, 1963. (3) If the claim of the Head Cashiers for the Supervisory Special Allowance at the rate mentioned in the two awards is allowed, the respondents will be drawing more than Rs. 500/- per month and, as such, they will not be 'workmen' eligible to file an application under Section 33C (2) of the Act. (4) The three respondents have been discharging

only the duties and functions that appertain to the post of a Head Cashier which they were occupying and they were not discharging any supervisory functions and in consequence none of the respondents is entitled to the supervisory special allowance under the Sastry and Desai Awards. The finding of the Labour Court that the respondents were discharging supervisory functions is not sustainable in law.

15. Mr. H. R. Gokhale, learned Counsel for the respondent in C. A. No. 1916 of 1968, whose contentions have been adopted by Mr. M. K. Ramamurthy, learned Counsel for the respondents in C. As. 1917 and 1918 of 1968, has supported the order of the Labour Court in its entirety. Regarding the first contention that the Labour Court is not the one specified by the appropriate Government, Dr. Aggarwala has pointed out that in this case the applications were filed in 1963 and 1965 and the evidence was closed and arguments were completed by November 25, 1967 on which date the case was reserved for orders. It was only on December, 19, 1967 that the Central Government issued the notification under sub-section (2) of Section 33C of the Act specifying each of the Labour Courts mentioned in Column II as the Labour Court to determine the amount at which any benefit referred to in that sub-section shall be computed in terms of money in relation to workmen employed in any industry in the areas specified in Column III, in relation to which the Central Government is the appropriate Government. Item 12 in this Notification is the Labour Court, Hyderabad, which dealt with the present applications. Therefore Dr. Aggarwala contends that at the relevant time that is in 1963, when C. M. P. No. 115 of 1963 was filed and in 1965 when C. M. Ps. Nos. 4 and 5 of 1965 were filed, the Labour Court had no jurisdiction to entertain those applications. As against this, Mr. Gokhale pointed out that the Central Government had issued a Notification on April 15, 1963 S. O. No. 1188, Ministry of Labour and Employment, and published in the Gazette of India on April 27, 1963. Item 5 relates to the present Labour Court, Hyderabad, and that Court had been specified as the Labour Court for the State of Andhra Pradesh to determine the amount at which any benefit referred to in sub-section (2) of Sec. 33C shall be computed in terms of money, in relation to a workman employed in any industry in relation to which the Central

Government is the appropriate Government. Counsel further pointed out that this Notification would clearly establish that as early as April 15, 1963 the Labour Court had been specified and conferred jurisdiction to entertain applications under Section 33C (2) of the Act. The earliest application, C. M. P. No. 115 of 1963 was filed on August 31, 1963 on which date the Labour Court had been specified. Counsel also points out that the Notification of December 19, 1967 relied on by the appellant was one issued in supersession of all earlier notifications in that regard.

16. We accept the contention of Mr. Gokhale that the Labour Court had been specified under Section 33C (2) as early as April 15, 1963. It follows that this contention of Mr. Aggarwala has no substance.

17. The second contention of Mr. Aggarwala relates to the claims being barred under Article 137 of the Limitation Act, 1963. This ground of limitation has not been raised either before the Labour Court or even in the special leave applications filed in this Court. The appellant has filed C. M. P. No. 1259 of 1969 for permitting him to raise this question of limitation based upon Article 137 of the Limitation Act of 1963. As no fresh facts had to be investigated and as the matter could be dealt with as a pure question of law, we permitted the appellant to raise this plea of limitation. As the averments in C. M. P. 1259 of 1969 will show, this plea of limitation has been raised on the strength of the Full Bench judgment of the Bombay High Court in *P. K. Porwal (Manager) v. Labour Court, Nagpur*, 1968-2 Lab LJ 505 (Bom) (FB). In this decision no doubt it has been held that Article 137 applies to applications under Section 33C (2) of the Act. Mr. Gokhale, on behalf of the respondents, urged that Article 137 had no application to proceedings initiated under Sec. 33C (2). It has become unnecessary to go into, in great detail, and deal with the contention of the appellant as this contention is now concluded by a recent decision of this Court in *Town Municipal Council, Athani v. Presiding Officer, Labour Court, Hubli*, Civil Appeals Nos. 170 to 173 of 1968, D/- 20-3-1969=(AIR 1969 SC 1335) which has disapproved the Full Bench decision of the Bombay High Court. After a very elaborate reference to the corresponding provision in the earlier Limitation Act and the decisions bear-

ing on the same, and after having due regard to the scheme of the Limitation Act, 1963, this Court has held that Article 137 of the 1963 Limitation Act does not apply to applications under Section 33C (2) of the Act and that no limitation is prescribed for such applications. Therefore the second contention also fails.

18. So far as the third contention is concerned, Dr. Aggarwala ultimately stated that he did not press the contention, that the respondents were not entitled to maintain their applications as they had ceased to be 'workmen' on the date of their applications under Section 33C (2) of the Act. In view of this statement by the learned Counsel, it is unnecessary to consider this contention any further.

19. Coming to the last contention which is the most important, it now becomes necessary to consider the relevant scheme of the Sastry and Desai Awards with particular reference to the directions given therein regarding the grant of special allowance to Supervisors. Before we do so, it is necessary to clear the ground by stating that all the three respondents were Head Cashiers and that they were paid the special allowances due to Head Cashiers as per the Sastry and Desai Awards. The claim for supervisory allowance is made on the basis of the nature of work stated to have been done by the respondents in their respective applications which have been adverted to by us earlier. While Bhide has stated in para 3 of his application the various duties discharged by a Head Cashier which, according to him, are heavy and important, and that over and above these items of work he has been regularly doing supervisory and controlling duties in respect of the employees working under him — Pyati and Deshpande have stated that even the items of work which are done by a Head Cashier and which they were actually doing are themselves duties which partake of a supervisory nature. The appellant Bank and its employees were all parties to the Sastry and Desai Awards. The appellant has filed a copy of the agreement that is usually entered into between the Bank and the Head Cashiers. The duties and functions of a Head Cashier are set out therein and they are more or less similar to the items of work claimed to have been done by the respondents. Bhide, who is the applicant in C. M. P. 115 of 1963, as Witness No. 7 for the workmen, after referring to the various items of work done by him, states:

"I was doing such work from 1946 when I was first appointed as a Head Cashier. All Head Cashiers under the respondent do work similar to mine."

Similarly, Deshpande, the applicant in C. M. P. 5 of 1965, as Witness No. 1 for the workmen, stated:

"As I am doing the supervisory duties mentioned in my petition I state that I am doing supervisory work in addition to being a head-cashier and hence I am claiming supervisory allowance. What all I have been doing is the duty of a head cashier and because it involves work of a supervisory nature I am claiming supervisory allowance The work specified by me as supervisory work done by me, was being done by the head cashiers from the time of even the inception of the Bank."

20. Dr. Aggarwala severely criticised the findings recorded by the Labour Court on the ground that it has not stated which part of the work, if any, done by the respondents, is supervisory work. On the other hand, the Labour Court has accepted in full the plea of the respondents that even *minor items of supervisory work* that may have been done by them as Head Cashiers will entitle them to claim the supervisory special allowance. According to the appellant the entire work done by the respondents was only as Head Cashiers and no part of that work can be called supervisory so as to make them eligible to claim the special supervisory allowance. Dr. Aggarwala urged that at the time of the Sastry Award the Tribunal had an overall picture of the staff working in the various Banks as well as the duties discharged by them and it is on that basis that the Tribunal has given the various categories of persons in paragraph 164 (b) of the Award and who will be eligible for the special allowance. The category of Head Cashiers dealt with in the Award is entirely different from the category of supervisors for whom a higher special allowance has been recognised under both the Awards.

21. Counsel also pointed out that the mere fact that the respondents, who were Cashiers, also incidentally did some supervisory work now and then will not make them eligible for getting the supervisory allowance. In order to claim the supervisory allowance, Counsel urged that the parties must establish that the main or essential duties entrusted to them and actually discharged by them were duties and functions of a supervisory nature,

which has not been established in the present case, by any of the respondents. If all the Head Cashiers who are already getting the special allowance provided for them under the two Awards are also made eligible for the special supervisory allowance, division of the various persons into different categories in the two Awards becomes meaningless and serves no purpose, and there will be no distinction between Head Cashiers and Supervisors. Dr. Aggarwala further pointed out that at the relevant time a claim was made by the Head Cashiers to be treated as Supervisors and this claim was rejected both by the Sastry Award and the Desai Award. These aspects, counsel urged, have been totally missed and lost sight of by the Labour Court when it accepted the claims of the respondents. According to Dr. Aggarwala, unless a person comes under the category of a Supervisor or discharges mainly supervisory functions, he will not be entitled to claim the supervisory special allowance.

22. Mr. Gokhale, on the other hand, equally vehemently urged that the question posed for consideration under contention No. 4, by the appellant, as to whether the respondents were carrying out supervisory functions to make them eligible for claiming the supervisory special allowance, is a pure question of fact on which the Labour Court had recorded a finding in their favour. He also contended that this Court should not interfere with a finding recorded by the Labour Court on such a question of fact. Mr. Gokhale also argued that even if the respondents have done some items of work which appear to have some element of supervisory character, they will be eligible to claim the special supervisory allowance. In this connection Mr. Gokhale referred us to certain statements contained in the applications filed by the respondents wherein they had stated that in discharging their duties as Head Cashiers they had to do certain work of a supervisory nature. Such discharge of functions by the respondents and accepted by the Labour Court, would entitle them to claim the supervisory special allowance.

23. We are not inclined to accept the contention of Mr. Gokhale that the point arising for consideration is purely one of fact. In exercising its discretion under Article 136, this Court does not normally enter upon pleas on questions of fact and is also generally reluctant to interfere with findings of fact recorded in a judgment or decision under appeal. So in

dealing with the question raised by the appellant that the respondents had been wrongfully held entitled to claim supervisory special allowance we will proceed on the basis that the facts found by the Labour Court are correct. The Labour Court has accepted the claim of the respondents regarding the items of work done by them, though it has not differentiated between the various items of work as to which of them is of a supervisory nature. We will also proceed on the basis that according to the Labour Court some items of work done by the respondents as Head Cashiers can be called, supervisory. But will that make them eligible for the supervisory special allowance? The status of the three respondents has to be inferred as a matter of law from the facts found and therefore the question naturally arises as to whether the Labour Court has drawn the correct legal inference from the facts found by it.

24. The Sastry Award was published in the Gazette on March 26, 1953. Chapter X of this Award deals with Special Allowances. In Paragraphs 161 and 162, the Award refers to the fixation of scales of pay and dearness allowance for clerical and subordinate staffs doing ordinary duties as such. It also refers to the fact that there are certain posts even in those grades which require special qualifications or skill from its incumbent and an extra payment in such cases is necessary by way of recognition of the special skill and responsibility. Reference is then made to the demand for such extra payment designated as 'special allowances' and that it was with reference to work 'now performed by employees under various designations.' After referring to the various methods that could be adopted for giving a benefit to persons with special qualifications or skill for discharging work carrying with it a greater responsibility, the Tribunal ultimately comes to the conclusion that it has found it simpler to solve the problem by providing for a lump sum allowance called 'special allowance' in each of such cases where the Tribunal considered it necessary. The Tribunal proceeds to state that it has provided only a minimum and 'in the case of big banks and particularly in their important offices it may be proper and desirable that the incumbents of such offices should be allowed more than what we have prescribed.' In the concluding part of Paragraph 162, the Tribunal states:

"It may be that what we have prescribed as a minimum is less than what some big banks are at present giving and have thought it proper to give for such incumbents in some of their more important offices; but it is not feasible to provide for divers conditions obtaining in various branches of banks where the volume of work differs to a considerable extent."

25. In Paragraph 163 the Tribunal states that it proposes to enumerate the categories for which special allowance should, in its opinion, be given. In Paragraph 164 the categories of employees who deserve to be specially considered as fit for special allowance are given and they are: Graduates; Holders of banking diplomas like C. A. I. I. B. and C. A. I. B.; Comptists; Stenographers; Cashiers (other than routine clerks); Supervisors; Sub-Accountants; Clerks-in-charge; Departmentals-in-charge; and Head Clerks. In clause (a) of this paragraph a special provision is made regarding the giving of two additional increments to graduates and holders of banking diplomas like C. A. I. I. B. and C. A. I. B. In clause (b) of this paragraph the rate of special allowances to be given for the other categories of employees is stated and the nine categories of employees are also enumerated. They are to get the special allowance depending upon the bank coming under class A, B, C or D. The nine categories of employees enumerated in this sub-paragraph are as follows:

1. Comptists.
2. Head Clerks and Stenographers.
3. Head Cashiers: Units of 5 clerks and above.
4. Head Cashiers: Units of 4 clerks and below.
5. Assistant Cashiers (above the level of routine clerks.) Units of 5 clerks and above.
6. Assistant Cashiers (above the level of routine clerks.) Units of 4 clerks and below.
7. Cashiers in charge of cash in pay offices.
8. Cashiers in charge of cash in Treasury pay offices, employees in charge of pay offices or sub-offices.
9. Supervisors, Superintendents, sub-accountants, departmentals-in-charge, employees in charge of treasury pay offices." There is a note to the effect that in case where an employee comes within more than one category, he should be entitled to the highest rate applicable to him.

Paragraph 165 refers to a controversy that appears to have been raised before the Tribunal as to whether some of the categories mentioned above come under the definition of the term 'workmen.' This question, we find, has been dealt with separately in Chapter XV. But it is emphasised in Paragraph 165 "what we are now providing must be understood as the allowances applicable to incumbents of such of these posts where they are 'workmen.'"

26. In Chapter XVI the Tribunal deals with the question as to whether Head Cashiers and certain other persons are to be treated as departmentals-in-charge. In this connection in Paragraph 338 it is mentioned by the Tribunal that some of the employees' unions demanded that head cashiers and treasurer's representative should be treated as supervisors or heads of sections and should get emoluments appropriate to such positions of responsibility. The Tribunal does not appear to have recognised this demand and has wound up the discussion on this point by stating that it has to provide for an appropriate scale of emoluments for head cashiers or treasurer's representatives and those who do similar work.

27. The claim of the respondents for the special allowance as supervisors is dealt with under Paragraph 164 (b) (9) of the Sastry Award. We may state that this Award was challenged by the Banks before the Labour Appellate Tribunal which substantially confirmed the directions issued in respect of payment of special allowances.

28. The Desai Award was published in the Gazette on June 13, 1962. In Chapter V, under sub-heading (xxiii), the Award deals with supervisory staff. In Paragraph 5.196 it refers to the Sastry Tribunal having provided special allowances for supervisors at the rates mentioned therein, depending upon the class of Bank in which he is working. In Paragraph 5.218 the Tribunal states that it is

"left with no alternative except only to fix special allowances for workmen employed in a supervisory capacity"

as was done by the Sastry Tribunal, after applying to them the scales of pay provided for the clerical staff. On this basis the Tribunal further states that it has fixed suitable allowances for supervisors in banks which come under Class A, B and C, including banks in the Excepted List. The Tribunal further states:

"In deciding whether a workman is entitled to supervisory allowance, the designation of the workman would not be decisive. In order to entitle a workman to such allowance what would be determinative would be the nature of the duties and functions assigned to him."

29. Under sub-heading (xxiv) the Award deals with Special Allowances. In Paragraph 5.220 the Award refers to the decision of the Sastry Tribunal to provide a lump sum allowance called special allowance to persons with special qualifications or skill required for discharging work carrying with it greater responsibility. It also refers to the further statements of the Sastry Tribunal that what it was providing was only a minimum and that in the case of big banks it may be proper and desirable that the 'incumbents of such offices' should be allowed more than what had been prescribed. In Paragraph 5.221 the categories of workmen employed in the various classes of banks to whom special allowances were granted by the Sastry Tribunal are set out. They are the nine categories enumerated in Paragraph 164 (b) of the Sastry Award.

30. In Paragraph 5.231 it is stated that the Sastry Award has been in operation for a long time and, as a result of decisions given by Tribunals or otherwise, the categories of persons entitled to special allowances under the Sastry Award as modified can now be regarded as fairly settled. In Paragraph 5.249 the Award deals with Head Cashiers. It refers to the demand made for giving supervisory grades to head cashiers, but this is not accepted by the Tribunal. On the other hand, an increase is made in the special allowances payable to head cashiers. The Tribunal then deals in Paragraph 5.273 with Supervisors, Superintendents, Sub-Accountants and Departmentals-in-charge. Here again, the Award granted an increase in the rate of special allowances for these categories of workmen depending upon their working in Banks characterised as A-class, B-class or C-class banks, including banks in the Excepted List. In Paragraph 5.282 the Tribunal gives the categories of workmen and the amount of special allowances per month which such categories of workmen will get in A, B and C-class banks. There are twenty categories of workmen mentioned therein. Items 7 and 8 deal with Head Cashiers, of units of 5 clerks and above and Head Cashiers of units of 4 clerks and below, respectively. Item 18 deals with supervisors, superintendents,

sub-accountants and departmentals-in charge. It may be mentioned that items 7 and 8 correspond to items 3 and 4 in the Sastry Award and item 18 corresponds to item No. 9 in Paragraph 164 (b) of the Sastry Award with this slight difference that employees in charge of treasury pay-offices are not dealt with under this clause. The rate of special allowance is also higher than that given under the Sastry Award.

31. Paragraph 5.285 states that special allowances prescribed under the Award would be in supersession of those prescribed under the Sastry Award as modified. In Paragraph 5.286 the Award states that special allowances are payable to employees who are workmen and who will continue to remain as workmen even after inclusion of the amounts of such special allowance as wages. In Paragraph 5.287 it is stated that when an employee falls within more than one category, he will be entitled to receive the special allowance at the highest rate applicable to him. We may state that this paragraph embodies the note appearing after the categories of employees enumerated in Para 164 (b) of the Sastry Award. Pausing here for a minute, we may state that the Note in the Sastry Award and Paragraph 5.287 in the Desai Award do not advance the case of the respondents any further. The effect of the note is only that if an employee has been assigned work the discharge of which will bring him under two categories, one of which carries a higher rate of special allowance, he will be entitled to such higher rate.

32. In paragraph 5.288 it is noted that the Banks urged that the special allowances granted under the Award should be paid to the employees only when they were required to perform and when they in fact performed the special duties for the performance of which the allowances were prescribed. The banks also appear to have urged that such allowance should not become payable when a person is occasionally or casually asked to do some duty of the type attracting a special allowance. These contentions urged on behalf of the banks is dealt with by the Tribunal in the same paragraph as follows:

"The special allowances which have been awarded are monthly special allowances. They are intended to compensate a workman for the performance of certain duties and the discharge of certain functions which constitute the normal part of

the duties performed and the functions discharged by such person. They are not intended to be paid for casual or occasional performance of such duties or the casual or occasional discharge of such functions."

33. In paragraph 5.289 the Award states that a person will be entitled to a special allowance so long as he is in charge of such work or the performance of such duties which attract such allowance, and that a person asked to work temporarily in a post carrying a special allowance would be entitled to such special allowance for such period during which he occupies that post.

34. In paragraph 5.290 special allowances are directed to be continued to be drawn by a permanent incumbent while on leave. In paragraph 5.291 the Award states that whenever a bank requires an employee to work in a post carrying a special allowance it should be done by an order in writing to avoid any future controversy.

35. Having seen the relevant provisions in the two Awards, we have come to the conclusion that the scheme of both the Sastry and Desai Awards for grant of special allowance as Supervisors is that such special allowances can be drawn only when a person falls in the category of a supervisor or is found eligible to be put in that category by whatever nomenclature such person may be designated, in view of the supervisory nature of the duties and functions assigned to him. The mere fact that a person whose duties are essentially and mainly that of a Head Cashier, for whom also a special allowance is payable under the two Awards, performs occasionally or casually or incidental to his work as a Head Cashier, duties which may be characterised as supervisory, will not entitle him to claim the higher rate of special allowance granted to a supervisor under the two Awards. Both the Sastry and the Desai Tribunals had before them various types of persons working in the banks as well as the duties discharged by them. It is on that basis and after a careful consideration of the duties so performed by them and the responsibilities attached to each post that the two Tribunals divided the persons into nine categories in the Sastry Award and twenty categories in the Desai Award. We are not inclined to accept the contention of Mr. Gokhale that merely because certain items of work, which really form part of the regular work of Head Cashiers, can be con-

sidered as being supervisory and are being done by the respondents, they will be entitled to claim the higher rate of supervisory special allowance.

36. We have already referred to the evidence of the respondents that the work that was being done by them were all items of work forming part of the duties of a Head Cashier, from the inception of the bank and all Head Cashiers do similar work. Therefore it follows that the work done by the respondents, even on their own admission and on the findings of the Labour Court, consisted of only items of work which a Head Cashier was bound to do; and the few items of work claimed by them to be supervisory were really done by them as incidental to their main duties as Head Cashiers.

37. In this view, we are not remanding the matter for further consideration by the Labour Court, for a clearer finding regarding the supervisory nature of the work done by the respondents because none of the respondents has ever claimed that any of them is in the category of a supervisor, or that he has been doing work which is essentially work of a supervisory nature. On the other hand, their specific claim is that they are doing the work of Head Cashiers and, in the discharge of such work, they have also been doing certain items which, according to them, are supervisory in nature. The Labour Court appears to have been impressed by the fact that the respondents are discharging duties which are highly responsible, onerous and important. It has no doubt found that the respondents are discharging supervisory functions and hence their claims come within the ambit of the Sastry and Desai Awards. But the Labour Court, as rightly pointed out by Dr. Aggarwala, has not cared to investigate which part of the items of work claimed to have been done by the respondents can be characterised as supervisory functions. Further investigation on this aspect has become unnecessary in the view that we have expressed earlier about the circumstances under which a person can claim the special supervisory allowance under the two Awards and in view of the fact that none of the respondents has claimed that he has been doing work which is essentially work of a supervisory nature.

38. In this connection it is also necessary to note that the appellant bank and its employees were parties to both the Sastry and Desai Awards. We have already referred to the fact that the Sastry

Award adverts, in paragraph 338, to the demand made by Head Cashiers to be treated as supervisors or heads of sections. No doubt this demand was in respect of emoluments being fixed appropriate to position of responsibility of supervisors; but this claim was rejected by that Tribunal. A similar demand, on behalf of Head Cashiers, for giving them supervisory grades was rejected by the Desai Award in paragraph 5.249. These circumstances clearly show that the two Tribunals were not inclined to treat Head Cashiers on a par with Supervisors and that must be due to the reason that the functions discharged by the Head Cashiers and Supervisors materially differ. The view expressed by us earlier that the Sastry and Desai Awards had in view persons falling under the category of supervisors or discharging supervisory functions by whatever nomenclature they may be designated, is also clear from some of the statements made in the Awards, to which we shall refer presently.

39. We will first take up the Sastry Award. In para 161 it is stated that the demand for extra payments, designated as 'special allowances', was made with reference to the 'nature of clerical and subordinate work now performed by employees under various designations'. In paragraph 162, again it is stated that the Tribunal has provided only a minimum special allowance and that it may be proper and desirable that 'the incumbents of such offices' in some of the big banks should be allowed by them more than that awarded by the Tribunal. In paragraph 163 the Tribunal proceeds to 'enumerate the categories for which special allowances, in our opinion, be given'. After specifying the categories of employees for whom special allowance is to be given, in paragraph 165 the Tribunal is faced with the question as to 'whether the employees in these categories will fall within the definition of workmen'. This question is separately dealt with in Chapter XV, but in paragraph 165, regarding this aspect the Tribunal states:

"What we are now providing must be understood as the allowances applicable to incumbents of such of these posts where they are workmen".

40. Similarly, in the Desai Award, in dealing with Supervisory Staff, in paragraph 5.218 the Tribunal states that it is left with no alternative except to fix special allowances for workmen 'employed in a supervisory capacity' as was done by

the Sastry Tribunal. It is further stated in the same paragraph that in deciding whether a workman is entitled to supervisory allowance, the designation of the workman would not be decisive and that in order to entitle the workman to such allowance what would be determinative would be the nature of the duties and functions assigned to him. In paragraph 5.221 the Tribunal itself has stated that the Sastry Tribunal provided special allowances for the 9 categories of workmen 'employed in various classes of banks' as mentioned therein.

41. In dealing with a complaint made on behalf of the workmen that the Sastry Award had not specified the nature of the work to be done and the duties which were required to be performed by the various persons who were entitled to receive special allowances, the Desai Tribunal states in para 5.231 that the Sastry Award has been in operation for a long time and as a result of decisions given by Tribunals the categories of persons entitled to special allowances can be regarded as fairly settled. In paragraph 5.288 the Tribunal states that the special allowances which have been awarded are monthly special allowances intended to compensate a workman for the performance of certain duties and the discharge of certain functions which constitute the normal part of the duties performed and the functions discharged by such person and that they are not intended to be paid for casual or occasional performance of such duties or the casual or occasional discharge of such functions. It is further mentioned in paragraph 5.289 that a person is entitled to special allowance so long as he is in charge of such work or the performance of such duties which attract such allowance and that a person asked to work temporarily in a post carrying a special allowance would be entitled to such a special allowance for such period during which he occupies that post.

42. Mr. Gokhale, learned Counsel for the respondent, referred us to the decision of this Court in *Lloyds Bank v. Panna Lal Gupta*, 1961-1 Lab LJ 18=(AIR 1967 SC 428) and urged that the said decision is an authority for the proposition that if a person does work which appears to have some element of a supervisory character, he will be entitled to claim the supervisory allowance under paragraph 164(b)(9) of the Sastry Award. In our opinion that decision does not lay down any such proposition. In that decision this Court had to deal with a

claim made by certain clerks working in the audit department for payment of the supervisory allowance under paragraph 164 (b) (9) of the Sastry Award. It must be stated at the outset that these clerks do not come under any of the nine categories mentioned in the Sastry Award, eligible for the special allowance. The Tribunal had held that the clerks in the audit department supervised the work of almost all the persons in the establishment with a view to ensure the correctness and authenticity of the accounts and it further held that having regard to the nature of the duties and functions performed by them they should be treated as 'supervisors' under category (9) of the Sastry Award. This Court set aside the award of the Industrial Tribunal and in so setting aside the award observed that before a clerk could claim a special allowance his work should appear to have some element of a supervisory character. Even this *prima facie* test was enough to non-suit the three clerks therein. We do not understand this decision as laying down that when any person, coming under one or other of the categories mentioned as items 1 to 8 of paragraph 164 (b) can claim the higher rate of allowance granted to supervisors coming under category 9, merely by establishing that while discharging the work which appertains to that particular category, he did some items of work which have an element of supervisory character. In fact, in the earlier part of the judgment it is stated that even if the three workmen before them do not by name or designation fall in category 9, 'they would nevertheless be entitled to claim the special allowance if it appears that the duties performed by them and the functions discharged by them are similar to, or the same as, the duties or functions assigned to persons falling in that category'. These observations, in our opinion, make it quite clear that before a person can claim the supervisory special allowance, he must establish that he has discharged the duties and functions which are similar to or the same as the duties or functions assigned to supervisors coming under category 9. This decision also makes it clear that in deciding the status of an employee claiming the special allowance, the designation of the employee is not decisive and what determines the status is a consideration of the nature of the duties and functions assigned to the employee concerned.

43. A similar claim for supervisory allowance, made by tellers in a bank, was

of the Act, to presume absence of circumstances entitling the accused to the benefit of an exception unless and until the contrary was actually proved. It was contended that, at least so far as rules relating to burden of proof were concerned, the Evidence Act, which was meant to provide a complete and comprehensive code without invoking the aid of any external rules, was exhaustive. It was, therefore, the duty of Courts to enforce the provisions of the Act, instead of making law which should be left to the legislature.

96. Mr. P. C. Chaturvedi, appearing for the accused, contended that the accused could be presumed to discharge the positive burden of proving an exception pleaded if he succeeds in creating a reasonable doubt by evidence, from whichever side it came, that his plea may be true. According to him, the standard of proof required by a prudent man, laid down by Section 3 of the Act, would be satisfied by a hypothesis. Prudence, according to him, always bases its judgments on reasonable hypothesis and not on certainties which are seldom possible in judging human affairs. And, Section 3 of the Act, learned counsel pointed out, specifically enacts that the prudent man not only could but "ought, under the circumstances of the particular case, to act upon the supposition" that a state of facts exists. His contention was that the duty of the prudent man to act upon a supposition, based no doubt on probabilities, obliges the prudent man to equate reasonable doubt that the accused's case may be covered by an exception with "proof" of the exception in a criminal case. Such an elastic and variable concept of prudence and proof, which differs in its application from case to case, was implicit, according to learned counsel, in Section 3 of the Act itself. In criminal cases, involving deprivations of life and liberty, much depended on oral testimony which may be defective or perjured. Therefore, in order to avoid the lurking risks of grave injustice, it was necessary, according to learned counsel, not to unduly limit the scope of the principle of benefit of doubt. Learned counsel went to the extent of asking us to countenance even a fiction, if need be, so as to meet or to repeal the obligatory presumption under Section 105 and thus to remove what the learned counsel tried to depict as a possible impediment in the way of justice, equity, and prudence. The learned counsel invited us to consider the consequences in cases where evidence was so equibalanced, on a disputed question of possession of property or on the question whether one or the other party was the aggressor in a fight, that the astutest judge could not possibly determine which of two rival versions was correct. Learned counsel urged that, on

the State's interpretation, both sides will have to be convicted in such cases as neither side could prove its defence case positively by a "preponderance of probabilities". Lastly, the learned counsel argued that Section 6 of the Indian Penal Code, read with Section 221 (5), Criminal Procedure Code, placed the burden upon the prosecution of negating the exceptions pleaded by the accused. This conclusion, according to learned counsel, necessarily flows from the proposition that the absence of an exception was an ingredient of each offence defined by the Indian Penal Code. The prosecution's primary and unalterable duty to dispel all reasonable doubt in a criminal case must, it was contended, extend to removing such doubts arising from anything whatsoever in the case which Courts could properly and legally consider.

97. Much unnecessary confusion, which has gathered round the relevant provisions of the Act, will vanish if we adopt the time honoured mode of construing statutes formulated in the form of rules as far back as 1584 in Heydon's case, (1584) 3 Co Rep 7a so as to remove ambiguities by examining the mischief meant to be remedied. These rules were adopted by the Supreme Court and cited with approval in *Bengal Immunity Co. Ltd. v. State of Bihar*, AIR 1955 SC 661 at p. 674. In Craies' "Statute Law" (5th Ed. p. 91), it was observed: "These rules are still in full force and effect, with the addition that regard must now be had not only to the common law, but also to prior legislation and to the judicial interpretation thereof." Fletcher Moulton, L. J. observed in *Macmillan v. Dent*, 1907-1 Ch 107 at pp. 117 at p. 120:

"In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported Heydon's case, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."

98. Lindley, M. R., in *Re Mayfair Property Co.*, 1898-2 Ch 28 at p. 35 said:—

"In interpreting an Act of Parliament you are entitled, and in many cases bound, to look to the state of the law at the date of the passing of the Act; not only the common law but the law as it then stood under previous statutes, in order properly to interpret the statute in question."

99. In *Shivanarayan Kabra v. State of Madras*, AIR 1967 SC 986 at p. 989 also the Supreme Court referred to these rules. It held that, in construing the section of an Act and determining its true scope, "it is permissible to have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the legislature, such as history

of the statute, the reason which led to its being passed, the mischief which it intended to suppress and the remedy provided by the Statute for curing the mischief."

100. The concepts of 'proved', 'disproved', and 'not proved,' defined in alluringly simple terms in the Act, compress a great deal of judicial wisdom with history and processes of evolution and development behind them which have not yet ended. The term 'Burden of proof' is not defined in the Act and cannot be fully understood without an exposition of its place and meaning in our procedural law as a whole. Nor an adequate understanding of the import of these basic concepts, even when they are incorporated in a comprehensive code, we have to necessarily examine their sources, the context in which they were given statutory form, the purposes they were designed to serve, and the functions they actually fulfil. Cut off from these moorings they may become ugly caricatures of that justice which all law is meant to serve. It is obvious that a mechanical interpretation with the help of a dictionary and rules of grammar, found to be inadequate on several occasions by our Supreme Court (e.g. Deputy Custodian Evacuee Property New Delhi v. Official Receiver of the Estate of Daulat Ram Surana, AIR 1965 SC 951 at p. 957; Kanwar Singh v. Delhi Administration, AIR 1965 SC 871 at p. 875; R. L. Arora v. State of U. P., AIR 1964 SC 1230 at p. 1237; State of U. P. v. C. Tobit, AIR 1958 SC 414), may not suffice here also.

101. Our Evidence Act is the first of the three comprehensive codifications of our adjectival or procedural laws introduced with the object of enabling courts to correctly ascertain those facts which determine rights and liabilities defined by the substantive laws. It provides for the adduction of evidence declared relevant and in a logical order conformably with rules of natural justice and reason so that truth may be brought out so far as possible and not obscured. Its purpose was "to consolidate, define, and amend the law of Evidence" so that inadequacies and uncertainties in this branch of our law may be removed. It is no secret that this was sought to be accomplished by basing the Act on principles and rules evolved by the judge-made Anglo Saxon law of evidence with slight modifications but without departing from its basic norms. Therefore, to these principles and rules we have to turn to find out the meanings of ambiguous expressions.

102. We find that the term "Burden of Proof," as used in English law, both at the time when Sir James Fitzjames Stephen drafted the Act and also today, carries within it two meanings. I may quote from Phipson on Evidence (10th ed., at page 43) to indicate the two senses:—

"As applied to judicial proceedings the phrase 'burden of proof' has two distinct and frequently confused meanings: (1) the burden of proof as a matter of law and pleading—the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond a reasonable doubt; and (2) the burden of proof in the sense of introducing evidence."

Again, we find here (p. 45):

"It is in the second sense that the term is more generally used, and must be applied in the following pages; and while the burden of proof in the first sense is always stable, the burden of proof in the second sense may shift constantly according as one scale of evidence or the other preponderates."

103. Whenever the law places a burden of proof upon a party a presumption operates against it. Hence, burdens of proof and presumptions have to be considered together. It has been said that a rebuttable presumption always covers a gap in evidence, but the gap, and together with it, the presumption will disappear as soon as there is credible evidence to fill the gap. The extent of the gap, in the eye of law, will vary with the nature of the presumption. The burden of establishing a plea connotes a bigger gap requiring more acceptable evidence to fill it than the burden of removing a presumption that no circumstances whatsoever exist to support the plea. As has been often pointed out, when there is ample evidence from both sides, the fate of the case is no longer determined by presumptions or burden of proof but by a careful selection of the correct version, based no doubt on preponderance of probabilities which has to be so compulsive or overwhelming in the case of a choice in favour of a conviction as to remove all reasonable doubt. In other words, the importance of burdens of proof and presumptions vanishes in the face of evidence given by both sides. They may, however, become decisive again in cases where evidence is equibalanced. Thus, their function is decisive only in cases where there is paucity of evidence on either side or the evidence given by the two sides is equibalanced. Neither a burden of proof nor a rebuttable presumption can be used for excluding any evidence. That is not their function at all but of other provisions of law.

104. In Phipson's Evidence (10th ed. p. 838), it is pointed out: "The chief function of a rebuttable presumption of law is to determine upon whom the burden of proof rests, using that term in the sense of adducing evidence." Wigmore, the celebrated American authority of the law of Evidence, dealing with the "Legal Effect of a Presumption" (See, 3rd ed.,

Vol. IX, p. 289) explains:—

".....It must be kept in mind that the peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion 'in the absence of evidence to the contrary' from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the Judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule." Again, he observed (3rd ed., Vol. IX, p. 230): "It is, therefore, a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary. For example, if death be the issue, and the fact of absence for seven years unheard from be conceded, but the opponent offers evidence that the absentee, before leaving, proclaimed his intention of staying away for ten years, until a prosecution for crime was barred, this satisfies the opponent's duty of producing evidence, removing the rule of law; and when the case goes to the jury, they are at liberty to give any probative force they think fit to the fact of absence for seven years unheard from. It is not weighed down with any artificial additional probative effect; they may estimate it for just such intrinsic effect as it seems to have under all the circumstances. This much is a plain consequence in our mode of jury trial; and the fallacy has arisen through attempting to follow the ancient continental phraseology, which grew up under the quantitative system of evidence, fixing artificial rules for the judge's measurement of proof."

105. It is true that the rules of evidence indicated above were evolved in the course of development of a mode of trial in which the judge gave guidance on questions of law and the jury pronounced its verdicts on questions of fact. Nevertheless, when these very guiding principles were sought to be reduced to the form of a code, the basic principles could not be deemed to be abandoned or departed from without clear words to the contrary. In fact, it is not possible to appreciate the true meaning of a number of provisions of the Act, including Sec. 105, without exploring the law contained in the sources of the codification. If, however, the above mentioned expositions are kept in view, it becomes quite easy to interpret Section 105 of the Act which covers the burden of establishing as well as the duty of introducing evidence of exceptions set up by the accused. It becomes clear that the obligation of the Court to presume absence of circumstances supporting a plea is meant to operate only initially. The presumption

which the Court is obliged to make vanishes when any circumstances supporting the exception are proved. On the other hand, the duty or the burden of the accused, dealt with in the first part of Section 105, to establish the exception pleaded may remain even after the initial presumption against him is removed as a result of evidence of either side. The obligation of the Court to presume initially absence of circumstances to support an exception cannot be used to eliminate or wipe out facts actually proved from either side even though they are not sufficient to establish an exception. The circumstances actually proved, even though falling short of proving the plea of the accused by a preponderance of evidence will, nevertheless, free the case from the initial presumption that no circumstances at all exist to support the exception pleaded. The case will then be decided on the whole evidence. This is all that Sec. 105, read with other provisions of the Act, clearly means.

106. If, for example, an accused "proves" infliction of injuries on him by the complainant in the course of the occurrence which is the subject-matter of the charge, he certainly proves some of the circumstances to support a plea of self-defence. The obligatory initial presumption against him is removed. Nevertheless, he may be convicted if the prosecution evidence proves that these injuries were indubitably caused in the exercise of a right of private defence by the complainant. But, his conviction would not be the result of any presumption under the last part of Section 105. It would follow from the superior proof given by the prosecution either direct or circumstantial or both. On the other hand, added to injuries on the person of the accused, proved to have been caused by the complainant during the occurrence, the accused may succeed in proving, even from such circumstances as an attempt of the prosecution to conceal these injuries, that there is a doubt about the veracity of the prosecution version itself and that his plea of self-defence, although not positively established, may reasonably be true. In such a case, the prosecution could not use the presumption contained in the last part of Section 105 to secure a conviction. No doubt, the prosecution will fail, in such a case, because it has failed to prove its own case beyond reasonable doubt. But, the doubt it has failed to eliminate would have been introduced by proved facts relied upon by the accused to establish the plea of an exception. The facts relied upon for proving an exception could not be automatically equated with facts disproved or disentitle the accused from getting the benefit of an exception simply because he could not fully prove, by a

"preponderance of evidence," the exception pleaded. A plea taken but left in the region of "not proved" by the evidence on record may be enough, on a criminal charge, for a bare acquittal provided the doubt introduced by some proved facts and circumstances, displacing the initial obligatory presumption, is strong enough to reasonably shake the moral conviction of guilt of the accused on the charge levelled against him. This seems to me to be the line of reasoning underlying the majority view in Parbhoo's case. It seems to be both practical and just. It accords with very firmly established principles of proof and burden of proof applicable to criminal trials in this country as well as with the provisions of the Act read as a whole. I confess that I fail to see any flaw in it.

107. The contrary view would erect the initial presumption under Section 105 into an artificial barrier against the entry of a reasonable doubt into the prosecution case even when the accused, though failing to fully prove an exception, actually creates a reasonable doubt. Not only is it humanly impossible for a judge to keep evidence confined in two separate watertight compartments of his mind, but it would also be illegal for him to do so. Apart from being much too unrealistic a view, this would restrict the powers of the Court to judge, on all the materials placed before it, whether the prosecution has proved its case beyond reasonable doubt or not. It would equate relevant and proved facts with what is either irrelevant and inadmissible or disproved. Such a view would clearly infringe Section 3, and, indirectly, also provisions relating to relevancy by reducing even facts duly proved as relevant to the same positions as those which are irrelevant and excluded. Such a course seems warranted neither by law nor by any canon of justice or expediency.

108. In Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) Bajpai, J., held that the fixed or stable burden of proof is found in Sections 101 and 102 of the Evidence Act, whereas Sections 103 and 105 of the Act contain the unstable burden which shifts in the course of the trial "as one scale of evidence preponderates over the other." In other words, preponderance of evidence was the test to be used in criminal as well as in civil cases for judging the veracity of a case, the only distinction being that such preponderance has to be great or overwhelming enough to eliminate reasonable doubt to warrant conviction in a criminal trial. Again, Mulla, J., who expressed the opinion, in Parbhoo's case, that the principle of reasonable doubt may not be found incorporated "in its entirety" in Sections 3 and 101 of the Act, relied on

Sir John Woodroffe's work on Evidence to hold that the test which the prosecution had to satisfy to secure conviction by proving its case beyond reasonable doubt was higher than the ordinary criterion of "preponderance of probability" contained in Section 3. Even this expression of an individual opinion by Mulla, J. implied that all parties, other than prosecutors, were required to satisfy the test of "preponderance of probability" for proving their pleas or cases. To hold that the special burden of the prosecution to prove its case beyond reasonable doubt is higher than the burden which lies upon a party in a civil proceeding or upon an accused under Section 105 of the Act does not mean that the accused could establish his own plea completely by anything less than a "preponderance of probabilities." Whenever the Supreme Court had held that the burden of the accused under Sec. 105 was discharged on a balancing of probabilities, it had referred to a full discharge of the burden; but, that was not the type of case under consideration in Parbhoo's case.

109. Again, to hold that, even if the accused failed to prove the plea fully, it was possible that he may yet succeed in shaking the foundations of the prosecution case and obtain an acquittal on a reasonable doubt is not to lessen the burden of what may be called a "clean acquittal." There is a difference between a complete exoneration, which is only possible when an accused turns the balance of probability in his favour, and a bare benefit of doubt, which is not entirely devoid of harmful consequences for the accused. The Supreme Court had also held that Section 105 did not prevent the Court from giving the benefit of doubt altogether to an accused pleading an exception, or in other words, S. 105 makes possible both kinds of acquittal—one by proving his plea fully and another by raising genuine doubt in the case. Ismail, J. observed in Parbhoo's case, that the difficulty to be resolved arose only in those limited number of cases where evidence in the case "falls short of proof but creates a reasonable doubt in the mind of the Court whether the accused person is or is not entitled to the benefit of the exception." He pointed out that the question before the Full Bench was whether in such a case, which was before the Court, the Court had no option except to convict. The majority of their Lordships rightly held, just as the Supreme Court later held, that the Court could not be expected to convict in such a case. It is not permissible, in my opinion, to extend the ratio decidendi of Parbhoo's case beyond what was decided there.

110. In Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) the learned Chief Justice spoke of the accused's

"minor burden of bringing his case within the exception or proviso relied upon by him." Ismail, J. considered that the decision on the question of self-defence would only be a "decision upon one of the issues in the case." The Advocate General contended that this approach to the plea of the accused was itself erroneous inasmuch as it gave the impression that the accused had to prove something less than a preponderance of probabilities to establish his case. All that seems to have meant, in describing the burden of the accused as "minor" compared with that of the prosecution, was to contrast it with the heavier burden of the prosecution to eliminate reasonable doubts which may creep in about the veracity of the prosecution version. There seemed to be no intention to reduce the burden of the accused below what the law required. On the other hand, Bajpai, J. took some pains to explain that the nature of the doubt "as to the plea of the right of private defence, which was before the Court, in Parbhoo's case, was that a "doubt had been cast in connection with the entire case." He emphasised that it had to be a reasonable doubt which "reacts on the whole case." He made it clear that the doubt he had in mind was one which "pervades the whole case." In fact, the learned Judge indicated that it would be wrong to assume that the doubt before the Court did not affect "the ingredients of the offence with which the accused has been charged" (the words used by him are italicized here " "). In other words, the nature of the doubt contemplated or assumed to exist for the purposes of answering the question before their Lordships in that case was one which affected the ingredients of the offence.

111. In fact, Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) was not concerned with the quantum of credible evidence in support of the plea of the accused which could "infect", if I may use that word, the whole prosecution case and stamp it with doubt, even though it falls short of fully establishing the plea of private defence. The question framed in Parbhoo's case proceeded on the assumption that the evidence given by the accused was credible with regard to some of the circumstances proved in support of the plea of private defence and threw a reasonable doubt on an ingredient of an offence even if it did not establish the plea of private defence by a preponderance of probabilities. The answers given in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 were based upon that assumption. It may be mentioned here that in each of the two Rangoon cases, which the majority purported to follow in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 the plea of accused was quite substantially supported on facts. In Em-

peror v. U Damapala, AIR 1937 Rang 83 (FB) the first question framed, which is relevant here, indicated that the exception was so well supported that the Court could be in doubt whether the exception itself was proved or not. In Nga Thein v. The King, AIR 1941 Rang 175 the facts found against the victim and in favour of the accused were quite substantial. It is in cases of this sort that genuine doubts arise.

112. There is a difference between a flimsy or fantastic plea which is to be rejected altogether and a reasonable but incompletely proved plea which casts a genuine doubt on the prosecution version so that it indirectly succeeds. Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) was not meant to afford any guidance on what reasonable doubt itself means. The doubt which the law contemplates is certainly not that of a weak or unduly vacillating, capricious, indolent, drowsy, or confused mind. It must be the doubt of the prudent man who is assumed to possess the capacity to "separate the chaff from the grain". It is the doubt of a reasonable, astute, and alert mind arrived at after due application of mind to every relevant circumstances of the case appearing from the evidence.

113. I may mention here that in two reported cases I have tried to point out that Courts must reach, whenever possible, definite conclusions by a careful analysis of the evidence and not take shelter behind a supposed uncertainty created by the facts appraised from a preconceived angle. Those cases are: Bharosa v. State, AIR 1965 All 417 which was a case resulting in two deaths, one on each side, from a fight over a disputed possession of a field, which ended in a conviction; and, Mangat v. State, AIR 1967 All 204, where there were injuries on both sides, but the case ended in a conviction on the finding that the aggression came from the side of the accused. I doubt whether what was laid down quite correctly but in rather general terms by the majority in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) has been really widely misunderstood. If any case of a real misunderstanding of the law by a trial Court occurs, it can be brought to the notice of this Court by appropriate proceedings taken by the State or by the complainant.

114. Perhaps the most important aspect of Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) which learned counsel for both sides seem to have assumed that we will see for ourselves, was stated by Iqbal Ahmad, C. J., at the outset when it was indicated that the real question before the Court in that case was whether "the evidence produced by the accused persons, even though falling short

of proving affirmatively the existence of the circumstances bringing the case within the exception pleaded by him, can be utilized as part of the entire evidence in the case for the purpose of showing that a reasonable doubt exists as to his guilt." The learned Chief Justice thus stated the prosecution's submission on this question. The argument is that, unless the accused succeeds in proving that his case comes within the exception or proviso pleaded by him, the evidence led by him must be totally discarded and the Court must proceed on the definite supposition that "there was an entire absence of the 'exception' or 'proviso' relied upon by the accused." It seems to me that on this question, involving a correct interpretation of the obligatory presumption at the end of Section 105, there is no escape from the answer given by the majority in Parbhoo's case unless the accused is to be denied the benefit of doubt altogether when he pleads an exception. Any answer other than the one given by the majority in Parbhoo's case will involve a clear (Sic) with propositions enunciated by the Supreme Court in Nanavati's case, AIR 1962 SC 605 and Dahyabhai's case, AIR 1964 SC 1563 and Bhikari's case, AIR 1956 SC 1 discussed by me below, which necessarily mean that the whole evidence must determine the result.

115. Iqbal Ahmad, C. J., in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) also referred to the argument of Sir Wazir Hasan that Section 6 of the I. P. C. provided a part of the definition of every offence. This section reads as follows:

"Throughout this Code every definition of an offence, every penal provision, every illustration of every such definition or penal provisions, shall be understood subject to the exceptions contained in the chapter entitled "General Exceptions; though exceptions are not repeated in such definition, penal provision, or illustration."

The learned Chief Justice held that, although this conception was correct, yet, Section 105 of the Act would become ineffective if the further argument, built on it, was accepted that Section 6, I. P. C., imposed automatically a burden of disproving the existence of exceptions upon the prosecution. Thus, the prosecution was not required to lead evidence to prove that an accused person was sane. Even in the absence of any provision, such as Section 105 of the Act, this would be the position. The ordinary presumption would be that every individual concerned in a case is sane, unless and until the contrary is proved, or, at least, until the validity of the presumption is shaken. Similarly, every person inflicting an injury on another would be presumed to have done so with intent to cause it without any

lawful excuse unless a justification, such as the exercise of a right of private defence, was either fully proved or its existence could be quite reasonably conceived on facts proved. Section 103 of the Evidence Act was there to place the burden of proving special facts to sustain the plea of an exception upon the accused. There seemed, therefore, no particular reason for Section 105 in the Act unless the reasoning which appealed to the learned Chief Justice, that it effectively meets an argument based on Section 6, I. P. C., was present in the minds of the framers of Section 105 also.

116. Section 105 of the Act specifically refers to the provisions of the Indian Penal Code which were before the draftsman. It must be presumed that the Legislature was fully aware of Section 6, I. P. C. Therefore, Section 105 of the Act seemed necessary in order to meet a possible construction which was not intended. In other words, Section 105 serves the purpose sometimes served by a proviso (See: Maxwell's "Interpretation of Statutes" 11th Edn., page 156). Of course, it could be looked upon as analogous to a proviso only if we view S. 6, I. P. C. and Section 105 of the Act together. It is certainly difficult to see the purpose of Section 105 of the Act unless it is viewed in the context of S. 6, I. P. C.

117. The argument that some negative burden may rest upon the prosecution seems to have been accepted by the Advocate General by implication when he conceded that the prosecution's burden extends to eliminating doubts which may arise from the evidence on the record. Section 105 of the Act could have been enacted to repel the more ambitious contention, which was actually advanced in Parbhoo's case by Sir Wazir Hasan and before us by Mr. P. C. Chaturvedi, that the prosecution must actually disprove, as a part of even its initial duty, all possible exceptions which may be set up by the accused because Section 6 of the I. P. C. annexes absence of exceptions to every definition of an offence. At least, its utility and effect do not seem to extend further than repelling such contentions because all else it enacts seems already covered by Section 103 of the Act. And, as we know, there is a presumption against redundancy.

118. The Advocate General repeated the argument accepted by the minority in Parbhoo's case, 1941 All LJ 619 = (AIR 1941 All 402) (FB) that English law of Evidence and English authorities could not be used for interpreting the provisions of our Evidence Act. Learned counsel tried to invoke the aid of Section 2 of the Act. He contended that its repeal in 1938 did not alter the position. Here again, I think we must apply the Mischief Rule in order to appreciate the effect of the repealed

Section 2 of the Act. It appears to me that the repealed section was directed only against rules of evidence which prevailed in this country independently of statutory authority. It did not prevent an examination of the sources upon which the codification contained in the Act is based when there is a doubt about the meaning of any particular provision. It certainly did not bar the adoption of correct canons of construction in interpreting the provisions of the Act.

119. The extent to which English authorities could be used in interpreting provisions of those enactments which are largely based on English law has been indicated on a number of occasions by Courts in this country. In *State of Punjab v. S. S. Singh*, AIR 1961 SC 493, their Lordships of the Supreme Court who took the majority as well as the minority views did refer quite extensively to the English sources and authorities in order to determine the correct meaning and scope of some of the provisions of the Evidence Act. It is true that the majority, after referring to an argument of a learned counsel, based upon the supposed intention of Sir James Fitzjames Stephen in drafting provisions of Sections 123 and 162 of the Act, observed that the learned counsel "fairly conceded that recourse to extrinsic aid in interpreting the statutory provisions would be justified within well recognised limits; and that primarily the effect of statutory provisions must be judged on a fair and reasonable construction of the words used by the statute itself." The majority did not, however, expressly dissent from a somewhat different proposition stated by Subba Rao, J., when his Lordship said: "The dictionary meanings do not help to decide the content of the said words. The content of the said words, therefore, can be gathered only from the history of the provisions. It has been acknowledged generally, with some exceptions, that the Indian Evidence Act was intended to and did in fact consolidate the English law of Evidence. It has been often stated with justification that Sir James Stephen has attempted to crystallise the principles contained in Taylor's work into substantive propositions. In case of doubt or ambiguity over the interpretation of any of the sections of the Evidence Act we can with profit look to the relevant English Common Law for ascertaining their true meaning". It is true that, where provisions of the Act are clear and unambiguous, no recourse to extrinsic matter, even if it consists of the sources of the codification, would be permissible. But, the position before us is, as already indicated, that it is not possible to fully bring out the meaning of Section 105 of the Act itself without reference to the principles found in the sources of the Act contained in English

Law. At least, the aspect of Section 105 which was raised and considered in Parbhoo's case made it necessary to go to those sources.

120. The majority of the judges deciding Parbhoo's case did attach considerable importance to what was held by the House of Lords in *Woolmington's case*, 1935 AC 462 (Supra). But, they also examined the meanings of the words used in the relevant provisions of the Act to determine the scope of the burden of proof resting upon the accused under Sec. 105 of the Act. The mere fact that they sought support from the basic principles laid down in *Woolmington's case*, 1935 AC 462 could not make their interpretation incorrect. It only added weight to the view taken by their Lordships, perhaps, it would have been better to refer to *Woolmington's case* after interpreting the language used in the relevant provisions of the Act. This, however, does not affect the correctness of the view taken by the majority. Even Collister, J., expressing the minority view, in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) turned to the statement of the law in Foster's "Crown Laws", for discovering a possible source or basis for Section 105 of our Act. Allsop, J., seems to have held the view that Section 2 of the Evidence Act (no one seems to have pointed out that it was repealed then) prohibited even use of English authorities. Braund, J., took the view: "The law of England is one thing and the law of India another". If one may say so, with very great respect, the erroneous assumption which seemed to underlie the minority view in Parbhoo's case was that the law in India must be different from that in England on questions of burdens of proof of the prosecution and the accused and that the twain did not meet here. This assumption seems to have stirred the judicial instinct of that great Judge of this Court on the Criminal side, Tej Narain Mulla, J., so much that he declared it to be "fundamentally wrong".

121. The English law on burdens of establishing cases in criminal trials is thus stated in Phipson's Evidence (10th Edn., paragraph 101, page 49): "Generally in criminal cases (unless otherwise directed by statute) the presumption of innocence casts on the prosecutor the burden of proving every ingredient of an offence, even though negative averments be involved therein. Thus, in cases of murder the burden of proving death as a result of the voluntary act of the accused and malice on his part is on the prosecution And the prosecution is bound to negative any exception favourable to the defendant which is engrafted in the statutory description of the offence though not one contained in a separate clause".

(Vide: Roberts v. Humphreys, (1873) 8 QB 483; R. v. James, (1902) 1 KB 540; R. v. Audley, (1907) 1 KB 383.

122. If this was the state of law in England, round about 1872, as it appears from (1873) 8 QB 483 (supra), decided in 1873, it will be evident why Section 105 of our Evidence Act, passed in 1872, became necessary. Although, the exceptions contained in the Indian Penal Code, to which Section 105 of the Act refers, are contained in separate sections, yet, the result of Section 6 of the Indian Penal Code could well be said to be that the exceptions were engrafted in every definition of an offence as though they formed parts of each section defining an offence. The language of Section 6, Indian Penal Code is quite explicit. Therefore, Section 105 of the Act became necessary so as to make it clear that, notwithstanding such a statutory provision, the ordinary rule of English law of Evidence, that an exception found in a separate clause or section has to be established by the party claiming its benefit, will apply in this country also. In other words, as I see it, Section 105 of the Act was introduced not in order to depart from but to make our law conform to the norms of English law of evidence on the subject.

123. The basic or primary burden of the prosecution is stated and explained again in Phipson's Evidence (10th Ed. paragraph 101, page 49) as follows:

"The prosecution must prove the guilt of the accused and he is under no obligation to prove his innocence. It is sufficient for him to raise a reasonable doubt as to his guilt. Thus, where an act is criminal or the offence is more serious, if it is done with a particular intent, the burden of proving that intent, in the absence of statutory provision, rests throughout on the prosecution. If the evidence proves that the accused did an act the natural consequence of which is a certain result, the jury is entitled to find that the act was done with the intention of bringing about that result. If on a review of all the evidence, they are left in doubt, then the prosecution have not discharged that burden. But generally facts in confession and avoidance are upon him, e.g., insanity or diminished responsibility, and the prosecution ought not to assume that burden".

124. This statement of the law in England seems to me to be applicable with equal force in this country with this difference that instead of the jury Courts generally decide questions of fact also here, and the plea of insanity and other exceptions seem to stand on the same footing when the ingredients of an offence overlap and conflict with those of exceptions.

125. The burdens of the prosecution and of the accused were thus contrasted in Phipson's Evidence (10th Ed., paragraph 102 at page 50):

"When the burden of the issue is on the prosecution, the case must, as we have seen, be proved beyond a reasonable doubt; though a prima facie case made by the prosecution and not rebutted by the accused may often amount to this, and suffice for conviction. When, however, the burden of an issue is upon the accused, he is not in general, called on to prove it beyond a reasonable doubt or in default to incur a verdict of guilty; it is sufficient if he succeeds in proving a preponderance of probability, for then the burden is shifted to the prosecution, which has still to discharge its original onus that never shifts, i.e., that of establishing on the whole case, guilt beyond a reasonable doubt".

The cases relied upon for this statement of English law were: (1942) AC 1; (1935) AC 462; R. v. Stoodart, (1909) 25 TLR 612; R. v. Schama, (1914) 84 LJKB 396; (1943) KB 607; R. v. Cohen, (1951) 1 KB 506; R. v. Dunbar, (1958) 1 QB 1.

126. The cases cited above in Phipson's Evidence to support the statement of the English law on the subject, include those which deal principally with the discharge of his full burden by an accused (e.g. 1943-1 KB 607 and 1958-1 QB 1) establishing a "preponderance of probability" in his favour as well as those (e.g. 1935 AC 462) which revolve round the prosecution's failure to discharge its burden of proving beyond reasonable doubt. To avoid confusion, it is necessary to bring out the difference clearly not only between the prosecution's higher onus of proving its case beyond reasonable doubt and the lower burden of the accused to prove an exception by a "preponderance of probability" only, but also between a complete proof and a reasonable doubt as different conclusions. Again, the process of balancing probabilities prudently, which is common to all cases, and the results of that process, which may differ from case to case, must also be clearly differentiated.

127. While the process of balancing probabilities is common for all cases, the burdens of the parties to establish their respective cases in a criminal trial are really only two in kind; the higher one of the prosecution to establish its case beyond reasonable doubt and the lower one of the accused to prove his plea by a mere preponderance of probability. As, however, the conclusions which can emerge from the process of assessing evidence include a state of reasonable doubt about the existence of an exception pleaded by the accused, which necessarily involves the failure of the prosecution to discharge its burden of eliminating reasonable

doubt when an ingredient of an offence becomes involved, the result, viewed from the point of view of the practical or actual, as distinguished from the legally imposed, burden of the accused, is sometimes put as it is in Phipson's Evidence where it is stated that it is "enough" for the accused to raise a reasonable doubt as to his guilt. This mode of describing the result of the prosecution's higher burden to eliminate reasonable doubt about the guilt of the accused has led to an attempt to reduce the legally imposed burden of proving an exception to the lower level of a burden of creating reasonable doubt only and to equate reasonable doubt with complete proof of an exception. On the other hand, the duty imposed by law upon the accused to prove the exception pleaded by him, by a "preponderance of probability", is sought to be used to reduce so much the prosecution's undeniable burden to eliminate reasonable doubt as to eliminate the accused's right to the benefit of doubt itself. In my opinion, neither should "preponderance of probability" be confounded with and reduced to the level of a reasonable doubt only, nor can the principle of reasonable doubt be eliminated altogether in a criminal trial. Each of the two kinds of conclusion—proof of an exception by a preponderance of probability and reasonable doubt about guilt—reflects a different situation. As soon as a Court finds one of these two types of conclusion to be the correct one to reach in a case the other is necessarily excluded.

128. The legal position of a state of reasonable doubt may be viewed and stated from two opposite angles. One may recognise, in a realistic fashion, that, although the law prescribes only the higher burden of the prosecution to prove its case beyond reasonable doubt and the accused's lower burden of proving his plea by a preponderance of probability only, yet, there is, in practice, a still lower burden of creating reasonable doubt about the accused's guilt and that an accused can obtain an acquittal by satisfying this lower burden too in practice. The objection to stating the law in this fashion is that it looks like introducing a new type of burden of proof, although, it may be said, in defence of such a statement of the law, that it only recognises what is true. Alternatively, one may say that the right of the accused to obtain the benefit of a reasonable doubt is the necessary outcome and counterpart of the prosecution's undeniable duty to establish its case beyond reasonable doubt and that this right is available to the accused even if he fails to discharge his own duty to prove fully the exception pleaded. This technically more correct way of stating the law was indicated by Woolmington's

case and adopted by the majority in Parbhoo's case, and, after that, by the Supreme Court. It seems to me that so long as the accused's legal duty to prove his plea fully as well as his equally clear legal right to obtain the benefit of reasonable doubt, upon a consideration of the whole evidence, on an ingredient of an offence, are recognised, a mere difference of mode in describing the position, from two different angles, is an immaterial matter of form only. Even if the latter form appears somewhat artificial, it must be preferred after its adoption by the Supreme Court.

129. The phrase "preponderance of probability" used in Phipson's Evidence to describe the lower burden of the accused for proving his plea and to contrast it with the higher onus of the prosecution to prove its case beyond reasonable doubt, has been employed for this very purpose by their Lordships of the Supreme Court, as indicated below. A passage was also cited by Mulla, J., in Parbhoo's case, from Woodroffe and Amir Ali's Law of Evidence, where the term 'proved', as used in Section 3 of the Act, was explained as implying "a mere preponderance of probability", when applied to civil cases. My learned brother Gupta has informed me that, in the separate judgment of my learned brethren Broome, Gupta, and Parekh, JJ., the use of this expression was deliberately avoided as it is liable to be misunderstood. While I respectfully agree that such an expression can be misunderstood, I prefer to explain it, as I understand it, rather than avoid using it. I find that this expression is too well established and recognised, after the repeated use by their lordships of the Supreme Court, for Courts in this country to be able to eschew it now. As Oak, C. J., has pointed out, the expression contains, according to the Advocate General, the only test of proof when an accused pleads an exception. The use of this expression by the Supreme Court, in circumstances indicated below, could be said to be the main reason for this reference to a Full Bench. This expression has also given rise to some differences of opinion between learned judges of this Court. Therefore, it seems to me to be very necessary to explain its meaning.

130. "Preponderance", literally interpreted, means nothing more than an outweighing in the process of balancing; however slight may be the tilt of the balance or the preponderance. I do not find sufficient grounds for holding that the word has been used in any other sense whenever it has been used either by our Supreme Court or by English Courts or by commentators such as Phipson or Sir John Woodroffe. It covers every tilt or preponderance of the balance of probability whether slight or overwhelming. In,

fact, the dividing line between a case of mere "preponderance of probability" by a slight tilt only of the balance of probability and a case of reasonable doubt is very thin indeed although it is there. A case of reasonable doubt must necessarily be one in which, on a balancing of probabilities, two views are possible. What may appear to one reasonable individual to be a case not fully proved may appear to another to be so proved on a balancing of probabilities. Such a case and only such a case would in my opinion, be one of reasonable doubt. A mere preponderance of probability in favour of the exception pleaded by an accused would, however, constitute a "complete" proof of the exception for the accused but a state of reasonable doubt would not. "Complete" proof for the prosecution cannot fall short of elimination of reasonable doubt about the ingredients of an offence. If one is clear about the meanings of the terms used no misapprehensions need arise.

131. It was contended by the Advocate General that the English Law had been misunderstood by the majority in Parbhoo's case inasmuch as Lord Sankey laid down in Woolmington's case (supra) that the principle of benefit of doubt was subjected to statutory exceptions. It is true that in Woolmington's case, the House of Lords was not interpreting any statutory exception to the principle, described as "a golden thread" always to be seen "throughout the web of English criminal law", that "it is the duty of the prosecution to prove the prisoner's guilt". But, their Lordships were dealing with a general statement of the law, found in Sir Michael Foster's "Crown Law", which had been repeated in different forms in Stephen's "Digest of Criminal Law", in Archbold's "Criminal Pleading, Evidence, and Practice", in Russel on "Crimes", and in Halsbury's "Laws of England". This statement of the law resembled what is to be found in Section 105 of our Evidence Act so much that Collister, J., in Parbhoo's case, almost took the view that Sec. 105 of the Act was meant to reproduce it. With great respect, I find some conflict between this view expressed by Collister, J., and a passage in an earlier part of his judgment where the learned Judge said that he could find no rule of English law "which exactly corresponds with the provisions of Section 105 and certain other sections". The correspondence may not be exact, but it was close enough to make Woolmington's case, 1935 AC 462 relevant. Moreover, a glance at (1873) 8 QB 483 will indicate that, when offences were created by statute, the burden of proving exceptions was placed on the accused even in England under statutory provisions meant for clarifying the position. In Woolmington's case, however, the effect of

Common Law rules of ordinary presumptions against the accused, arising from proof of commission of conscious acts, on the principle of Benefit of Doubt was explained. This was done in the context of the requirement to prove mens rea, still conventionally spoken of as "malice aforethought", as an ingredient of the offence of murder in England and of a charge to the jury which could be vitiated by a misplaced emphasis. Nevertheless, the principles stated and explained there were general and basic.

132. Section 105 of the Act is really a part of a general statement of principles derived from English Common Law rules such as those considered in Woolmington's case. It does not contain a statutory exception to any general principle. It lays down general rules for cases in which accused plead exceptions. It merely codifies, in careful and concise language, certain general rules of presumptions and burdens of proof for such cases, just as Sir Michael Foster attempted to state them in a somewhat different language. The view taken by Lord Sankey about such statements of the rules found in English law was: "Rather do I think they simply refer to stages in the trial of a case". In other words, they are more akin to rules of pleading than to rules determining quantum of proof. Lord Sankey pointed out that rules of Evidence found in earlier cases and statements of law are confused. He observed: "It was only later that Courts began to discuss such things as presumption and onus". He also said: "The word onus is used indifferently throughout the books, sometimes meaning the next move or next step in the process of proving and sometimes the conclusion." When Lord Sankey referred to a "statutory exception", he did not mean such general propositions or principles only, lying partly in the region of rules of pleading and partly of rules of evidence, which were enacted in Section 105 of the Act. What was meant by Lord Sankey, when he spoke of a "statutory exception", was a real exception to the general principle of a full burden of proof upon the prosecution. Such an exception, which constitutes a departure from the general principle, was considered in (1943) 1 KB 607 where a statutory presumption of corrupt motive arose, "unless the contrary is proved", from a receipt by the accused of a gift or other consideration from a contractor. This presumption relieved the prosecution of a part of its duty. But, Section 105 of the Act has no such object or effect.

133. If there could be any doubt whether Section 105 conflicts with or subjects the general principle contained in Section 101 of the Act to an exception, so as to diminish the prosecution's burden of

proof, the very definite pronouncement of our Supreme Court in AIR 1962 SC 605 has cleared it completely. It was held there: "The alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under Section 105 of the Evidence Act is more imaginary than real. Indeed, there is no conflict at all." Woolmington's case was used here to show identity of principles applied, between our law and English law, in cases in which exceptions are pleaded. Hence, the Supreme Court declared that the law in India was the same as that in England on the general principles found in Woolmington's case.

134. Cases dealing with a real statutory exception which does modify the operation of the principle that the prosecution must prove all the ingredients of the offence with which the accused is charged do not help us in interpreting S. 105 of the Act. For example, in AIR 1960 SC 7 the character of a presumption of guilt under Sec. 5 of the Prevention of Corruption Act (1947) from proof of certain facts, "unless the contrary is proved", was considered. It was held there that the exception laid down by statute was "a complete departure from the established principle of criminal jurisprudence that the burden always lies upon the prosecution to prove all the ingredients of the offence charged and that the burden never shifts on to the accused to disprove his guilt." AIR 1966 SC 1762 is also a case of a presumption under Section 4 of Prevention of Corruption Act where the accused was obliged, after proof by the prosecution of facts sufficient to raise the presumption, to disprove his guilt by leading evidence which could, by a preponderance of probabilities, establish the defence case. These are cases of presumptions of guilt or of true statutory exceptions to the principle of a full burden of proof upon the prosecution.

135. In AIR 1966 SC 1 it was held that, even in a case where insanity is pleaded, the accused would be entitled to an acquittal if a doubt is created by any evidence in the case on the question whether the accused had the required mens rea when he committed the offence. Such a doubt was held to be capable of shaking the prosecution case on an ingredient of the offence with which the accused is charged. It was also pointed out that "this was very different from saying that the prosecution must also establish the sanity of the accused" despite Section 105 of the Act. The last mentioned observation could be reconciled with the principle stated first only by adopting the majority view in Parbhoo's case which was that the prosecution was not called upon to discharge initially any burden of eliminating the exception, although, in order to satisfy its unshifting stable burden, it had to remove

doubts introduced, in the course of trial, about the ingredients of the offence. The whole evidence was examined, including the accused's previous acts and conduct, to overcome possible doubts. Therefore, this case does not conflict with the majority view in Parbhoo's case.

136. In AIR 1966 SC 97 the Supreme Court, after citing Woolmington's case held: "The principle of common law is part of the criminal law of the country. That is not to say that if an exception is pleaded by an accused person, he is not required to justify his plea; but the degree and character of proof which the accused is expected to support his plea, cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case." Here, the Supreme Court was really contrasting the lower degree of proof required from the accused for fully establishing the exception pleaded, by a "preponderance of probabilities" just like the burden of a party in civil litigation, with the heavier special burden resting upon the prosecution in a criminal case to prove its case "beyond reasonable doubt". This was a case in which the accused, having completely justified his plea of protection, under the ninth exception contained in Section 499, in a prosecution for defamation, was acquitted. As I have already explained, the majority view in Parbhoo's case, where quite a different problem was before this Court, also was that the accused could fully establish the exception pleaded by a "preponderance of probability." The Supreme Court, in holding here that "as soon as the preponderance of probability is proved, the burden shifts to the prosecution which has still to discharge its original onus", evidently took the view, also expressed by the majority in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) that Section 105 deals with the shifting burden and Section 101 with the stable burden. This was not a case of an equipoised balance of probabilities. Nor was it a case, where the prosecution version, although not improbable, was yet faced with a genuine or serious doubt. In this case, the Supreme Court did not really have the problem before it which was before this Court in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB). I, therefore, find no conflict whatsoever between what was held here by the Supreme Court and the majority view in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB). On the other hand, in my estimation, the views expressed by the Supreme Court in this case give considerable support, either directly or indirectly, to the majority view in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB).

137. AIR 1968 SC 702 was another case in which the Supreme Court held

that a party which had pleaded an exception (this was a case of private defence) must succeed due to a demonstration of "preponderance of probabilities" in favour of its version that right to possession of property was being vindicated legitimately by it. I find no statement of the law in this case also by their Lordships of the Supreme Court which either expressly or impliedly overrules or conflicts with the majority view of this Court in Parbhoo's case.

138. In AIR 1964 SC 1563 where the plea of insanity of an accused was rejected their Lordships of the Supreme Court practically held what was held by the majority in Parbhoo's case. Several of the very propositions laid down by the majority in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) were expressed here by the Supreme Court in a somewhat different language. It was very explicitly held here that even if the accused does not succeed in discharging the burden of proving the exception pleaded, he will be entitled to an acquittal if he is able, with the help of all the material on the record, from whichever side it may have come, to show that there is a prudent man's "reasonable doubt as regards one or other of the necessary ingredients of the offence itself."

139. I may, however, observe that one question, which was raised and considered both by the majority and minority of the judges of this Court, in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) has not engaged the attention of the Supreme Court so far because it does not appear to have been raised in any case there. That question is whether the presumption under the last part of Sec. 105, which is obligatory upon a Court, is not removed as soon as any credible evidence in support of the plea comes on the record. This presumption imposes a duty upon the Court which differs very much from the burden of the accused, contained in the first part of Section 105, to prove his plea. Unless the hands of the Court are freed from any supposed grip or hold of this presumption, by lifting it as soon as any credible evidence comes on record in support of the exception pleaded by the accused, the Court would not be in a position to view the evidence as a whole and give the benefit of doubt to the accused. The presumption would then operate practically as a rule of exclusion of evidence. It would, in that case, act as a genuine statutory exception snapping the golden thread of Anglo-Saxon Jurisprudence which we have adopted as our own.

140. The crux of the problem of construction of Section 105 before this Court in Parbhoo's case lay in determining the true scope of the last few words of Sec-

tion 105: "The Court shall presume the absence of such circumstances". That problem is again before us. The decisions of the Supreme Court, particularly those in Nanavati's case (supra) and in Dahyabhai's case (supra), go a long way in enabling us to resolve the difficulty in the same way as the majority solved it in Parbhoo's case. I say so because the Supreme Court has held that, Section 105 does not limit or conflict with Section 101; that the accused would get the benefit of doubt even if he fails to prove his plea by a "preponderance of probability" but succeeds in casting a doubt on the prosecution version relating to an ingredient of an offence; that, the hands of the Court are not tied so that it is not legally bound to convict, even if the accused fails to discharge his burden fully but succeeds in raising a reasonable doubt (See: Dahyabhai's case, AIR 1964 SC 1563 at p. 1568) about his intent in committing the alleged offence; that, the general law on the question of the fixed or primary burden of the prosecution, which lasts till the end of the trial and is not curtailed by Section 105, is the same in India as it is in England. These propositions can only hold good if the same meaning is given to the duty imposed by the obligatory presumption upon the Court, as contrasted with the burden of the accused, which the majority of learned Judges of this Court gave to it in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB).

141. There are, however, two passages, one in Nanavati's case, (AIR 1962 SC 605 at pp. 616 to 617) and the other in Dahyabhai's case, (AIR 1964 SC 1563 at p. 1567) which have been quoted fully by my learned brother D. S. Mathur, J., and the first partly by my learned brother Mukerjee, J. also, on the strength of which it could be urged that the significance of the obligatory presumption, contained in the last part of Section 105, has also been considered and pronounced upon by their Lordships of the Supreme Court. After having examined these passages very carefully in the context in which they occur, it seems to me that the Supreme Court was not interpreting, in either of these two cases, the last part of Sec. 105 separately and as contrasted or compared with the first part of it. Although, the scope or the hold of the obligatory presumption on the Court under the last part of Section 105 or the situation in which it must be lifted by the Court has not been specifically or directly considered in these cases, yet, it is evident that the Supreme Court clearly expressed views which necessarily mean that the obligatory presumption is lifted when there is sufficient material on record to justify giving the benefit of a reasonable doubt to an accused even if the accused has failed to discharge his own burden of prov-

ing an exception by a preponderance of probabilities.

142. Another difficulty in the way of accepting the correctness of the majority view in Parbhoo's case is said to arise from the three-fold division of possible situations made by the Supreme Court in Nanavati's case AIR 1962 SC 605 at p. 617. We are not concerned here at all with the first category of cases which do not really require the proof of a statutory exception by the accused but demand from him a disproof of ingredients of an offence which are deemed to be established on proof of certain facts justifying the raising of a statutory presumption (e.g. Sections 4 and 5 of the Prevention of Corruption Act). In the second and third types of cases, the accused is required to bring his case within the exception pleaded by him. The question arises whether, in these cases, the accused becomes entitled to acquittal when he proves facts or circumstances raising genuine doubts, or providing reasons to believe that the exception may exist even though not fully proved. The Supreme Court was not considering the right of private defence specifically here and did not put it in the second category of cases. But, dealing with the plea of an accident in the doing of a lawful act in a lawful manner, covered by the exception found in Section 80, I. P. C., it held that the accused could, by proving only some of the facts necessary to establish the exception to the offence of culpable homicide, negative the offence or throw a reasonable doubt about the "intention or the requisite state of mind which is the essence of the offence". In other words, whenever the facts proved throw the prosecution case into a state of doubt on "intention or the requisite state of mind" the ingredients of the offence are affected.

143. Every offence against which a plea of private defence can be taken requires a state of mind or mens rea on the part of the accused to be proved by the prosecution. This is usually gathered by circumstances raising a presumption about the intention. The defence may give some evidence pointing in another direction. This may actually negative mens rea as was the case in Amjad Khan v. The State, AIR 1952 SC 165, where the Supreme Court pointed out that a reasonable apprehension of death or grievous hurt may justify killing in exercise of a right of private defence even before an actual attack on a person had commenced. In some cases, the defence may while falling short of negating mens rea, be only able to show that its existence has become doubtful. In such cases, according to the view of the majority in Parbhoo's case, the accused would be entitled to an acquittal because the prosecution has failed to dis-

charge its special burden of eliminating doubts. The accused may have failed to prove his plea but he gets a benefit which, whether it is called the benefit of the exception pleaded or of doubt on the whole case, is available to him only because he has succeeded in throwing the existence of an ingredient of the offence into the region of reasonable doubt. To constitute any offence under the I. P. C. there is a mens rea which makes the action complained of criminal or culpable. In Shiv Ram v. State, AIR 1965 All 196 at p. 199 I held, with regard to mens rea: "If the doctrine of mens rea is, as it no doubt is, elaborately and carefully attempted to be incorporated throughout the provisions of the Indian Penal Code, I do not think that this truth is expressed felicitously at all by saying that the doctrine does not apply to offences against the Indian Penal Code". I also held there (at page 201): "In applying this fundamental doctrine of our criminal jurisprudence to an offence defined by a statute, when it is applicable, as it is to all offences under the Indian Penal Code, one has to assume that there is a mens rea for the offence, and then to proceed, by scanning the words of the statute, to discover it". To those views I still adhere.

144. The doctrine of mens rea is not abstruse. The principle is stated in the maxim: "actus non facit reum, nisi mens sit rea" or "an act does not make one guilty unless the mind is also guilty". In AIR 1947 PC 135 at p. 139, the Privy Council adopted the rule, with regard to an alleged violation of Rule 81 (2) of Defence of India Rules, that "unless the statute, either clearly or by necessary implication rules out mens rea as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind". In other words, it is presumed to exist within or may be impliedly annexed to even a statutory definition of an offence unless the definition is in terms which necessarily exclude it.

145. A guilty mind, standing by itself, is not punishable under the law although, as Dr. Johnson's judgment on the actor Garrick, who said that he felt like a murderer when acting Richard III—that he should be hanged each time he acted Richard III—implied, it may be morally reprehensible. Mens rea as a "state of mind" becomes a part of a legally punishable offence only when it produces harmful results. It is manifested by intent, actual or presumed, gathered from acts or omissions which flow from it. It includes more than an immediate intent to injure. It partly embraces what falls under motive. As Paton points out ("Text book of Jurisprudence" 3rd Ed. p. 275), the distinction between intention and motive is not always so precise as may appear at

first sight. Even if the distinction made in Salmond's jurisprudence (12th Ed. p. 372), between motive as the cause or the "ulterior object", which lies behind, and the immediate intention, which accompanies an act, is accepted, it is clear from Salmond's own explanation of mens rea as a basis of a criminal liability (See: Salmond's jurisprudence 12th Ex. p. 366), that wrong motivation overlaps mens rea. "A man is responsible", wrote Salmond, "not for his acts in themselves but for his acts coupled with the mens rea or the guilty mind with which he does them". The guilty mind is not only exhibited or proved by the immediate intent to injure but also by what may be called an "ulterior intention" actuating the action.

146. Investigation into the nature of intent, both immediate and ulterior or underlying, is carried out in cases of insanity as well as of accident. An insane person may form the immediate intention to attack another person due to a delusion that he was about to be attacked by that other person. If he had an immediate intention to kill due to such a delusion his incapacity to see facts as they actually are and to realise that what he was doing was wrong can only appear, if at all, from evidence other than that of his intention to injure. The pleas of accident as well as of grave and sudden provocation were repelled in Nanavati's case, AIR 1962 SC 605 (Supra) by examining facts showing an ulterior or prior intention proved by deliberate preparation. In Dahyabhai's case, AIR 1964 SC 1563 (Supra) and Bhikaris case, AIR 1966 SC 1 (Supra) the alleged incapacity of the accused for mens rea was disbelieved by investigating "all circumstances which preceded, attended, and followed the crime," including previous acts and conduct of the accused, indicating a deliberately formed legally punishable intention.

147. If the ingredients of an offence can be affected in cases of alleged insanity and accident by reasonable doubts entertained about the motivation or about the totality of facts affecting intention at the time of commission of the alleged crime, I do not see why they cannot be similarly affected by findings of reasonable doubt on the question of the real intent in causing injuries in the course of an alleged exercise of a right of private defence. The ingredients of each of these pleas will necessarily overlap and collide with the ingredients of the offence. Mens rea cannot simultaneously be present and absent. Initially, the prosecution can rely on proof of the actus coupled with the obligatory presumption at the end of Section 105. But, an incompletely established plea will remove the initial presumption and can—not must—cast a rea-

sonable doubt on the existence of mens rea which the prosecution must dispel to succeed. In most cases of alleged exercise of a right of private defence it is not difficult to arrive at a definite finding whether the right existed or not. In a genuine case of an exercise of the right of private defence, the primary intention is to protect from injury and the intent to injure the aggressor is as much secondary and consequential as the injuries themselves. Presence or absence of mens rea will be determined in such cases by the real or ulterior or primary intent. If that intent is to protect and defend, the consequential intention to injure will not make the act criminal. We cannot confine our attention to the immediate or consequential intent and forget the real intent for determining mens rea.

148. There seems to me to be no need to distinguish between the wrongfulness or guilt of the mind and of the act in a case where a right of private defence is pleaded because the two must go together in such a case. It is true that causing of injury during the lawful exercise of a right of private defence is authorised by law just as an executioner is permitted to hang a condemned man in the discharge of his duty. In Keny's "Outlines of Criminal Law" (16th ed. at p. 21) we find: "One who had duly executed a condemned criminal had effected a homicide which was justifiable; his own innocence of crime stood really on the basis that the actus was not forbidden (and therefore, not reus), but it could equally well be established by the plea that he had done nothing wicked nor immoral and therefore, had displayed no mens rea". The actus stands on a separate footing only in exceptional cases. In cases of strict statutory liability the actus is punishable without the need to prove any mens rea and the only issue to be decided is whether the actus reus is proved. In a case where a right of private defence is set up the actus cannot be wrongful or rightful independently of the existence or absence of mens rea, as explained above. Both intention behind as well as voluntariness in the commission of acts cannot, I believe, be viewed apart from the whole set of circumstances which produce them. If injuries are shown to have been caused under the compulsion of events necessitating acts of private defence, or, it is doubtful whether they were so caused, it seems to me that belief in the existence of mens rea, which is an essential ingredient of the offence, is bound to be shaken.

149. I may also observe that the Advocate General conceded that possession of property may be an essential part of a particular prosecution case which the prosecution will have to prove in establishing the ingredients of an offence. Here,

the prosecution case will presumably include a charge for criminal trespass under Section 441, I. P. C. which requires a very clearly specified intention. And, it is likely that there will be counter-cases in which each side will claim a right to defend property and person. A definite finding on possession, which is usually not difficult, decides the fate of the case of each side in such situations. In very exceptional cases, however, it may not be possible to determine which side was in possession and which meant to disturb it. Similarly, there may be exceptional cases where, although no right to possess property may be involved, it may not be reasonably possible to decide which side had the primary aggressive intent and which side had the right and primary intent to defend. I, therefore, hold that cases in which the plea of private defence is taken would fall in the third category of cases classified by the Supreme Court in *Nanavati's case* (Supra) so that the plea, even if not fully proved may, when supported by sufficient evidence, make the prosecution case doubtful on an essential ingredient of the offence.

150. The views expressed by the Supreme Court and the propositions stated by the majority of judges of this Court in *Parbhoo's case*, 1941 All LJ 619 = AIR 1941 All 402 (FB) will not even appear to be inconsistent in any way if the factual context and assumptions on which each view rests are kept in mind. It has been rightly pointed out by Dr. A. L. Goodhart, in a very elaborate essay on "Determining the Ratio Decidendi of a case" (See: "Jurisprudence in Action", 1953, Essays published by the Association of the Bar of New York), that the principle of a case is determined by taking into account the facts treated by the Judge as material and his decision "as based thereon". The only criticism of this method, found in *Salmond's Jurisprudence* (12th ed. p. 181), is that Courts, in their quest for "the rule which the judge thought himself to be applying", tend to ignore it in practice. But, it was stated there: "any such rule must be evaluated in the light of facts considered by the Court to be material". Our Supreme Court certainly adopted the method, in *Andhra Sugars Ltd. v. State of Andh. Pra.*, AIR 1968 SC 599 at p. 606, when it held that a passage in a previous decision, which appeared to lay down a rule, "must be read with the facts of the case". If this method is followed, no conflict whatsoever between anything laid down by the Supreme Court and what was held by the majority in *Parbhoo's case* will even seem to arise.

151. I may now refer to an argument advanced by Mr. P. C. Chaturvedi, the learned counsel for the accused, relying on AIR 1943 PC 211. It was contended

that the optional presumption arising under Section 114, Illustration (a), which can be rebutted by merely offering a reasonable explanation, such as the accused may give in his statement under Sec. 342 of the Criminal Procedure Code, accounting for recent possession of stolen goods, results in a situation which is exactly similar to that which arises from the obligatory presumption under the last part of Section 105 of the Act after the optional presumption has been raised. The submission was that the obligatory presumption can also be similarly rebutted by a reasonable explanation. The flaw in this argument is that the particular optional presumption under S. 114 of the Act is a conditional presumption which will not arise at all if there is a reasonable explanation, whereas the rebuttable obligatory presumption under S. 105 operates always and invariably at the outset and is removed only by proof of some circumstance or circumstances, and not by a plausible explanation only. The conditional presumption under Section 114, when raised, goes the whole length of proving the guilt of the accused. The gap it will cover, when raised, is either of proof of intention in removing property or of proof of knowledge of the stolen character of goods. Where the explanation is accepted, the optional presumption is not raised at all and the prosecution will fail on the ground that an ingredient of the offence charged has not been proved. On the other hand, the accused may be convicted even if the obligatory presumption under the last part of Section 105 of the Act is removed. The learned counsel for the accused also erroneously assumed, in putting forward this argument, that the accused must be deemed to have discharged his onus of proving an exception as soon as the initial obligatory presumption at the end of S. 105 is lifted. However, the conditional, optional presumption under S. 114 can be used to illustrate how various presumptions differ in function and application.

152. The common factor which operates in using a presumption, whether optional or obligatory, is the prudence and reasonableness which the Court is expected to employ. This is not defined by any provision dealing with a burden of proof or a presumption although the illustrations given in Section 114 indicate what it requires. It is only broadly defined by Section 3 of the Act. It covers a proof by preponderance of probability, where this is enough, and, in a criminal trial, also the higher degree of proof, by eliminating reasonable doubt, which the prosecution must provide.

153. Even a literal interpretation of the first part of Section 105 could indicate that "the burden of proving the existence of circumstances bringing the case within"

an exception is meant to cover complete proof of the exception pleaded, by a preponderance of probability, as well as proof of circumstances showing that the exception may exist which will entitle the accused to the benefit of doubt on the ingredients of an offence. If the intention was to confine the benefit of bringing a case within an exception to cases where the exception was established by a preponderance of probability, more direct and definite language would have been employed by providing that the accused must "prove the existence" of the exception pleaded. But, the language used in the first part of Section 105 seems to be deliberately less precise so that the accused, even if he fails to discharge his duty fully, by establishing the existence of an exception, may get the benefit of the exception indirectly when the prosecution fails in its duty to eliminate genuine doubt about his guilt introduced by the accused. Again, the last part of Section 105, even if strictly and literally interpreted, does not justify reading into it the meaning that the obligatory presumption must last until the accused's plea is fully established and not just till circumstances (i.e. not necessarily all) to support the plea are proved. Moreover, a restrictive interpretation of Section 105, excluding an accused from the benefit of bringing his case within an exception until he fully proves it, is ruled out by the declaration of law by the Supreme Court that there is no conflict between Section 105 and the prosecution's duty to prove its case beyond reasonable doubt. Hence, the obligatory presumption, at the end of Section 105, cannot be held to last until the accused proves his exception fully by a preponderance of probability. It is necessarily removed earlier or operates only initially as held clearly by judges taking the majority view in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB).

154. My view, therefore, is that, in cases where the accused pleads exceptions, the obligatory presumption is lifted as soon as there is some evidence to support the plea. The accused may carry his plea further and succeed in creating a reasonable doubt about an ingredient of an offence. The prosecution will have to remove this doubt, possibly in the course of argument to succeed after this. In other cases, the accused may have carried his case still further and established his plea by a preponderance of probabilities. Although, there is no provision in our Criminal Procedure Code for production of evidence in rebuttal by the prosecution, as of right, after the accused has established an exception by a preponderance of probability, yet, it is conceivable that, in exceptional cases, the prosecution may be able to demolish the defence case, even

after it is fully proved, by some rebutting evidence which the Court is persuaded to admit under Section 540, Criminal P. C. in exercise of the Court's power to decide the case justly after finding out the whole truth. For example, the prosecution may be able to prove that a doctor, who had given evidence of the injuries on the accused, had undoubtedly fabricated evidence. Ultimately, these stages become parts of a single psychological process of appraisal of evidence as a whole which the judge goes through in his mind when considering, sifting, weighing, comparing, and testing the prosecution and defence versions and evidence, placed side by side, with a view to pronouncing his judgment. At this stage, the obligatory presumption under Section 105 cannot stand in the way of an acquittal if evidence in the case justifies giving the accused the benefit of reasonable doubt on the charge.

155. The obligatory presumption thus fits into the whole procedural machinery regulating a criminal trial in this country only as a sort of proviso, inserted almost parenthetically by way of abundant caution, so as to prevent Courts from imagining circumstances in support of exceptions pleaded when they are unsupported by any proved circumstances. Its function does not extend to obstructing Courts in performing their duties to give effect to genuine doubts which may arise from facts proved. Its purpose and meaning can only be fully understood in the context of the whole scheme for the adduction of evidence in a criminal trial. Torn from this context it can operate only as a stumbling block and not as the aid to justice which it was, I have no doubt whatsoever, meant to be.

156. The duty and power of the Court to find out the truth in a criminal case, independently of the duties which devolve on the parties to adduce their evidence, are exemplified by S. 540, Cr. P. C. This additional duty of the Court to ascertain the truth more accurately when trying a criminal case as compared with the duty in the trial of a civil case, could not be discharged satisfactorily unless it had the power to give the benefit of a reasonable doubt to the accused. Our Evidence Act has clearly provided for three kinds of conclusion a Court may arrive at. The negative conclusion, falling under "not proved" reminds one of the verdict "not proven" which a jury may return in Scotland as an alternative to either of the two other verdicts, "guilty" or "not guilty", which are the only ones open to a jury in England. In England, however, the verdict of "not guilty" covers a case in which the prosecution has failed to prove its case "beyond reasonable doubt" as well as a case where an accused pleading an exception establishes it fully so that the prosecution case is disproved.

157. The Advocate General also raised the question whether the principle of benefit of doubt, accepted in England as a matter of public policy the ground upon which it was placed by Lord Hailsham in, 1936-2 All ER 1138 was available to the accused on the same grounds or to the same extent in this country. The learned counsel for the accused answered this argument by pointing out that, irrespective of the ground on which this principle should be accepted, it must have the same force in India as in England after the final pronouncement of the Supreme Court on this matter. I may observe that Sode-man's case, 1936-2 All ER 1138 (Supra), citing observations of Duff, J., has been mentioned with approval by their Lordships of the Supreme Court in Harbhajan Singh's case, AIR 1966 SC 97 at p. 102. Speaking for myself, I do not see why principles of public policy or consideration of consequences of taking a particular view should not affect the interpretation to be given to statutory provisions dealing with basic norms when two interpretations of a statutory provision are open. Acting in this manner would not be legislation but an operation within the "interstices of the Statute". I do not see why the principle of benefit of doubt deserves, either on grounds of public policy, or as a part of the concept of fair trial in a criminal case, to be given less recognition or force in this country. Methods of investigation of crime available to the prosecuting authorities in this country are still rudimentary and have not reached the level of scientific precision which they have attained in other countries. Powerful motives and factors come into play to conceal the actual offenders and to mislead prosecuting authorities in criminal cases every where. The adoption of short cuts by producing perjured evidence in support of hastily arrived at conclusions of prosecuting authorities are not less common in this country than elsewhere. However, I am content to base my opinion on this question on the strength of the declaration of law by the Supreme Court that the principle of benefit of doubt has the same force in this country as it has in England. Accused persons in this country are not entitled to a lesser protection than the accused in England when the Constitution itself protects life and liberty here against deprivation except one in accordance with the procedure prescribed by law. The meaning of our procedural or adjectival laws must, therefore, be determined in conformity with firmly established notions of a fair trial unless some statutory provision clearly sanctions a departure from these.

158. As the answer given by the majority of the learned judges in Parbhoo's case, 1941 All LJ 619 = AIR 1941

All 402 (FB) (Supra) accords with the basic principles, embodied in Sections 3 and 101 and 103 and 105 of the Act, as explained by their Lordships of the Supreme Court, it is not necessary for me to discuss authorities of other High Courts cited before us which have been referred to fully by my learned brother D. S. Mathur, J.

159. I may also mention that although Parbhoo's case does not appear to have been specifically referred to by the Supreme Court so far—and this, according to the Advocate General, was also significant—their Lordships did cite with approval, in Dahyabhai's case, AIR 1964 SC 1563 (Supra) a decision of a Division Bench of the Patna High Court in AIR 1955 Pat 209 where reliance was placed on the majority decision in Parbhoo's case. Kamla Singh's case was mentioned by the Supreme Court because, just as in Dahyabhai's case, AIR 1964 SC 1563 the plea of insanity as an exception was raised there. The precise problem considered in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) and the answer given there have not, so far as I am aware, come up for consideration before the Supreme Court in relation to the right of private defence.

160. After a close scrutiny of every part of each of the seven opinions in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) I have come to the conclusion that the majority of their Lordships did not lay down anything beyond three important propositions which, if not either directly or indirectly supported by decisions of their Lordships of the Supreme Court, have not been affected in the slightest degree by these decisions. These propositions are: firstly, that no evidence appearing in the case to support the exception pleaded by the accused can be excluded altogether from consideration on the ground that the accused has not proved his plea fully; secondly, that the obligatory presumption at the end of Sec. 105 is necessarily lifted at least when there is enough evidence on record to justify giving the benefit of doubt to the accused on the question whether he is guilty of the offence with which he is charged; and, thirdly, if the doubt, though raised due to evidence in support of the exception pleaded, is reasonable and affects an ingredient of the offence with which the accused is charged, the accused would be entitled to an acquittal. As I read the answer of the majority in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) I find it based on these three propositions which provide the ratio decidendi and this is all that needs to be clarified.

161. The practical result of the three propositions stated above is that an accused's plea of an exception may reach

one of three not sharply demarcated stages, one succeeding the other, depending upon the effect of the whole evidence in the case judged by the standard of a prudent man weighing or balancing probabilities carefully. These stages are: firstly, a lifting of the initial obligatory presumption given at the end of Sec. 105 of the Act; secondly, the creation of a reasonable doubt about the existence of an ingredient of the offence; and, thirdly, a complete proof of the exception by "a preponderance of probability", which covers even a slight tilt of the balance of probability in favour of the accused's plea. The accused is not entitled to an acquittal if his plea does not get beyond the first stage. At the second stage, he becomes entitled to acquittal by obtaining a bare benefit of doubt. At the third stage, he is undoubtedly entitled to an acquittal. This, in my opinion, is the effect of the majority view in Parbhoo's case which directly relates to first two stages only. The Supreme Court decisions have considered the last two stages so far, but the first stage has not yet been dealt with directly or separately there in any case brought to our notice.

162. The last two preceding paragraphs, which summarise my opinion, would have been enough to answer the question before us if it had not been urged so emphatically, on behalf of the State, that the majority view in Parbhoo's case overlooks important aspects of the question, which were more fully argued before us with the help of Supreme Court decisions, and that trial Courts need detailed guidance on the application of the principle of Benefit of Doubt when exceptions are pleaded. After having anxiously examined every aspect of the question referred to us, I answer the question framed, in complete agreement with the conclusions of my learned brethren Broome, Gupta, Gyanendra Kumar, Yashoda Nandan and Parekh, JJ., as follows:—

The answer of the majority of learned Judges who decided AIR 1941 All 402 (FB) is still good law. It means that in a case in which, in answer to a prima facie prosecution case, any general exception in the Indian Penal Code is pleaded by an accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively that the accused has fully established his plea, he will still be entitled to an acquittal, provided that, after weighing the evidence as a whole prudently (including the evidence given in support of the plea of the said general exception), the Court reaches the conclusion that, as a consequence of the doubt arising about the existence of the exception, the prosecution has failed to discharge its onus of proving the guilt of the accused beyond reasonable doubt.

163. MUKERJEE J.:— I am in respectful agreement with the views expressed by my Lord the Chief Justice that the statement of law in Parbhoo's case, 1941 All LJ 619 = AIR 1941 All 402 (FB) is not accurate. I would like to add a short few words.

164. The answer to the question referred to this Full Bench should follow from a correct interpretation of Sec. 105, S. 4 and S. 3 of the Indian Evidence Act. The terms of these sections have been quoted in the judgment of my Lord the Chief Justice and I do not reproduce them here to avoid repetition.

165. The effect of Section 105, read with Sections 3 and 4 of the Indian Evidence Act, was considered by the Supreme Court in the case of AIR 1962 SC 605. At page 616 of the report Subba Rao J., (as he then was) observed as follows:

"The legal impact of the said provisions on the question of burden of proof may be stated thus: In India, as it is in England there is a presumption of innocence in favour of the accused as a general rule and it is the duty of the prosecution to prove the guilt of the accused; to put it in other words, the accused is presumed to be innocent until his guilt is established by the prosecution. But when an accused relies upon the General Exceptions in the Indian Penal Code or on any special exception or proviso contained in any other part of the Penal Code, or in any law defining an offence, Sec. 105 of the Evidence Act raises a presumption against the accused and also throws a burden on him to rebut the said presumption. Under that section the Court shall presume the absence of circumstances bringing the case within any of the exceptions, that is, the Court shall regard the non-existence of such circumstances as proved till they are disproved."

Clearly, the incidence of the burden of proving an exception under Section 105 of the Indian Evidence Act is on the accused person and this was conceded by Mr. Chaturvedi. The crucial question for determination is, as pointed out by my Lord the Chief Justice, how the burden may be rebutted by the accused. Section 105 says that the Court shall presume the non-existence of circumstances bringing the case within the exception proved until "disproved". In view of the categorical terms of the definition of the word "disproved" as given in S. 3 of the Indian Evidence Act, it is manifest that the accused person cannot succeed by merely creating a reasonable doubt in the mind of the Court as to whether he is or is not entitled to the benefit of the said exception. A presumption of law cannot be successfully rebutted by merely raising a doubt, however, reasonable. Something more than raising a reasonable doubt is

required for rebutting a presumption of law and it is necessary for the accused to show that his explanation is so probable that a prudent man ought, in the circumstances, to accept it.

166. The Advocate General frankly conceded that the burden on the accused of proving an exception is lighter than the burden which lies on the prosecution of establishing the guilt of the accused. In AIR 1966 SC 97 the Supreme Court observed:

"Where an accused person is called to prove that his case falls under an exception, law treats that onus as discharged if the accused succeeds in proving a preponderance of probability. The onus on an accused person may well be compared to the onus on a party in civil proceedings"

In a criminal proceeding the prosecution has to prove the guilt of an accused person beyond reasonable doubt but in a civil proceeding a party succeeds on the balance of probabilities. The distinction in the standard of proof in the two classes of cases cannot, I think, be better expressed than by quoting from the judgment of Denning, J., in *Miller v. Minister of Pensions*, (1947) 2 All ER 372. (Not cited at the bar). Speaking of the degree of proof required in a criminal case before an accused person is found guilty, Denning, J., stated:—

"That degree is well settled. It need not reach certainty but it must reach a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course, it is possible but not in the least probable", the case is proved beyond reasonable doubt."

As regards the degree of cogency required to discharge a burden in a civil case, his Lordship stated:

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not", the burden is discharged 'but if the probabilities are equal, it is not.'" (Emphasis (here in 'mine)).

167. The burden on an accused person being the same as the burden on a party in a civil proceeding, it follows that if the balance or probabilities supports the plea of exception the burden on the accused person is discharged but if the Court is left in a state of reasonable doubt as to whether the accused person is or is

not entitled to the benefit of the said exception, it would be a case where the probabilities are equal and, having regard to what Denning, J. has laid down, the plea would fail.

168. If, however, as pointed out by my Lord the Chief Justice, the nature of the case is such that, on the totality of evidence, a reasonable doubt arises as regards some ingredients of the offence, the accused person is entitled to an acquittal; in other case, a reasonable doubt as regards the exception claimed will not entitle him to an acquittal.

169. **GYANENDRA KUMAR AND YASHODANANDAN JJ.** :— We have had the advantage of reading the judgment jointly prepared by Broome, Gupta and Parekh, JJ. as well as the separate judgments of Oak, C. J., Mathur, J. and Beg, J. Concurring with these learned Judges, we find ourselves in respectful disagreement with the view taken by Oak, C. J. that in a case where an accused pleads that he had caused grievous hurt to the complainant in the exercise of his right of private defence of property but succeeds only in creating a reasonable doubt about his claim of being in possession over the field in question he will be liable to conviction. We also respectfully concur in the view taken by Broome, Gupta, Beg and Parekh, JJ. that the dictum laid down by the majority of Judges in *Parbhoo's case*, 1941 All LJ 619 = AIR 1941 All 402 (FB) is fundamentally correct and calls for a mere elucidation. In our opinion, there is no conflict between the decisions of the Supreme Court and *Parbhoo's case*, 1941 All LJ 619 = AIR 1941 All 402 (FB) and we agree that the question referred to this Full Bench should be answered in the affirmative.

170. We now proceed to give our own reasons for coming to this conclusion. The question that has been engaging the attention of this Full Bench loses much of its complexity, if it be clearly borne in mind that the task before a Court administering criminal justice is to determine whether a crime has been committed and, if so, whether the responsibility for it can be fastened on the accused. Before the Court proceeds to consider the responsibility or otherwise of the accused, it has to determine as to whether a crime has been committed at all. The burden of proving beyond reasonable doubt that a crime has been committed and that the accused is responsible for it rests upon the prosecution.

171. Crime may be described as an act or omission prohibited by law and made punishable by it. In this sense not every act of killing is a crime. To cite some examples of killing which are not forbidden by law but are in fact permitted by

it, we may take a case where the killing is by way of execution of a prisoner sentenced to death by a Court competent to do so by the executioner appointed by lawful authority for that purpose. In cases of such homicides, which have sometimes been described as "justifiable homicide", no crime can be said to have been committed and consequently no one can be found guilty for its commission. Likewise a case in which the accused pleads having committed homicide in the exercise of right of his private defence of person or property and also successfully establishes his claim, would, in our opinion, fall in the same class. A person who kills another in order to save his own life cannot be said to have committed an act prohibited by law or a crime. If an accused claims protection of the Exception mentioned in Section 96 of the Indian Penal Code and fails to establish affirmatively by preponderance of probabilities that he had acted in exercise of the right claimed, but the evidence on record, taken as a whole, creates a doubt that the claim made by the accused might reasonably be true, then the matter becomes doubtful whether an unlawful homicide has taken place at all. In such a case a corresponding doubt is created as to whether an act prohibited by law has been committed and consequently the accused cannot be found guilty of a crime which remains in the region of doubt. He will, in spite of his having failed to discharge the burden placed on him by Section 105 of the Evidence Act, be entitled to the benefit of doubt and acquittal.

172. In a case where the accused claims to have committed homicide in the exercise of his right of private defence either of person or of property and fails to satisfy the Court affirmatively that he had such a right but only succeeds in creating a reasonable doubt regarding the correctness of his claim, it is not, in our opinion, quite accurate to say that one of the ingredients of the offence of culpable homicide, as defined in Section 299 of the Indian Penal Code, or the mens rea is wanting. The offence of culpable homicide is fully defined in Section 299 and the mens rea necessary for the offence are also expressly enumerated in the section itself. There are three species of mens rea in Section 299 of the Indian Penal Code: (1) An intention to cause death; (2) an intention to cause bodily injury likely to cause death; (3) knowledge that death is likely to be caused. When an accused has killed another to protect his own life, he did have the intention to kill. In fact in most cases it is not denied by him that he had the requisite intention or knowledge. He merely claims that he was motivated by the desire to save his own life. To equate motive with mens rea would result in a confusion of legal con-

cepts. "Mens rea" has been defined by Glanville Williams in his "Criminal Law, The General Part Second Edition" as follows:

"What, then, does the legal mens rea means. It refers to the mental element necessary for particular crime and this mental element may be either intention to do the immediate act or bring about the consequence or (in some crime) recklessness as to such act or consequence".

In this sense of the expression, when a person commits homicide in exercise of the right of private defence either of property or of person, the element of mens rea contemplated by Section 299 of the Indian Penal Code is undoubtedly present. Thus where a reasonable doubt is created with regard to the claim of an accused to the protection of the Exception provided for by Section 96 of the Indian Penal Code, the accused becomes entitled, in our opinion, to the benefit of doubt and acquittal not because an ingredient of the offence under Section 299 of the Indian Penal Code or its mens rea becomes doubtful, but because a doubt is created as to whether the act attributed to him amounts to a crime at all. We find support for the view we are taking from the following passages from Russell on Crime, XI Edition:

"The new conception that merely to bring about a prohibited harm should not involve a man in liability to punishment unless in addition he could be regarded as morally blameworthy came to be enshrined in the well known maxim *actus non facit reum, nisi mens sit rea*. This ancient maxim has remained unchallenged as a declaration of principle at common law throughout the centuries up to the present day. So long therefore, as it remains unchallenged no man should be convicted of crime at common law unless the two requirements which it envisages are satisfied, namely, that there must be both a physical element and a mental element in every crime

A clear analysis of the requirements of law for the establishment of criminal liability demands a term which indicates the physical element alone, entirely distinct from that mental element which the old maxim so sharply set in opposition to it. For this purpose lawyers have for some time been in the habit of employing the expression *actus reus* thus using the adjective *reus* to qualify the noun *actus* in the same way as the maxim used it (in the feminine form), to qualify the noun *mens* in both cases then it means "legally prohibited" or "legally reprobated". Thus it is logically possible and correct to advance the legal proposition that for criminal liability at common law there must be not only an *actus reus*

but also a mens rea, each distinct from the other.....

On this footing the word actus carries only a factual significance, i.e. that a human deed has been effected. The addition of the word reus carries the further significance that in the factual circumstances of the deed there is a situation which the law has forbidden to be brought about. To have killed a man is, without more, an actus of no precise legal kind; it is a "homicide" and we do not yet know for certain if the law has forbidden that particular killing. If however there is for example evidence that the killing was the execution of a condemned prisoner by the legally appointed executioner, then it is an actus which the law, far from forbidding has indeed commanded, and therefore, it is not an actus reus; and it is described as a "justifiable homicide", a homicide in accordance with, and not against, the law. Again if the death had been caused by a surgeon in the course of an operation which was recognised by him and by the medical profession in general to be dangerous (in the sense that it was medically advisable to risk the known chance that even when conducted with the best of skill and care it might cause the patient's death), this will be a risk which the law does not forbid to be taken but permits to be taken, and the killing will not be an actus reus.....

... ..

However harmful or painful an event may be it is not an actus reus unless the law in the particular circumstances of the case has forbidden it to be brought about. The duly appointed executioner who has put to death a convicted criminal in accordance with his sentence has killed a man with deliberate intent so to do, but he has committed no crime because the deed was not prohibited, but was actual commanded, by the law; again, the use in certain circumstances of even deadly force by any citizen in the prevention of the commission of a crime by another person, or in the arrest of one who has committed a felony, does not give rise to criminal liability. Similarly the law does not prohibit a limited chastisement of a child by a parent or schoolmaster, nor the causing of hurt in the course of many sports and games or in the performance of a surgical operation by one duly qualified. That the deed was not prohibited by law is a complete defence for the man who had done that deed, for although the actus was his, yet in the special circumstances of his case it was not reus".

To our mind there is nothing in Section 105 of the Indian Evidence Act or Section 4 thereof which runs counter to the view expressed above.

173. The Supreme Court in AIR 1962 SC 605 while considering the question of

burden of proof resting on the accused, has laid down three different categories: "(1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused: (2) The special burden may not touch the ingredients of the offence but only the protection given on the assumption of the proof of the said ingredients (See Ss. 77, 78, 79, 81 and 88 of the Indian Penal Code): (3) It may relate to an exception, some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of the offence: (See S. 80 of the Indian Penal Code)."

173-A. We are not concerned with the first category of cases. With regard to the third category of cases, the Supreme Court has held that though the burden lies on the accused to bring his case within the Exception, the facts proved may not discharge the said burden, but may affect the proof of the ingredients of the offence. In this category the Supreme Court has placed Sections 80 and 84 of the Indian Penal Code. Section 80 is concerned with an accident, where the consequences brought about are naturally unintentional; while Section 84 deals with the unsoundness of mind of the accused i.e. absence of capacity in the accused to form an intention.

174. In our view, the claim to an Exception under Section 96 of the Indian Penal Code does not fall in the third category of cases, because if there is a reasonable doubt regarding the correctness or otherwise of the claim of the accused, none of the ingredients of the offence defined in Section 299 of the Indian Penal Code is affected.

175. To us it appears that Section 96 is more akin to Sections 77, 78, 79, 81 and 88 of the Indian Penal Code and falls in the second category of cases contemplated by the Supreme Court. Though the Supreme Court has held that as far as the second category of cases is concerned, the burden of bringing his case under the Exception lies on the accused, it has not proceeded to consider as to what would be the result if there is a reasonable doubt regarding the claim of the accused. The observation of the Supreme Court that "the alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under Section 105 of the Evidence Act is more imaginary than real" applies, in our judgment, with equal force to the second category of cases; and if a doubt is created in the mind of the Court that the defence of the accused might reasonably be true, a resultant doubt would accrue about the commission of the crime and hence the guilt of the accused. Thus from a practical point of view there

is no difference in the result whether the defence raised by the accused falls within the second or third category of "Exceptions."

176. In the result we answer the question referred to the Full Bench as under:

The dictum of the majority of learned Judges of this Court in 1941 All LJ 619 = AIR 1941 All 402 (FB) is still good law. But, it may be elucidated that in a case in which any general Exception in the Indian Penal Code is pleaded by an accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively that the accused has fully established his plea of the claimed Exception, he will still be entitled to an acquittal, if, upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the said general Exception), a reasonable consequential doubt is created in the mind of the Court as to whether the accused is really guilty of the offence with which he is charged.

BY THE COURT

177. In accordance with the majority opinion, our answer to the question referred to this Full Bench is as follows:—

The majority decision in 1941 All LJ 619 = AIR 1941 All 402 (FB) is still good law. The accused person is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court about the guilt of the accused.

Reference answered accordingly.

AIR 1970 ALLAHABAD 102 (V 57 C 9)
RAJESHWARI PRASAD AND
A. K. KIRTY JJ.

Smt. Rohini Kumari, Appellant v. Narendra Singh, Respondent.

Second Appeal No. 1508 of 1966, D/- 5-10-1968.

Hindu Marriage Act (1955), S. 10 —
— Scope — Desertion — Meaning of —
There must be determination to put an
end to marital relations and to put an end
to cohabitation permanently — Remar-
riage of husband by itself, cannot afford
reasonable cause for desertion. AIR 1959
Andh Pra 547 (FB) & AIR 1963 Andh Pra
323 & AIR 1965 Mys 299, Dissent. from.

In a petition for judicial separation based upon allegations of desertion by the other spouse, it has to be proved that for the period of two years specified in Section 10 (1) (a) the deserting spouse has been in deser-

tion without cause and that the deserting spouse has further the intention of putting an end to marital relations. If during that period, the deserting spouse has a just cause to remain apart, desertion would come to an end and the relief for judicial separation must be refused.

(Para 10)

"Desertion" within the meaning of the provisions of the Hindu Marriage Act (1955) does not imply only a separate residence and separate living. It is also necessary that there must be a determination to put an end to marital relations and to put an end to cohabitation permanently. Without such animus deserendi, there can be no desertion within the meaning of Section 10 of the Hindu Marriage Act (1955). If that be so, then it is clear that the consideration that in case the husband remarries, the wife is entitled to separate residence and maintenance, cannot be utilised as argument for coming to the conclusion, that the fact of the remarriage of the husband must necessarily afford a reasonable cause for desertion. It would not be correct to say that remarriage of the husband by itself, without anything more, affords reasonable cause for desertion. The question that would still remain to be answered would be as to what was the impact of the fact of remarriage of the husband, on the mind of the deserting spouse. In cases where the consideration of remarriage of the husband failed to have any impact on the mind of the wife, remarriage of the husband would not afford reasonable cause for desertion. AIR 1964 SC 40 & 1939-2 All ER 698 & 1956-1 All ER 555 & AIR 1965 Mad 139, Rel. on; AIR 1959 Andh Pra 547 (FB) & AIR 1963 Andh Pra 323 & AIR 1965 Mys 299, Dissent. from.

(Para 28)

Cases Referred:	Chronological	Paras
(1965) AIR 1965 Mad 139 (V 52) =		
ILR (1964) 1 Mad 845, Annamalai		
Mudaliar v. Perumayee Ammal		29
(1965) AIR 1965 Mys 299 (V 52),		
K. Siddegowda v. Parvathamma		17
(1964) AIR 1964 SC 40 (V 51) =		
66 Bom LR 297, Lachman Utam-		
chand v. Meena	14, 18, 22, 23	
(1963) AIR 1963 Andh Pra 323		
(V 50) = (1962) 2 Andh WR 452,		
S. Puttaiah v. Rushingamma		16
(1961) 1961-3 All ER 957 = 1962		
P 69, Brewer v. Brewer		23
(1959) AIR 1959 Andh Pra 547		
(V 46) = 1959 Andh LT 634 (FB),		
Thenku Verriah v. Tamiseti		
Nagiah		15
(1957) AIR 1957 SC 176 (V 44) =		
1956 SCR 838, Bipinchandra		
Jaisinghbai Shah v. Prabhavati		18
(1956) 1956-1 All ER 555 = 1956-1		
WLR 270, Parrock v. Parrock		25
(1948) 1948-2 All ER 822 = 1949		
P. 98, Dunn v. Dunn		19

- (1943) 1943-1 All ER 57, Tickler v. Tickler 9
 (1939) 1939-2 All ER 698 = 83 SJ 24
 496, Earnshaw v. Earnshaw
 (1938) 1938-3 All ER 722 = 1939 P. 11, Herod v. Herod 24

Lalji Sinha, for Appellant; Keshav Sahai, N. P. Midha and Bishun Singh, for Respondent.

RAJESHWARI PRASAD J.:— This second appeal has come up before us on account of an order of reference made by Hon. Asthana, J. when the second appeal was listed before him for hearing.

2. The second appeal arises out of proceedings under Section 10 of the Hindu Marriage Act, 1955 and is directed against the order of the learned Civil Judge, Hamirpur, which was confirmed in appeal by the District Judge, Banda.

3. The respondent Sri Narendra Singh happened to be Yuvraj of the estate known as "Sarela Estate" and he was married to the appellant, who is the daughter of Maharaj Kumar of Alirajpur Estate. The marriage had taken place sometime in January 1945. The marital life of the party went on smoothly for about two years when it is said that the appellant left for Alirajpur in February 1947 at a time when her husband was out of station. As she went to her father's place she took away all her belongings including valuables and jewellery received by her either from her parents or from her father-in-law's side. In spite of repeated attempts on behalf of the respondent, she refused to come back to him and to perform her marital obligations. According to the case of the respondent, she is reported to have said that the respondent was at liberty to remarry and that she ceased to have interest in him. On such allegations, the respondent pleaded that the appellant deserted him without reasonable cause and without his consent early in 1947. Consequently, the respondent was entitled to an order of judicial separation under S. 10 of the Act.

4. The application was contested by the appellant on the ground *inter alia* that she was not treated well when she stayed at her husband's place till March 1947; she had developed serious heart trouble and her father-in-law himself had sent her for treatment to Alirajpur; she did not take away with her valuables and jewellery as alleged by the respondent; she had not refused to return back to Sarila but she insisted upon an assurance of better behaviour; she had never permitted the respondent to remarry; and that the petition had been filed for the purpose of putting her to harassment with a view to negative her claim against the petitioner. The purpose of the petition was to justify his conduct in having married Countess Reita in Europe.

5. On such pleadings, the learned Civil Judge framed three issues as given hereunder:—

- (1) Has the respondent deserted the petitioner since 1947? If so, its effect?
- (2) Whether the petitioner has wilfully neglected the respondent since 1947? If so, its effect?
- (3) What is the petitioner's relief, if any?

The trial Court decided issues 1 and 2 in favour of the petitioner-respondent and allowed the petition for his judicial separation from the appellant.

6. The lower appellate Court agreed with the findings of the trial Court and dismissed the appeal.

7. The concurrent findings of fact given by the two Courts below have rightly not been questioned before us as those findings must be taken to be finding in second appeal.

8. The findings of fact arrived at by the two Courts below are those:—

- (1) During her stay at Sarela she was provided with decent accommodation, wholesome food and all such amenities which were available at Sarela;
- (2) It is not correct that she was given inhuman treatment at Sarela during her stay there, and that she had developed heart trouble as a result of it;
- (3) She had left Sarela with the intention of permanently giving up her marital relations with the respondent and of not returning back to Sarela or to her husband;
- (4) The appellant left her matrimonial home without any reasonable cause and without the consent of the respondent and with the intention of bringing cohabitation to an end;
- (5) Marriage of the respondent with Countess Reita did not have such an impact on the mind of the appellant that it caused her to continue to live apart and to continue the desertion.

All the above findings are necessarily findings of fact and ordinarily in a second appeal, this Court is bound by such findings.

9. In *Tickler v. Tickler*, (1943) 1 All ER 57 at p. 59 Scott, L. J. quoted the following words of Lord Romer in an earlier decision:—

"The question whether a deserting spouse has a reasonable cause for not trying to bring the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period must always be a question of fact."

The second appeal has been sought to be supported on the submission that the desertion by the respondent, if any, came to an end when the respondent married Countess Reita in Europe in the year 1955. On that basis, it has been submitted that Section 10 (1) of the Hindu Marriage Act was not applicable to the case.

10. The question that arises is whether the conduct of the respondent was such as to excuse the appellant from making an attempt to put an end to the desertion or from attempting at any reconciliation. The rule of law involved in the above question appears to be that such conduct on the part of the deserted spouse would legally operate as a consent to the existing separation and would have the effect of absolving the deserted spouse from any obligation to return to the matrimonial home or to make amends for her improper conduct. In a petition for judicial separation based upon allegations of desertion by the other spouse, it has to be proved that for the period of two years specified in Section 10 (1) (a) the deserting spouse has been in desertion without cause and that the deserting spouse had further the intention of putting an end to marital relations. If during that period, the deserting spouse has a just cause to remain apart, desertion would come to an end and the relief for judicial separation must be refused.

11. The relevant portion of S. 10 (1) of the Hindu Marriage Act, 1955 is given hereunder:—

"Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the District Court praying for a decree for judicial separation on the ground that the other party—

- (a) has deserted the petitioner for a continuous period of not less than two years immediately before preceding the presentation of the petition

The explanation to Section 10 is in the following terms:—

"In this section, the expression "desertion" with its grammatical variations and cognate expressions would mean, the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage."

12. The petition in this case under Section 10 (1) was filed on the 20th September, 1956. The precise argument is that inasmuch as the respondent married Countess Reita in the year 1955, a reasonable cause for desertion came into existence, and therefore, it is not a case where the appellant could be deemed to have deserted the respondent for a period

of not less than two years immediately before preceding the presentation of the petition.

13. The respondent admitted that he came in contact with a Dutch lady named Countess Reita in 1953, fell in love with her in 1954 and he ultimately married her in the year 1955, after she embraced Hinduism and adopted the name of "Shrimati Reita Devi." According to him, this development was due to the attitude of the appellant in having determined not to come back to the respondent in spite of several efforts made on his behalf for reconciliation. It was further pleaded that the appellant had gone to the length of expressing that she had nothing to do with the respondent and that the respondent was free to remarry.

14. Mr. Lalji Sinha appearing for the appellant has placed reliance on the decision of the Supreme Court in the case of Lachman Utamchand v. Meena, AIR 1964 SC 40. It was observed that if during the required period of two years, the wife had a just cause to remain apart, she would not be in desertion and the petition for judicial separation would fail. The learned counsel for the appellant, therefore, urges that in view of the conduct of the respondent in having remarried himself in the year 1955, desertion if any came to an end and the remarriage afforded a just cause to the wife for living apart. That also was a case for judicial separation under Section 10 (1) (a) of the Hindu Marriage Act (1955). In that case, it was found that the wife had left the matrimonial home without justifiable cause and without the consent of the husband; that there was clear evidence and satisfactory proof that besides the factum of desertion, there was also animus deserendi at the time when the wife left the husband's house.

15. The learned counsel for the appellant then relied upon a decision in the case of Thenku Verriah v. Tamiseti Nagiah, AIR 1959 Andh Pra 547. The question that was referred to the Full Bench in that case was whether Cl. (4) of Section 2 of the Hindu Married Women's Right to Separate Residence and Maintenance Act 1946 is applicable only if the husband contracts a second marriage after the Act was passed or whether the words "marries again" are merely descriptive of the position of the husband as a twice married man at the date when the proceedings are taken under the Act and do not exclude from their operation the husband who has taken a second wife before the Act. The above question had arisen in a proceeding for restitution of conjugal rights. The petition was contested by the wife on the ground that the petitioner had a second wife living at the time of the suit. Under Act No. 19 of 1946, a wife is entitled to separate residence and main-

tenance if the husband married again. An observation was made that if the wife is entitled to separate residence and maintenance in case the husband marries again, suit for restitution of conjugal rights obviously would not lie. It was also observed that under the Hindu Marriage Act a wife can resist a petition for restitution of conjugal rights on the ground that the husband had married another wife before the Act. The conclusion at which the Full Bench arrived is quoted below:—

"Whatever might have been the rights of the respondent to claim restitution of conjugal rights before the Act, he ceased to have any after this Act in view of the second marriage, though contracted before the Act. Section 29 (3) which saves certain proceedings, does not include in its ambit a proceeding for the restitution of conjugal rights. I, therefore, hold that after the Act of 1955 the respondent is not entitled to have a decree for restitution of conjugal rights against the second appellant."

16. The learned counsel for the appellant next relied on another Division Bench decision of the Andhra Pradesh High Court in the case of S. Pullaiah v. S. Rushingamma, AIR 1963 Andh Pra 323. The case which went in appeal was one under Section 13 (1) (i) and Section 10 (1) (a) of the Hindu Marriage Act for dissolution of marriage between the appellant and the respondent or in the alternative for a decree for judicial separation. After referring to the right of a wife to claim separate residence and maintenance from her husband given to her under the Hindu Married Women's Right to Separate Residence and Maintenance Act (Act 19 of 1946) as well as Hindu Adoptions and Maintenance Act, 1956, the Court proceeded to pose the following question:

"Now, if the wife could claim maintenance on the ground of the husband having taken a second wife, could it be posited that she had deserted her husband without reasonable cause within the ambit of S. 10 (1) (a) of the Act?"

The answer was that obviously desertion could not be described as one without reasonable cause if the husband had married again, since that marriage would afford a justifiable cause to the wife to live away from her husband.

17. Reliance has also been placed by the learned counsel for the appellant on the decision of the Mysore High Court in the case of K. Siddegowda v. Parvathamma, AIR 1965 Mys 299. That decision also proceeded on the basis that under Section 18 (2) (d) of the Hindu Adoptions and Maintenance Act, the respondent had a clear right to live separately from the appellant by reason of the fact that he had already another wife living, and that

if she had the right to live separately in that way, it would be unreasonable to suggest that there was no reasonable cause for separate residence.

18. The learned counsel for the appellant also drew our attention to the decision of the Supreme Court in Bipinchandra Jaisinghbai Shah v. Prabhavati, AIR 1957 SC 176, but as this case has been fully considered and explained in the latter decision of the Supreme Court in the case of AIR 1964 SC 40 (supra), it is not necessary for us to point out the facts of this case.

19. The last case relied upon by the learned counsel for the appellant is Dunn v. Dunn, 1948-2 All ER 822. In the last mentioned case, however, the question, as to on which party, burden lay, in a case of this nature came up for consideration. It was held that the burden of proof, where the husband's petition is for a decree of divorce on the ground of desertion, is on the husband to show that she deserted him without a cause. The wife may seek to rebut the inference of desertion by proving just cause for refusal, but there is no legal burden on her to do so. Even if she did not prove just cause, the Court had still to ask itself whether the husband has discharged the legal burden resting on him.

20. Mr. Bishun Singh, learned counsel appearing for the respondent in reply to the argument advanced by Mr. Lalji Sinha submitted that unless it is shown that the fact or event had some impact on the mind of the respondent as a result of which, she deserted the respondent, the second marriage of the respondent did not determine the desertion or put an end to it. The appellant must be held to be continuing the desertion. Desertion must be held to be continuing even after the respondent married Countess Reita in the year 1955.

21. It has been pointed out by the learned counsel for the respondent that so far as facts of the instant case are concerned, it has been found by the two Courts below and there is overwhelming evidence in support of that finding that respondent was fully aware of the romance between the respondent and Countess Reita from the year 1953 and also of the fact that it ultimately resulted in the marriage of the two. The respondent sent a letter to the appellant on 13th October 1953 telling her that that state of affairs could not continue indefinitely and that it would be unfair to the respondent to be subjected to that state of affairs any longer. She was also told that she had failed to point out any extraordinary behaviour on the part of her husband which could be a valid reason for her desertion in that manner. She was asked to disclose the reason for her persist-

ent refusal to come and live with her husband and she was told that the husband would be prepared to meet any reasonable wishes that she may express. She was asked to join her husband at his post at Hague. Assurance was given to her that arrangements would be made, for her going over to Europe, by the respondent. In the end she was requested not to force the respondent to take any further steps. The appellant sent a reply to that letter on the 17th April 1954 through her Advocate Sri M. B. Rege. Amongst other things, it was said that despite every thing, the appellant wished her husband happiness. It was further expressed that the appellant would appreciate if her stridhan which included her household effects and which she had taken with her to Alirajpur, jewellery and presents given to her by friends and her husband's family at the time of her wedding to the value of Rs. 90,000 and which had been left by her at Sarela were returned to her as soon as possible. It was also said that arrangements that may be agreed upon, be made for her separate maintenance and residence, with due consideration to her status and that of her family. A desire was expressed that the unfortunate matter be not given wide publicity. It is conspicuous to note that in spite of the fact that she was already aware of the friendship between the respondent and the Dutch girl, the appellant did not make any reference at all to that effect in her letter. She did not say that her refusal to go back to her husband was justified on the ground that the husband had developed friendship with that Dutch girl. It is, therefore, clear that the fact of friendship between the respondent and Countess Reita did not make any contribution (contrition) in the mind of the appellant for her determination to have nothing to do with the respondent and never to return to her husband's home. What she really insisted upon was, that separate arrangement for maintenance and residence for her be made and that her alleged belongings be returned to her. It is, therefore clear that as a matter of fact, the friendship of the respondent with Countess Reita which ultimately resulted in marriage, did not really have any impact on the mind of the appellant so as to afford a cause for desertion.

22. Mr. Singh in support of the submission that he has made also relied on the decision of the Supreme Court in AIR 1964 SC 40 (supra) on which reliance was placed by the learned counsel for the appellant himself. A clear observation in support of that rule of law has been made by the Supreme Court in that decision:

"But there is one other matter which is also of equal importance that is that the conduct of the deserted spouse should have had such an impact on the mind of

the deserting spouse that in fact it causes her to continue to live apart and thus continue the desertion. But where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse. It appears to us that the principle that the conduct of the deserted spouse which is proved not to have caused the deserting spouse to continue the desertion does not put an end to the desertion, appears to be self-evident and deducible from the legal concepts underlying the law as to desertion."

23. The Supreme Court then proceeded to make reference to a passage in the judgment of Wilmer, L. J. in 1961-3 All ER 957 laying down that rule of law. The submission made by Mr. Singh, therefore, finds support from the decision of the Supreme Court in the case of AIR 1964 SC 40 (supra).

24. Mr. Singh also relied on the decision in the case of Earnshaw v. Earnshaw, 1939-2 All ER 698 where it was held, approving the decision in an earlier case of Herod v. Herod, (1938-3 All ER 722) that the petitioner's adultery had clearly had no influence on the mind of the respondent and the period of desertion had, therefore, not been interrupted by it. The petitioner was found entitled to a decree nisi.

25. The above proposition has also been sought to be supported by the decision in Parrock v. Parrock, 1956-1 All ER 555. In that case also, the rule of law referred to above was clearly recognised. On the facts of that case, it was held that the wife had withdrawn from cohabitation to start life with another man in circumstances which raised the suspicion that adultery had been committed; the true inference from the facts was therefore, indifferent to the fact, which she must have known, that Mrs. M. became the husband's mistress; and that on such considerations, discretion would rightly be exercised in favour of the husband.

26. Our attention was also invited to paragraph 157 of the Eighth Edition of Rayden on Divorce at p. 188. The paragraph is couched in the following language:—

"A spouse who deserts may, during the statutory period, repent, of the intention to stay away, but may be prevented from returning because of the attitude or conduct of the other spouse, as where a husband who is deserted lives with another woman. If a spouse commits adultery after he or she had been deserted, or commits any other misconduct or neglect, the desertion is not terminated as a matter of law; the material question is whether the deserter knows of the adultery, or whe-

ther it had any influence on his or her conduct. In order to judge whether there has been any such influence, one must look not only at the conduct of the petitioner, but also at the conduct and declarations of the respondent. It is for the person committing the adultery to show that the adultery did not affect the deserting party's conduct at all, bearing in mind especially the impeding of a possible reconciliation by reason of that adultery. If it is left in doubt whether the respondent knew of the adultery, or if known, whether his or her conduct was affected by it, the petitioner would fail to discharge the burden of proof. The question is one to be decided according to the circumstances of each case".

The same passage finds place in paragraph 489 of Halsbury's Laws of England Third Edition Vol. 12 at p. 259.

27. The submissions by Mr. Singh, therefore, have much force and we accordingly hold that the desertion by the appellant did not come to an end by the fact that the respondent contracted friendship with Countess Reita in the year 1953 and ultimately married her in the year 1955.

28. So far as the two decisions of the Andhra Pradesh Court and the one of the Mysore Court relied upon by the learned counsel for the appellant and referred to above, are concerned, it is clear that they proceeded on the assumption that as the wife had been given a right to separate maintenance and residence under other Acts, in case the husband marries a second wife, the husband's remarriage, without anything more affords reasonable cause, for desertion, by the wife. With great respect, we do not agree with the view taken by Andhra Pradesh and the Mysore Court in the above cases. "Desertion" within the meaning of the provisions of the Hindu Marriage Act (1955) does not imply only a separate residence and separate living. It is also necessary that there must be determination to put an end to marital relations and to put an end to cohabitation permanently. Without such animus deserendi, there can be no desertion within the meaning of Section 10 of the Hindu Marriage Act (1955). If that be so, then it is clear that the consideration that in case the husband remarries, the wife is entitled to separate residence and maintenance, cannot be utilised as argument for coming to the conclusion, that the fact of the remarriage of the husband must necessarily afford a reasonable cause for desertion. It would not be correct to say that remarriage of the husband by itself without anything more affords reasonable cause for desertion. The question that would still remain to be answered would be as to what was the impact of the fact

of remarriage of the husband, on the mind of the deserting spouse. In cases where the consideration of remarriage of the husband failed to have any impact on the mind of the wife, remarriage of the husband would not afford reasonable cause for desertion within the meaning of the provision under consideration.

29. Such view finds support from the decision of the Madras High Court reported in AIR 1965 Mad 139, A. Annamalai Mudaliar v. Perumayee Ammal. The view taken by the Madras Court is that the provision of the Hindu Adoptions and Maintenance Act No. 78 of 1956 and of the Hindu Married Women's Right to Separate Residence and Maintenance Act No. 19 of 1946 purported to give the trends, of what is claimed to be progressive thought in this country of placing women at par with men in the matter of their marital rights. The Court took the view that the right to live separately from the husband given to the wife under S. 18 (2) (d) of the Act (78 of 1950) was not and could not be of the same character e.g. if he abandons the other wife, he could certainly call upon his previously separated wife to live with him. To respond to such request will be a duty which she owes to him as her husband. In support of the conclusion at which their Lordships of the Madras Court arrived, their Lordships relied on the argument that Sec. 18 (2) (d) of Act No. 78 of 1956 says that a Hindu wife shall be entitled to live separately from her husband if he has any other wife living, and if the word "living" was to be given its ordinary interpretation then all the wives that a man had married at a time when such marriages were legal, could live without him and yet claim maintenance. We are in respectful agreement with the view taken by the Madras Court in the last mentioned case.

30. As a result of the view that we have taken, the decree of the Court below for judicial separation of the respondent from the appellant must be maintained.

31. The appellant filed an application in the trial Court under Section 25 of the Hindu Marriage Act for fixing permanent alimony and maintenance. The lower appellate Court has arrived at the finding that the appellant was not entitled to receive any sum from the respondent by way of maintenance. In arriving at the conclusion, the lower appellate Court took notice of the fact that the appellant has been granted an allowance of Rs. 400 per month by the Ministry of States, Government of India and that she has been receiving that allowance. The appellant is possessed of a car and other household articles and that there was nothing on the record to show that she was not maintaining herself from her own income. The

lower appellate Court also took into consideration the fact that the respondent was getting a salary of Rs. 1600 per month. The respondent pays income-tax and super tax on his income. He has also to deposit annuity and general provident fund. After those deductions, he would be receiving about Rs. 1200 per month only out of his salary. Apart from it, the respondent has a daughter from Countess Reita. On the date the lower appellate Court decided the appeal, the lower appellate Court speculated that he would have to pay at least Rs. 200 per month for the maintenance of that daughter.

32. Keeping in view on the one hand the present high costs of living and on the other the fact that the respondent is liable to pay allowance for the maintenance of the daughter, we consider that appellant is entitled to an allowance from the respondent at the rate of Rs. 150 per month only.

33. In view of our findings given above, the appeal is dismissed with this modification that the respondent will pay by way of maintenance a sum of Rs. 150 per month to the appellant beginning from the date of this order.

34. In view of the litigation being between husband and wife we do not make any order as to costs of this Court.

Order accordingly.

AIR 1970 ALLAHABAD 108 (V 57 C 10)
M. H. BEG J.

Indo Allied Industries Ltd., Appellant
v. Punjab National Bank Ltd., Respondent.

Company Appln. No. 5 of 1964, D/-
20-8-1968.

(A) Contract Act (1872), S. 226 — Banker and customer — Responsibility and position of head office of Banking concern with regard to deposits made by customers who open current account at its branches.

In the absence of an express contract to the contrary, there is an implied contract with a customer who opens an account with branch office of a Banking concern, which carries with it the duty of the bank to pay the customer only at the branch where the account is kept subject to instructions to transfer the amount elsewhere. If the obligation to transfer is frustrated by local legislation or governmental action of the country where the account is kept, the remaining implied obligation to pay at the branch or office where the account is kept cannot be substituted automatically by an unconditional obligation of the principal to pay

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elsewhere by resorting to Section 226 of the Contract Act. Section 226 permits enforcement of contracts as they stand and not their substitution by fresh contracts with different terms.

(Para 18)

(B) Contract Act (1872), S. 1 — Applicability — Act has no extra-territorial operation.

(Para 19)

(C) Words and phrases — Word 'collusion' — Meaning of.

"Collusion" is a strong term. It had been defined as "A deceitful agreement—between two or more persons—to some evil purpose such as to defraud a third person of his right." Collusion may be either apparent and patent, or, what is more common, secret and covered by an apparent show of honesty. In either case, collusion implies a community of purpose and intention between parties colluding.

(Para 20)

(D) Companies Act (1956), S. 518 — Power under — Power is wide but is to be exercised when just and beneficial.

It would not be justifiable to unduly curtail the ambit of a power conferred under Section 518 which is in wide and general terms. The only limitation upon the power is that the question to be decided must arise "in the winding up." The statutory powers of the Court in a winding up proceeding are meant to be exercised on just and equitable grounds. It is not possible to state categories of justice and equity exhaustively. Therefore, the power is wide, but its exercise is made to depend, by Section 518 (4), upon the satisfaction of the Court that it will be "just and beneficial" to exercise it. Thus, there is scope for the exercise of a discretion on judicially determined grounds.

(Para 27)

Section 518 (b) expressly enables the Court to exercise all powers which it may exercise in a winding up by the Court and this often involves determination of disputed questions of fact, although these are generally decided on evidence taken by means of affidavits: (1880) 13 Ch D 808, Rel. on.

(Para 28)

Cases Referred: Chronological Paras

(1961) AIR 1961 Ori 80 (V 48), K. I. D. Syndicate Ltd. v. Koshal T. & T. Co.	28
(1954) 1954 AC 495 = 1954-2 WLR 1022, Arab Bank Ltd. v. Barclays Bank	17
(1921) 3 KB 110 = 90 LJ KB 973, Joachimson v. Swiss Bank Cor- poration	23
(1915) 1915-2 KB 576 = 84 LJKB 1443, Clare & Co. v. Dresdner Bank	16
(1880) 13 Ch D 808 = 49 LJ Ch 264, In re Union Bank of Kingston- Upon-Hull	28

(1878) 3 AC 325 = 47 LJ PC 42,
(Henry) Prince v. Oriental Bank
Corporation 16

Radha Kishan and V. B. Singh, for Appellant; S. K. Tewari and S. N. Misra, for Respondent.

ORDER:— This is an application under Section 518 of the Companies Act, 1956 (hereinafter referred to as the Act), filed by the voluntary liquidator of Indo-Allied Industries Ltd. The company under liquidation had its registered office at Gorakhpur. Its Managing Agent, Ram Samujh Singh, opposite party No. 2 (now represented by his heirs), who was in charge of its business at Rangoon, opened an account on behalf of the company in the Rangoon branch of the Punjab National Bank Ltd., New Delhi, opposite party No. 1. The liquidator informed the Manager of the Rangoon branch of the Punjab National Bank Ltd., by a letter dated 6-2-57, that he had been appointed liquidator of the Company in a voluntary liquidation on 6-1-57. He sought information with regard to deposits made at Rangoon on behalf of the Company since 1-7-1953. The Rangoon branch of the Punjab National Bank gave details of various deposits made which showed that a sum of Kayate 16,101.75, (each K. is said to be worth roughly Re. 1 in Indian currency) stood to the Company's credit upto 30th of June, 1957. The liquidator was also informed that, after the closing down of the Company's Rangoon office, the account had become a "non-resident" account automatically so that the Burmese Exchange Control Department had to be given a full account of the concern and of circumstances leading to its liquidation before any transfer could be made to the liquidator in India. The liquidator gave the required details, but he was informed on 25-11-1957 by the Rangoon branch of the bank that an application made for the transfer of K. 16,101.75 to India had been rejected by the Burmese Exchange Control Department. For a long time the liquidator did nothing more. But, in 1963 the liquidator learnt, as a result of further inquiries, that the account of Indo-Allied Industries in the Rangoon branch was closed on 23-5-1961. The liquidator protested against closure of this account without his authority and after information given by him that he was the liquidator. The Rangoon branch of the Bank had been nationalised and its assets and liabilities were taken over by the Peoples Bank No. 7 of Rangoon which, as the successor of the Rangoon branch of Punjab National Bank Ltd., informed the liquidator, by a letter dated 29-9-1963, that the account was closed by payments made by three cheques, amounting to K. 16056. 75, to Ram Samujh Singh, the Director of the Company, who had been authorised, according to it, to operate the account

singly. The petitioner claimed that the payments had been made collusively and wrongfully by the Rangoon branch of the Punjab National Bank Ltd., to Ram Samujh Singh, opposite party No. 2, after information given by the liquidator that the Company had gone into liquidation and before its nationalisation by the Burmese Government. The applicant seeks to fasten liability to pay the amount thus realised by Ram Samujh Singh on both the Opposite Parties.

2. Neither Ram Samujh Singh, opposite party No. 2, a permanent resident of Gorakhpur, who died during the pendency of these proceedings, nor his heirs, who reside at Gorakhpur, have filed any reply or put in appearance. The Punjab National Bank Ltd. New Delhi, Opposite Party No. 1, has contested the applicant's claim and asserted that the bank's Rangoon branch was taken over by the Burmese Government on 23-2-1963. It denied any knowledge of the circumstances in which any sum was deposited with its Rangoon branch or how the account was closed. It, however, relied on the correspondence of the applicant with the Rangoon branch of the Bank, and, after that, with the Peoples Bank No. 7, which the applicant had filed in this Court, to put forward the plea that the Rangoon branch was not satisfied that the applicant had legal authority to act on behalf of the Company as no information was received by the Rangoon branch of the bank. It also pleaded that, according to the law in Burma, a "non-resident" account ceased to belong to the company. The Bank denies all responsibility for the transmission of the amount to India as the Control Exchange Department of Burma had rejected an application for the transfer of the amount to India. It pleaded that the authority of the liquidator appointed under the law of this country could not be recognised in Burma which is a foreign country. Its case alone is that the applicant could only enforce his claim, if at all, in Burma against the successor of the Rangoon branch of the Bank according to the law in Burma. It denied that the petitioner had any cause of action against it in India. It is also pleaded that the liquidator's claim was barred by limitation. A further plea is that payments to Ram Samujh Singh satisfied the demand which could be made against the Rangoon branch of the Bank.

3. The liquidator had prayed for the determination of only three questions under S. 518 of the Act and did not ask for anything more, but, after an examination of the detailed pleas taken by the two sides, the proceedings practically assumed the form of a *suit*. Issues were framed and evidence was taken by my

learned brother Satish Chandra, J. when he was the Company Judge of this Court. The issues, as finally reframed, are as follows:—

- (1) Was the liquidator appointed in accordance with law?
- (2) Did the authority of Ram Samujh Singh, Opposite Party No. 2, to operate upon the account in dispute in the Rangoon branch of the Punjab National Bank come to an end on or after 6-1-1957?
- (3) Was there any collusion between the Opposite Parties to allow Ram Samujh Singh to withdraw the amount in dispute after the Bank had been informed that the Company was in voluntary liquidation and the Bank had agreed to transfer the amount to the liquidator?
- (4) On proved facts and circumstances of the case, were both or either of the two opposite parties, and if so, which party was liable to pay the amount in dispute to the liquidator?
- (5) Was the claim of the applicant time-barred?
- (6) Has this Court jurisdiction under S. 518 of the Companies Act to determine the liabilities of Opposite Parties on proved facts and circumstances?
- (7) To what relief, if any, is the applicant entitled?

4. Issues Nos. 2 and 3 and 4 reproduce the three questions contained in the application under Section 518 of the Act which the applicant wants answered. Issues Nos. 1 and 5 and 6 have been raised by the pleas set up by the opposite party No. 1, the Punjab National Bank Limited, India.

5. On the first issue, there was no serious dispute. The applicant proved, from the regularly kept minutes' book of the meetings of the shareholders of Messrs. Indo-Allied Industries Limited that a resolution was passed, at the annual general meeting of the shareholders, held on 6th January, 1957, that the Company be wound up and Sri K. P. Misra be appointed its liquidator. This fact was published in the official gazette dated 19-1-1957. Ram Narain Pandey, the Accountant of the Company, proved the passing of the resolution. He was not questioned on the point. It has, therefore, been duly proved that the applicant was appointed liquidator of the Company in voluntary liquidation in accordance with S. 485 (1) of the Act.

6. The second issue raises a question which is difficult to answer. The liquidator sent a letter dated 16th February, 1957, to the Manager of the Rangoon Branch of the Punjab National Bank Ltd.

informing him that the company had gone into liquidation and that he had been appointed its liquidator by the creditors and shareholders of the concern. The letter contained a request for details of all the depositors and amounts deposited in the account of the company from 1-7-1953. In his reply, dated 8th March, 1957, the Manager of the Rangoon Branch asked for a letter duly signed by all the Directors of the Company. With a letter dated 12th of March, 1957, the liquidator sent a copy of the resolution of the meeting duly certified by the Chairman of the Board of Directors and a duly certified copy of the information published in daily newspapers in India showing that the applicant had been acting as the liquidator of the Company. On 19th of August, 1957 the Manager of the Rangoon Branch sent information about the deposits made showing a balance of K. 16,101.75 standing in the account of the company at Rangoon. The Manager also informed the liquidator that the account had been opened as a "resident account" on 25-7-1950, but that it had become a "non-resident" account after the closing down of the Company's Rangoon office. Further details relating to the company, from its inception to its liquidation, were asked for to satisfy the Burmese Exchange Control Department. Presumably, the Rangoon branch wanted to transmit the money to the liquidator after having been duly satisfied that the liquidator and not Ram Samujh Singh had the authority to receive the amount in deposit in a "non-resident" account. On 26-8-1957, the liquidator sent the required information, but he never wrote that the authority of Ram Samujh Singh to operate on the account was terminated. The liquidator even referred the Bank to Ram Samujh Singh for further information. It appears that the Rangoon branch of the Bank applied for the transfer of the amount to India after obtaining the applicant's signature on an application for it. Then, the Manager of the Rangoon branch informed the applicant that his application for the transfer of K. 16,101.75 to India had been rejected by the Burmese Exchange Control Department without assigning any reason.

7. Periodic intimation was, however, sent by the Rangoon branch of the Bank addressed to the office of Indo Allied Industries Ltd. at Gorakhpur (but not to the liquidator). The intimations sent show that on 19th February, 1960, an amount of K. 16071.75 stood to the credit of the company. Evidence reveals a long and unexplained gap in correspondence after this. The liquidator apparently made no further attempts either to get or to inquire about the deposits until 3rd of February, 1963, when he suddenly sent an enquiry, by a registered acknow-

ledgment due letter, addressed to the Manager of the Rangoon branch of the Bank, asking for information about the account of the Indo-Allied Industries Ltd. On 12th February, 1963, the Manager of the Rangoon branch sent a reply informing the liquidator that the account had been closed on 23rd May, 1961. Subsequent letters by the liquidator to the Rangoon branch of the Bank failed to elicit any reply. After enquiries made by the liquidator through the Indian Embassy at Rangoon, the liquidator addressed a letter dated 16th July, 1963, to the Manager, Peoples Bank No. 7 at Rangoon, asking for information relating to the account of the Company. The Peoples Bank No. 7 sent a reply on 27th July, 1963, showing that it had taken over the Rangoon branch of the Punjab National Bank and would look into the matter. On 29th October, 1963, the Manager of the Peoples Bank No. 7 at Rangoon, as the successor to the rights and liabilities of the Rangoon branch of the Punjab National Bank Ltd. at Rangoon, sent the information that the account of the company was closed by Mr. Ram Samujh Singh the Director of the Company, who had been "appointed to operate singly on the account" and who had withdrawn the whole amount.

8. There is no dispute about the genuineness of the correspondence which has been filed in this Court. It is evident from the above mentioned correspondence that the Rangoon branch of the Punjab National Bank at first recognised the authority of the liquidator rather hesitatingly, but, after the rejection, by the Burmese Exchange Control Department, of the application for transmission of the amount to the liquidator, the Rangoon branch did not consider itself bound to retain the money for the liquidator but treated Ram Samujh Singh as duly authorised to withdraw the deposits. It did not even address any letters or send any intimation about the account to the liquidator after that. It had permitted the Director, Ram Samujh Singh, opposite party No. 1, who was then residing at Rangoon, to withdraw the whole amount on behalf of the company. In other words, the Rangoon branch of the Bank recognised the authority of Ram Samujh Singh to operate on the account as continuing notwithstanding the appointment of a liquidator in this country whose application to transmit the deposits of the company to him had been turned down by the Burmese Exchange Control Department.

9. The terms of the actual contract between the Rangoon branch of the Bank and Ram Samujh Singh were only available, if at all, to the Peoples Bank No. 7 at Rangoon or to R. S. Singh who did not

appear here. The last letter sent by the Peoples Bank to the liquidator shows that its stand is that, on the terms of that contract, the authority of Ram Samujh Singh to operate on the account continued, in the circumstances mentioned above and even after the appointment of the liquidator, and that payment to R. S. Singh by the Rangoon branch of the Bank was a discharge of its liability to pay to the company. The Peoples Bank is not a party to these proceedings. Neither the Head Office of the Punjab National Bank at Delhi nor the liquidator could prove the terms of that contract. It may be mentioned that the only witness examined on behalf of the liquidator was Ram Narain Pandey, the accountant of the Company who had continued in service after liquidation commenced, and he stated that the authority of Ram Samujh Singh to operate solely on the company's account at Rangoon was continued.

10. The rule found in statutory provisions dealing with voluntary liquidation in England, on which our statutory provisions on the subject are based, is that the powers of the directors or of any single director to carry on the normal business of the company or to act on its behalf terminate on the appointment of a liquidator in a voluntary liquidation. but, they may be continued or renewed by the liquidator, or, by a general meeting of members, or in a creditors' voluntary winding up, by the committee of inspections or by the creditors (See Halsbury's Laws of England, 3rd edition, Vol. 6 para 1503). Section 487 of our Act provides that, in the case of a voluntary winding up, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up of such business. But, the corporate state and corporate powers of the company continue until it is dissolved. Section 491 provides that, on the appointment of the voluntary liquidator, the powers of the Board of directors, the managing or whole time directors, managing agents, secretaries, treasurers, and managers, shall cease except in so far as their continuance is sanctioned by the company's general meeting or by the liquidator. Under Sec. 512 (1) (b) of the Act the liquidator in a voluntary liquidation exercises the same powers as the liquidator in a winding up by the Court. Under Section 456 of the Act, the liquidator, in a winding up by the Court, has the power to take charge of and to assume control over all the properties and claims to which the company is or appears to be entitled. Therefore, a Bank in this country will be bound to recognise the authority of the liquidator as superseding that of a director after the winding up has commenced and the liquidator appointed. But,

our Companies Act does not provide for the recognition of the authority of a liquidator appointed in another country. It is not possible to assume that there is some statutory rule in Burma on the subject. Such a question will, in the absence of a specific provision in the laws of a country, be governed by international law.

11. The rule of Private International Law adopted by the English Courts, is stated in Dicey's "Conflict of Laws" (7th edition p. 491), as follows:—"Rule 82—A Liquidator duly appointed and authorised under the law of the place of incorporation can act on behalf of the corporation in England, but a foreign winding up order has no other effect in England." Comments on the rule indicate that the first part of the rule is based on the principle that the law of the place of incorporation determines who is entitled to act on behalf of the corporation.

12. Thus, it seems that the right of a liquidator appointed in another country and authorised by the law of his country to exclude others from exercising any control over the property of the company would be recognised if he appears before an English Court to assert rights on behalf of a foreign company in liquidation over property situated in England. Courts in this country would also, I presume, adopt such a reasonable rule of international law, but it is not possible to predict what rule Courts in Burma would adopt if such a question arose there.

13. Apparently, the Peoples Bank of Burma acknowledged that it had taken over the rights and obligations of the Rangoon branch of the Bank, but it disputed the authority of the voluntary liquidator appointed in this country on the ground that it had a special contract with Ram Samujh Singh. In the absence of proof of the terms of that contract or the state of law on the subject in Burma, it cannot be determined whether the authority of Ram Samujh Singh to operate on the account in Rangoon came to an end after 6-1-1957. Issue No. 2 cannot, therefore, be determined on the material on record. It has to be left unanswered. But, this could not affect any liability of Ram Samujh Singh to account to the liquidator for money had and received on behalf of the company.

14. Before deciding issues Nos. 3 and 4 a question an answer to which will largely determine these issues may be considered. This is: What is the responsibility and position of the head office of a Banking concern or corporation with regard to deposits made by customers who open current account at its branches? The applicant relies on Section 226 of the Indian Contract Act which reads as follows:—"Enforcement and consequences of agents contracts. Contracts entered into

through an agent and obligation arising from acts done by an agent may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person." On the other hand, the Opposite Party No. 1 relies on the special position under an implied contract of each branch of a bank in relation to a customer who opens an account at that branch.

15. Apart from the complication introduced by the fact that the Rangoon branch, where deposits were made, functioned in a foreign country whose Government restricted transfer of deposits and then took over the branch as a State-owned bank the very opening of an account at a particular branch of a bank connotes reciprocal obligations circumscribed by the fact that the account was opened at that branch. The position is thus stated in Hart's Law of Banking (4th Ed. Vol. 1, P. 96):

"In the absence of special agreement upon the matter, a banker is only bound to recognise a balance in favour of his customer at the office upon which his cheque is drawn; and the customer is entitled to draw cheques only upon the office at which he keeps an account and to have them paid only at that office. From the nature of the case the undertaking on the part of the banker implied by the opening an account must be limited in this way."

16. In (Henry) Prince v. Oriental Bank Corporation, (1878) 3 AC 325, the Privy Council held that, although, the branch banks are in principle and in fact "agencies of one principal banking corporation or firm", yet, "they may be regarded as distinct for special purposes, e.g. that of estimating the time at which the notice of dishonour should be given or of entitling a banker to refuse payment of a customer's cheque except where he keeps his account." In *Clare & Co. v. Dresdner Bank*, (1915) 2 KB 576 Rowlatt, J. went so far as to hold: "I come to the conclusion, therefore, that, although the question seems never to have been raised before, probably because such a thing has never been dreamt of, there is no obligation on a bank to pay in one country a debt due to customer on current account in another country." In that case, the plaintiffs, who had an account at the Berlin branch of the defendant Bank, wrote to a London branch demanding payment of the amount due on the account at the Berlin branch. The plaintiffs had made no request to the Berlin branch to remit the money to London. The Courts held that there had been no breach of obligation to pay as the plaintiffs were not entitled to demand payment from the London branch.

17. Arab Bank Ltd. v. Barclays Bank, 1954 AC 495 was a case of a claim made upon the head office of the Barclays Bank in England for an amount deposited in the current account of the Arab Bank Ltd. kept at a branch of the Barclays Bank at Allenby Square in Jerusalem. After the termination of the British mandate over Palestine, the Arab Bank Ltd. requested the local "head office" of Barclays Bank in Cyprus to transfer the amount to its account at the Midland Bank Ltd. in London. This request was refused by the Barclays Bank on the ground that the Jewish authorities, which were in de facto control over the area in which the Jerusalem branch of the Bank was situated, would not permit the transfer. As a result of outbreak of war and the passing of a law by the State of Israel, the amount was paid to the Custodian of Absentee Property appointed by the local Jewish authorities. The Arab Bank sued the head office of Barclays Bank in England for return of money "had and received." It was held by the House of Lords that the rights to be paid the credit balance, being "locally situate" in the State of Israel became subject to the legislation of that State. The Arab Bank could not therefore, recover from the head office of the bank in England. In addition to the plea of frustration of the contract with the branch in Jerusalem, due to war and local law, a plea which was upheld in this case was that there was no effective initial demand for payment upon the branch in Jerusalem.

18. The position, therefore, is that, in the absence of an express contract to the contrary, there is an implied contract, in such cases, which carries with it the duty of the bank to pay the customer only at the branch where the account is kept subject to instructions to transfer the amount elsewhere. If the obligation to transfer is frustrated by local legislation or governmental action of the country where the account is kept, the remaining implied obligation to pay at the branch or office where the account is kept cannot be substituted automatically by an unconditional obligation of the principal to pay elsewhere by resorting to Section 226 of the Contract Act. Section 226 permits enforcement of contracts as they stand and not their substitution by fresh contracts with different terms.

19. Moreover, our Contract Act has no extra-territorial operation. The rule of Private International Law on the subject is thus stated in Dicey's "Conflict of Laws" (7th ed. p. 875): "Rule 171. The rights and liabilities of the principal as regards third parties are, in general, governed by the proper law of the contract concluded between the agent and the third party." It may be possible to infer an

implied contract in cases such as the one before me, by applying some generally accepted principles, such as those discussed in Prof. Cheshire's "Private International Law", (6th ed. 213) under the "Doctrine of Proper Law," but I find it difficult to see how particular provisions of our Contract Act would apply to a contract formed outside India with regard to deposits beyond our territories. There was no express contract to that effect in this case.

20. Issue No. 3 may be taken up. If there was any collusion between Ram Samujh Singh and the Rangoon branch of the Opposite Party No. 1 after the Burmese Government had refused to allow the transmission of the amount to the liquidator in India, such a collusion has not been shown to be authorised by opposite Party No. 1 which had no knowledge of it. "Collusion" is a strong term. It had been defined as: "A deceitful agreement.....between two or more persons.....to some evil purpose such as to defraud a third person of his right." Collusion may be either apparent and patent, or, what is more common, secret and covered by an apparent show of honesty. In either case, collusion implies a community of purpose and intention between parties colluding. There is no evidence in this case of the means employed by Ram Samujh Singh for obtaining payment from the Rangoon branch of the bank. It is possible that he may have prevailed upon the Rangoon branch that he was legally entitled to draw the amount. Even if the conduct of Ram Samujh Singh was fraudulent it could not be assumed that the Rangoon branch of Opposite Party No. 1 was a party to that fraud.

21. It was, however, contended that the collusion was apparent in this case. I do not think this would be a correct inference from facts proved. A collusion to be apparent must be based on facts which must be incapable of any other reasonable explanation. In the present case, the facts are not inconsistent with other possibilities. Therefore, there was no patent collusion between Ram Samujh Singh and the Rangoon branch of the Opposite Party No. 1. And the evidence of secret collusion is practically absent. All that could be said is that there are suspicious circumstances in the case so that it is possible that the Rangoon branch of Opposite Party No. 1 had not dealt quite honestly with the account in allowing Ram Samujh Singh to withdraw the amount lying with it. This could, however, not amount to collusion of the principal in any action of the branch at Rangoon.

22. Issue No. 4 raises the question of the liability of either or both of the parties to the alleged collusive payment to Ram Samujh Singh. It has to be borne in

mind that the Rangoon branch had not refused to pay the liquidator. Even before the liquidator made any demand for the transmission of the amount to India, the Rangoon branch seems to have taken steps on behalf of the liquidator and applied to the Burmese Exchange Control authorities for transmission of the amount to India. A copy of the Exchange Control Manual issued by the Rangoon Gazette Limited shows what were Foreign Exchange Regulation Rules. Rule 9 reads as follows:

"No person shall remit any money to any place outside the Union of Burma except under a permit or the approved application granted in his own name by the Controller."

After the Controller had rejected whatever application was made by the Rangoon branch of Opposite Party No. 1, the liquidator himself made no demand upon the Burma branch to transmit the amount to India. No doubt, if he had made that demand, the Rangoon branch would have pleaded inability to send the amount to India. It had already indicated its inability before any demand was made. The fact, however, remains that the liquidator did not make the demand.

23. An important principle, resulting from the implied contract between a customer and banker, was laid down in *Joachimson v. Swiss Bank Corporation*, (1921) 3 KB 110, by the Court of Appeal in England, after an elaborate discussion of case law on the subject. This was that, "where money is standing to the credit of a customer on current account with a banker, in the absence of a special agreement, a demand by the customer is a necessary ingredient in the cause of action against the banker for money lent." This rule was also relied upon by the House of Lords in the *Arab Bank's case*, 1954 AC 495 (supra). In the present case, I find neither a demand upon the Rangoon branch of opposite party No. 1 nor upon Opposite Party No. 1 made by the liquidator. And, before any cause of action could accrue in favour of the liquidator, by making of a demand for payment, the Rangoon branch of the Bank had been nationalised and its assets and liabilities had passed on to the Peoples Bank No. 7 of Rangoon.

24. Even if the payment by the Rangoon branch of the Opposite Party No. 1 to Ram Samujh Singh was unjustifiable or wrongful, the effect would be that the amount would be deemed to be still in deposit with its successor, the Peoples Bank No. 7 of Rangoon. It could not be said, on the facts stated above, that the liability devolved upon the principal without even a demand for payment made either upon the agent or upon the principal before the liability, if any remained till then, was transferred to the Peoples

Bank No. 7 of Rangoon. But, the Peoples Bank No. 7 of Rangoon is neither before this Court nor the question of its liability to pay is raised here. The question can only be decided in Rangoon in such proceedings as may still be open to the liquidator.

25. Ram Samujh Singh, as a director of the company in liquidation, could not, however, set up the plea that he was dealing with the company's funds outside India or that he had made a contract with respect to the Company's funds outside India. He would certainly be liable to account because the relationship which made him accountable for the company's funds and properties was created in India. It is immaterial where he misappropriated or realized the funds of the company. Against him, the Courts in this country could proceed in personam. Ram Samujh Singh, Opposite Party No. 2, who died in the course of the proceedings, did not even come forward to deny the claim of the liquidator. Under all the facts and circumstances stated above, it is clear to me that the Opposite Party No. 1 was not liable, but Ram Samujh Singh, Opposite Party No. 2, was accountable to the liquidator for the amounts realised by Ram Samujh Singh in Rangoon on behalf of the company.

26. The fifth issue raises the question of limitation against the Opposite Parties. As I have held that there is no liability of opposite party No. 1 on the facts and circumstances found above, to pay the amount realised by Ram Samujh Singh and that the liability, if any, was transferred to the Peoples Bank No. 7 of Rangoon, which was only enforceable in Rangoon, the question of limitation for any action against Opposite Party No. 1 does not arise in this case. So far as Ram Samujh Singh is concerned, it is not necessary to determine here whether any claim against his heirs would be barred by time if a suit was filed against them. It is enough to point out that so far as proceedings under Section 543 (1) of the Companies Act are concerned, for assessment of damages for misappropriating any funds of the company, the proceedings would be barred by Section 543 (2) of the Act. Such action can be taken only on an application under S. 543 (1) which has to be made within five years from the date of the appointment of the liquidator or of misapplication, retainer, or misfeasance, whichever is later. No such application under Section 543 (1) of the Act has been made to this Court so far. Therefore, action under Section 543 (1) of this Act against Ram Samujh Singh is barred by time.

27. The sixth issue raises the question of jurisdiction of this Court under Section 518 of the Act which enables the liquidator or any contributory or cre-

ditor to apply to the Court "(a) to determine any question in the winding up of the company." This is the jurisdiction which has been invoked. This provision occurs in the part dealing with voluntary winding up. Section 518 (b) enables the Court, inter alia, to exercise in regard to "any other matter, all or any of the powers which the Court might exercise if the company were being wound up by Court." I do not think that it would be justifiable to unduly curtail the ambit of a power conferred in such wide and general terms. The only limitation upon the power is that the question to be decided must arise "in the winding up." The statutory powers of the Court in a winding up proceeding are meant to be exercised on just and equitable grounds. It is not possible to state categories of justice and equity exhaustively. Therefore, the power is wide, but its exercise is made to depend, by Section 518 (4), upon the satisfaction of the Court that it will be "just and beneficial" to exercise it. Thus, there is scope for the exercise of a discretion on judicially determined grounds.

28. With due respect, I am unable to accept the view expressed in *K. I. D. Syndicate Ltd. v. Koshal T. & T. Co.*, AIR 1961 Ori 80, that the Court's power under Section 518 of the Act does not extend to deciding disputed questions of fact. Section 518 (b) expressly enables the Court to exercise all powers which it may exercise in a winding up by the Court and this often involves determination of disputed questions of fact, although these are generally decided on evidence taken by means of affidavits. In *re Union Bank of Kingston-upon-Hull*, (1880) 13 Ch D 808 Jessel M. R. refused to unduly curtail the Court's power under a corresponding provision in Section 138 of the Companies Act of 1862, in England. I prefer to adopt a similar view of this Court's powers under Section 518 of the Act. The jurisdiction of this Court to consider a matter in a winding up is also determined under Section 10 of the Act by the place of registration of the company which is being wound up. I, therefore, hold that this Court has jurisdiction to determine questions raised between parties before this Court. It has determined only such questions as could, in my opinion, be justly and properly determined here.

29. Coming to the seventh and last issue, I hold that, for reasons already stated, the applicant can obtain no relief beyond the determination of two of the three questions raised by him. He had prayed for no further relief. This application, therefore, partly succeeds and partly fails. The parties will bear their own costs.

Order accordingly.

AIR 1970 ALLAHABAD 115 (V 57 C 11)

JAGDISH SAHAI AND
GANGESHWAR PRASAD JJ.

Ameer and others, Petitioners v. Sub-Divisional Magistrate Varanasi (S), and others, Respondents.

Civil Misc. Writ No. 7 of 1962, D/-13-8-1968.

Panchayats — U. P. Panchayat Raj Act (26 of 1947), Ss. 53, 89, 2 — Expression 'Criminal Case' in S. 89 — Connotation — Not restricted in its meaning to definition given in S. 2 — It includes proceeding under S. 53 also.

The expression "criminal case" in Section 89 is not restricted in its meaning to the definition given in Section 2 of the Act; it includes a proceeding under Section 53 also. A Sub-Divisional Magistrate has, therefore, the power under Section 89 to revise an order passed in such a proceeding by the Nyaya Panchayat. AIR 1960 SC 971, Ref. (Para 10)

An examination of the provisions of the Act clearly shows that the matters which the Nyaya Panchayat has been empowered to deal with fall into three categories viz. "Civil Case", "Criminal Case", and "Revenue Case". Sections 75, 78, 79, 81, 83, 85 and 86, which regulate the procedure in relation to matters to be dealt with by a Nyaya Panchayat, speak of the abovementioned categories only and it is consequently, not possible to say of any case coming up before the Nyaya Panchayat that it falls outside the said categories. The examination of Sections 83, 85, 86 and 87 would show that the expression 'Criminal Case' has to be construed not as circumscribed by the definition given to it in the Act but as also including a proceeding under S. 53. (Paras 6, 7)

If a proceeding under Section 53 has to be regarded as a "criminal case" within the meaning of the provisions which regulate its procedure before the Nyaya Panchayat, it should follow that the proceeding is a "criminal case" for the purpose of Section 89 also. The expression "criminal case" is a well-known expression having a recognised and generally accepted connotation. A proceeding under Section 53 of the Act is analogous to a proceeding under Section 107, Criminal P. C., and having regard to the facts which necessitate it and the consequences which may ensue from it there can be no doubt that such a proceeding is a criminal case. In treating the proceeding as included in the expression "criminal case" in Section 89 and the other provisions referred to above, it is only ascribing to it the meaning which it bears in common acceptance. (Para 8)

BM/EM/A726/69/RSK/B

Cases Referred: Chronological Paras
 (1960) AIR 1960 SC 971 (V 47) =
 (1960) 3 SCR 857, Vanguard Fire
 and General Insurance Co., Ltd.
 v. Fraser and Ross 9
 (1955) Writ No. 753 of 1954, D/-
 11-3-1955 (All), Girwar Singh
 v. Sub-Divisional Magistrate 2, 12
 G. N. Varma, for Petitioners; Standing
 Counsel, for Respondents.

GANGESHWAR PRASAD J.:— This writ petition has come up before us upon a reference made by a learned single Judge of this Court.

2. Under Section 53 of the U. P. Panchayat Raj Act (hereinafter referred to as the Act), each of the petitioners was ordered by the Nyaya Panchayat of village Khewali, district Varanasi, to execute a personal bond in the sum of Rs. 50 with one surety of like amount for keeping the peace for a period of fifteen days. The order of the Nyaya Panchayat provided that in case of default in executing the required bond a penalty of Rs. 5 per day shall be imposed on each defaulting petitioner. Against that order the petitioners filed an application in revision under Section 89 of the Act before the Sub-Divisional Magistrate Varanasi (S) who dismissed it on the ground that no revision lay. The view that the Magistrate took was that an order under Section 53 is not an order in a "criminal case" as defined in the Act and is, accordingly, not revisable under Sec. 89. In taking this view he followed the decision of Mehrotra, J. in Girwar Singh v. Sub-Divisional Magistrate Writ No. 753 of 1954 decided on March 11, 1955 (All). By means of this petition the petitioners pray for a writ in the nature of certiorari quashing the orders of the Nyaya Panchayat and the Sub-Divisional Magistrate. The learned single Judge before whom the writ petition originally came up for hearing found some difficulty in accepting the opinion expressed by Mehrotra, J. in the above decision, and that led to the reference.

3. The relevant portion of Section 89 of the Act runs as follows:

"Section 89 (1)— A Sub-Divisional Magistrate, Munsif or Sub-Divisional Officer, according as it is a criminal, civil or revenue case, may either on his own motion or on the application of any party made within 60 days from the date of the order complained of or where personal service of summons had not been effected on the applicant from the date of the knowledge of the order call for the record of any case which has been decided by a Nyaya Panchayat and if it appears to him that injustice or material irregularity has occurred, he may make such order in the case as he thinks fit.

(2)

(3)
 (4) Except as aforesaid, a decree or order passed by a Nyaya Panchayat in any civil, criminal or revenue case shall not be open to appeal or revision in any Court."

4. The expressions "criminal case", "civil case" and "revenue case" have all been defined in Section 2 of the Act. According to the definition, "Criminal case" means a criminal proceeding in respect of an offence triable by a Nyaya Panchayat. Certainly, a proceeding under Section 53 cannot be said to be a proceeding in respect of an offence triable by a Nyaya Panchayat, and if the revisional power of Sub-Divisional Magistrate is regarded as confined to a criminal case as defined in the Act the conclusion that an order under Section 53 is not revisable is correct. The question, however, is whether the revisional power can properly be regarded as so confined.

5. Now, "case" is an expression of very wide import. When used in relation to an authority performing judicial function or exercising judicial power, it includes every matter which furnishes occasion for the performance of that function and every subject in respect of which that power is exercised. There is nothing to indicate that the expression "case" has been given a restricted meaning in the Act. No doubt, sub-section (1) of Section 49 which provides for the formation of Benches speaks of "cases and inquiries" coming up before the Nyaya Panchayat, and it may thus create the impression that the Act contemplates a distinction between "cases" and "inquiries"; but sub-section (3) of that section would dispel the impression and show that no such distinction is really contemplated. Sub-section (3) lays down that no Panch, Sarpanch or Sahayak Sarpanch shall take part in the "trial of or inquiry in any case" to which he or any near relation, employer, employee, debtor, creditor, or partner of his is a party or in which any of them is personally interested. Here a "trial" has certainly been distinguished from an "inquiry", but the word "case" has been used as comprehending both. If a "case" and an "inquiry" were to be considered distinct things there can obviously be no "inquiry in a case". It cannot also be reasonably suggested that the prohibition contained in sub-section (3) does not extend to an "inquiry" or that any matter which may be dealt with by the Nyaya Panchayat is outside the scope of the prohibition. It will further be noticed that sub-section (2) of Section 49 uses the expression "cases" at one place and "cases and enquiries" at another, although it seems evident that when using "cases" it means both "cases" and "enquiries". Section 49, therefore, does not indicate that the Act draws a distinction between

"a case" and "an inquiry," but only discloses that the word "case" has been used in that wide sense in which it includes every matter coming up before the Nyaya Panchayat under the provisions of the Act and when it mentions both "cases" and "enquiries" it does so merely out of abundant caution and not because "enquiries" are not included in "cases". It would also be noted that a proceeding under Section 53 of the Act has not been described in the Act as an "enquiry" or an "inquiry" and there is no reason why such a proceeding should not be regarded as a "case" an expression which, it would be noted, has not been defined in the Act as it now stands.

6. An examination of the provisions of the Act clearly shows that the matters which the Nyaya Panchayat has been empowered to deal with fall into three categories viz. "Civil Case", "Criminal Case", and "Revenue Case". Sections 75, 78, 79, 81, 83, 85 and 86, which regulate the procedure in relation to matters to be dealt with by a Nyaya Panchayat, speak of the abovementioned categories only and it is consequently, not possible to say of any case coming up before the Nyaya Panchayat that it falls outside the said categories. It is true that in some sections of the Act some other expressions have also been used but they seem to us to be either inapt or unnecessary. The heading prefixed to Section 73 is "Res Judicata and Pending Suits" although the section itself speaks of civil and revenue cases and not suits. Sub-section (1) of Section 77-A provides that if any Panch is absent at any hearing, the remaining Panchas may try "the case, suit or proceeding" although the words "suit" and "proceeding" have neither been defined in the Act nor used in it elsewhere in relation to matters to be dealt with by the Nyaya Panchayat. The word "suits" has again been unnecessarily added to the word "cases" in the heading of Section 78. These sections and Section 49 to which attention has already been drawn serve to demonstrate that the Act suffers from inaccurate and slovenly drafting and that, in finding out the meaning of even those expressions which have been defined in the Act, the Court has to take into account to a larger extent than would otherwise have been necessary, the context in which they occur.

7. Before we advert to Section 89 itself we have to see whether or not a proceeding under Section 53 is a "criminal case" for the purposes of some other provisions. Sub-section (2) of S. 53 makes it obligatory for the Bench to hear the witnesses whom the person proceeded against may produce. Surely, the person concerned should, therefore, have the right to get his witnesses summoned and

the Nyaya Panchayat should have the power to secure their attendance before it. Section 86 is the only section empowering the Nyaya Panchayat to compel the attendance of witnesses and the production of documents, and the power conferred thereby is in relation to civil, criminal and revenue cases. If, then, a proceeding under Section 53 is not a criminal case within the meaning of the section, it is not possible for the person proceeded against to have witnesses summoned or for the Nyaya Panchayat to compel their attendance. And Section 87 which provides for imposition of fine upon a witness for his failure to appear before the Nyaya Panchayat would automatically be inapplicable if the power to summon is itself lacking. Section 83 makes it the duty of the Nyaya Panchayat, in relation to civil, criminal and revenue cases, to receive evidence and to ascertain the facts by every lawful means in its power. It is not possible to conceive that the legislature intended to exclude a proceeding under Section 53 from the ambit of Sec. 83 and to absolve the Nyaya Panchayat from the obligation of ascertaining the facts so far as that proceeding is concerned. Section 83 further provides that the Evidence Act would not apply to any civil, criminal or revenue case in a Nyaya Panchayat except as provided in the Act or as may be prescribed. Could it be the intention of the legislature that even though the Evidence Act would not apply to trials for offences it would nevertheless apply to a proceeding under Section 53? Under Section 85 a Sub-Divisional Magistrate may transfer a case to another Bench of the Nyaya Panchayat. Let us suppose that a proceeding under Section 53 is being taken against a person in contravention of sub-section (3) of Section 49 or that for some other reason the ends of justice require the transfer of the said proceeding to some other Bench. The power conferred by Section 85 will however, not at all be exercisable and the person proceeded against will have no remedy under the provisions of the Act if a proceeding under Sec. 53 is not included in the expression "criminal case". Such a result could not have been intended by the legislature. The only reasonable conclusion to be drawn, therefore, is that in all the aforesaid provisions the expression "criminal case" has to be construed not as circumscribed by the definition given to it in the Act but as also including a proceeding under S. 53.

8. If, as we have observed above, a proceeding under Section 53 has to be regarded as a "criminal case" within the meaning of the provisions which regulate its procedure before the Nyaya Panchayat, it should, in our opinion, follow that the proceeding is a "criminal case" for the purpose of Section 89 also. The ex-

pression "criminal case" is a well known expression having a recognised and generally accepted connotation. A proceeding under Section 53 of the Act is analogous to a proceeding under Sec. 107, Criminal P. C., and having regard to the facts which necessitate it and the consequences which may ensue from it there can be no doubt that such a proceeding is a criminal case. In treating the proceeding as included in the expression "criminal case" in Section 89 and the other provisions referred to above, we are only ascribing to it the meaning which it bears in common acceptance. If a proceeding under Section 53 of the Act were not to be regarded as a "criminal case" for the purposes of the abovementioned sections the result would be that those provisions, which must necessarily have been intended to apply to all matters coming up before the Nyaya Panchayat would become inapplicable. In order, therefore, to effectuate the purpose of the Act and make it workable in respect of a matter dealt with by it, it is necessary that the expression "criminal case" be understood as including a proceeding under Sec. 53 also.

9. Section 2 of the Act, like almost all interpretation clauses, subjects its definitions to the usual condition, "unless there is anything repugnant in the subject or context." Dealing with the effect of such a condition in the definition of the word "insurer" in Section 2 of the Insurance Act 1938 the Supreme Court observed as follows in *Vanguard Fire and General Insurance Co. Ltd. v. M/s. Fraser and Ross* AIR 1960 SC 971:

"The main basis of this contention is the definition of the word 'insurer' in Section 2 (9) of the Act. It is pointed out that that definition begins with the words 'insurer means' and is exhaustive. It may be accepted that generally the word 'insurer' has been defined for the purposes of the Act to mean a person or body corporate etc. which is actually carrying on the business of insurance, i.e., the business of effecting contracts of insurance of whatever kind they might be. But Section 2 begins with the words 'in this Act, unless there is anything repugnant in the subject or context' and then come the various definition clauses of which Cl. (9) is one. It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all the definitions in

statutes generally begin with the qualifying words similar to the words used in the present case, namely, unless there is anything repugnant in the subject or context. Therefore, in finding out the meaning of the word 'insurer' in various sections of the Act, meaning to be ordinarily given to it is that given in the definition clause. But this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word has been used and that will be giving effect to the opening sentence in the definition section; namely, unless there is anything repugnant in the subject or context. In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. Therefore, though ordinarily the word 'insurer' as used in the Act would mean a person or body corporate actually carrying on the business of insurance it may be that in certain sections the word may have a somewhat different meaning."

Reference may also be made to Maxwell's Interpretation of Statutes (9th Edition) page 34 where it is stated:

"Even where an Act contains a definition section it does not necessarily apply in all the contexts in which a defined word may be found. If a defined expression is used in a context which the definition will not fit, the context must be allowed to prevail over the 'artificial conceptions' of the definition clause, and the word must be given its ordinary meaning".

10. We have shown that if in the sections mentioned above and in Section 89 of the Act the expression "criminal cases" were to be interpreted in terms of the definition given in Section 2 there would be an obvious repugnancy in the subject and the context. We may also observe that authority is not altogether wanting for the view that the definition provided by an enactment may itself, in certain circumstances be held to be inaccurate and unreliable, and we may draw attention to the following passage in "The Construction of Statutes" by Crawford (1940 Edition) page 363:

"Although the legislative definition may be of great assistance in clearly revealing the legislative meaning, it may also create considerable confusion, the definitive language may itself require construction. Its own language may be ambiguous. It may be clearly contradictory with the language of the statute proper. The statute may indicate that the legislative definition is inaccurate. It is, therefore, obvious that before legislative definition can be relied upon, its applicability as

well as its reliability should be ascertained. And in this connection, one important situation should be mentioned. In the event that the definition found in the interpretation clause is at variance with the intention of the law-makers as expressed in the plain language of the statute, the intention must prevail over the legislative definition. In other words, the intent of the legislature must control the legislative definition. But the interpretation clause and the statute proper must all be construed together as a part of the same statute. Where this is done, if the definition laid down by the legislature does not conflict with the intent of the legislature, then the former may be given effect. If the two can be harmonized, there can be no objection to allowing the interpretation clause to control the language defined. To give the interpretation clause precedence where the two cannot be harmonized, would operate to make the ancillary portion of the statute superior to the primary portion. The statute's meaning would in all probability be distorted, and the legislative intent defeated."

For our present purpose, however, it is sufficient to say that the expression "criminal case" in Section 89 is not restricted in its meaning to the definition given in Section 2 of the Act; it includes a proceeding under Section 53 also. A Sub-Divisional Magistrate has, therefore, the power under Section 89 to revise an order passed in such a proceeding by the Nyaya Panchayat.

11. We think it necessary to mention that there is one proceeding under the Act which is certainly a case in the wide meaning of the term but is not subject to revision under Section 89. That is a proceeding under Section 63. Since it is not an independent proceeding started before the Nyaya Panchayat the legislature thought it proper, may be, by way of abundant caution, to say in sub-section (3) of Section 77-A that the provisions of sub-sections (1) and (2) of that section shall *mutatis mutandis* apply to an inquiry made by a Nyaya Panchayat under Section 63. That inquiry, however, results only in a report to the Magistrate who directed the inquiry and does not lead to any order. The provisions of Section 89 are, consequently, inapplicable to it. We should not, therefore, be understood as holding by implication that a proceeding under Section 63 of the Act is also a proceeding subject to revision under Section 89.

12. The decision of Mehrotra J. in Writ No. 753 of 1954, D/-11-3-1955 (All) (Supra) proceeded upon the provisions of the Act as they stood at that time. It is not necessary for us to discuss the old provisions of the Act; but we may indicate that we do not find it possible to agree

with the learned Judge in the opinion expressed by him. Before parting with the case we may point out the desirability of suitable amendments in the Act so that the anomalies shown above may be removed and the legislative intent may be expressed in clearer and more accurate language.

13. For the reasons discussed above the writ petition is allowed, the order of the Sub-Divisional Magistrate Varanasi (S) dated 23-9-1961 is quashed and he is directed to hear and decide the revision on merits.

Petition allowed,

AIR 1970 ALLAHABAD 119 (V 57 C 12)
D. P. UNİYAL AND C. B. CAPOOR JJ.

Chandi Prasad, Applicant v. Chaudhari Chandra Pratap Singh, Opposite Party.

Criminal Revn. No. 269 of 1966, D/-6-3-1968 against judgment of Addl. S. J. Basti, D/-17-2-1966.

(A) Criminal P. C. (1898), S. 146 (1) — Reference of dispute to Civil Court — In judging whether Magistrate had sufficient ground what has to be seen is substance and not form of order of reference — Order disclosing that Magistrate found it difficult to decide on question of possession — Held, it could not be said that order of reference was incompetent. (Para 8)

(B) Criminal P. C. (1898), S. 146 (1-B) and (1-D)—Order under S. 146 (1-B) passed after adopting finding of civil Court on question of possession referred to it — It is no more open to party to assail order of reference to Civil Court. (Para 10)

(C) Criminal P. C. (1898), Ss. 146 (1-B), (1-D) and 439 — Order of Magistrate under S. 146 (1-B) — It cannot be set aside in revision: AIR 1963 Pat 243 (FB) held impliedly overruled by AIR 1966 SC 1888.

The finding given by the Civil Court in pursuance of the provision of sub-section (1-B) of Section 146 is a finding of a Court of civil jurisdiction, and as such, it is not subject to the jurisdiction of criminal court. In so far as sub-section (1-D) bars appeal from such finding and prohibits review or revision of such finding, it clearly envisages that in so far as the order of the Magistrate is based on the finding of Civil Court the same cannot be interfered with in any way. The order being an integral part of that finding cannot be set aside in revision: AIR 1963 Pat 243 (FB) held impliedly overruled by AIR 1966 SC 1888. (Para 12)

Cases Referred: Chronological Paras (1967) 1967 All LJ 649 = ILR (1967) 2 All 386, Guru Prasad Pandey v. State

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- (1966) AIR 1966 SC 1888 (V 53) =
1966 All LJ 1122 = 1966 Cri LJ
1514, Ram Chandra Agarwal v.
State of U. P. 12
- (1963) AIR 1963 Pat 243 (V 50) =
1963 (2) Cri LJ 25 (FB), Raja
Singh v. Mahendra Singh 12
- (1899) 1899 AC 626 = 68 LJ PC
148, Madden v. Nelson and Fort
Sheppard Railway 10
- B. C. Saxena and K. C. Saxena, for
Applicant; A. G. A., for Opp. Party.

UNIYAL J.:— This application in revision arises out of proceedings under Section 145, Criminal P. C. and is directed against an order passed by the Magistrate in terms of Section 146 (1-B) of the Code of Criminal Procedure.

2. The dispute related to a plot of land which each party claimed to be in his exclusive possession. On being satisfied that there was an apprehension of the breach of the peace in respect of the land in question, the Magistrate attached the property and followed the procedure laid down in sub-clause (1) of Section 145, Criminal P. C. After perusing the written statements, affidavits and other documents filed by the parties concerned, the Magistrate came to the conclusion that it was a fit case which should be referred to the Civil Court under sub-section (1) of Section 146, Criminal P. C. The parties were directed to appear before the Civil Court and they adduced evidence in support of their respective claims as respects of the fact of possession of the subject of dispute. The Civil Court recorded a finding that the opposite party was in possession of the disputed plot on the date of the preliminary order as also two months next before the date of such order.

3. On receipt of the finding of the Civil Court the Magistrate proceeded to dispose of the proceeding under Sec. 146 (1-B), Criminal P. C. in conformity with the decision of the Civil Court, and passed an order directing the delivery of possession to the opposite party.

4. The applicant filed a revision in the Court of the Sessions Judge against the order of the Magistrate but the same was dismissed. He then came up in revision to this Court and the matter was heard by our brother Rajeshwari Prasad, J., who observed that in view of the Division Bench decision of this Court in *Guru Prasad Pandey v. State*, 1967 All LJ 649 an order passed by the Magistrate in conformity with the decision of the Civil Court was not amenable to the revisional jurisdiction of the Sessions Judge and the High Court. He was, however, of the view that it was not clear from the said decision whether what was intended was to lay down that no revision petition was entertainable against the order of the Magistrate or whether it was intended

that the correctness of the finding of the Civil Court was not liable to be challenged by way of revision. He, therefore, directed the case to be laid before a larger Bench for decision and that is how the matter has come before us.

5. The learned counsel for the applicant advanced three contentions before us; first, that the Magistrate had no jurisdiction to make the reference to the Civil Court. Secondly, that if it was shown that the reference made by the Magistrate to the Civil Court was itself illegal the order passed by him under Sec. 146 (1-B) would become vitiated and the High Court was entitled to interfere in revision. Lastly, it was contended that the order of the Magistrate, which was based on the finding recorded by the Civil Court, was liable to be challenged by way of revision.

6. Before we proceed to examine the above contentions, it is necessary to read the relevant provisions of the Code of Criminal Procedure.

7. Section 146, Criminal P. C. as amended by Act 26 of 1955, is as follows:

"146(1)— If the Magistrate is of opinion that none of the parties was then in such possession, or is unable to decide as to which of them was then in such possession, of the subject of dispute, he may attach it, and draw up a statement of the facts of the case and forward the record of the proceeding to a Civil Court of competent jurisdiction to decide the question whether any and which of the parties was in possession of the subject of dispute at the date of the order as explained in sub-section (4) of S. 145; and he shall direct the parties to appear before the Civil Court on a date to be fixed by him;

Provided that.....

(1-A) On receipt of any such reference, the Civil Court shall peruse the evidence on record and take such further evidence as may be produced by the parties respectively, consider the effect of all such evidence, and after hearing the parties, decide the question of possession so referred to it.

(1-B) The Civil Court shall, as far as may be practicable within a period of three months from the date of the appearance of the parties before it, conclude the inquiry and transmit its finding together with the record of the proceeding to the Magistrate by whom the reference was made; and the Magistrate shall, on receipt thereof, proceed to dispose of the proceeding under Section 146 in conformity with the decision of the Civil Court.

(1-C)

(1-D) No appeal shall lie from any finding of the Civil Court given on a reference under this section, nor shall any review or revision of any such finding be allowed.

(1-E) An order under this section shall be subject to any subsequent decision of a Court of competent jurisdiction.

8. It will be seen that the Code envisages two situations in which a Magistrate may decide to make a reference to the Civil Court in a proceeding under Section 145, Criminal P. C.:

(i) if he is of opinion that none of the parties is proved to be in possession of the subject of dispute; or

(ii) if he is unable to decide as to which of them was in such possession.

In the instant case the Magistrate, it appears, was unable to decide as to which of the two parties was in possession of the subject of dispute and he, therefore, considered it to be a fit case to be referred to the Civil Court for recording a finding on the question of possession. It is true that he did not, in so many words, state that he was making the reference because of his inability to determine as to which of the parties was in possession of the subject of dispute. Nonetheless, it is perfectly plain from the order passed by him that he found difficulty in reaching a definite conclusion as to which of them was really in possession. Under the circumstances he was, in our opinion, perfectly justified in making a reference to the Civil Court. In judging whether the Magistrate had sufficient ground to refer the dispute to the Civil Court, what has to be seen is the substance and not the form of the order. The jurisdiction of a Magistrate to refer the question of possession for decision to the Civil Court arises as soon as he is unable to make up his mind as to which of the parties was in possession on the relevant dates. It cannot be said that the order of reference passed by the Magistrate in terms of sub-section (1) of Section 146 was incompetent. We, therefore, overrule the first contention and hold that the Magistrate had acted legally in referring the dispute to the Civil Court for decision.

9. As regards the second contention, whether it is open to a party to challenge the order of reference made by the Magistrate under sub-section (1) of Section 146 by way of revision, we think that the answer must be in the affirmative. In the present case, however, the point raised is purely academic inasmuch as the applicant did not file any revision against the said order of the Magistrate.

10. It remains however to consider whether it is open to a party to assail the validity of the order of reference after the Civil Court has recorded a finding on the question of possession and that finding has been adopted by the Magistrate by passing an order under sub-section (1-B) of Section 146, Criminal P. C. Prima facie, it seems to us that such a course would result in defeating the purpose

which the law seeks to achieve, namely, to expeditiously dispose of the proceedings under Section 145, Criminal P. C. Apart from the fact that the aggrieved party has a right and opportunity to file a revision against the order of the Magistrate making the reference to the Civil Court at the time when it was made, there is the further fact that the applicant having submitted to the jurisdiction of the Civil Court and contested the case before it, it would be contrary to the provisions of sub-section (1-D) of Section 146 to permit a party to challenge the finding of the Civil Court by an indirect method. If once it is held that the finding of the Civil Court is not subject to an appeal or to a review or revision, then it must follow that a party cannot be allowed to do that indirectly which he is prohibited from doing directly. (See *Madden v. Nelson and Fort Sheppard Railway*, 1899 AC 626.

11. Coming to the last contention advanced by the learned counsel for the applicant, we are of opinion that the order passed by the Magistrate in terms of sub-section (1-B) of Section 146 cannot be assailed in revision in so far as that order is in conformity with the finding of the Civil Court. By sub-section (1-D) of Section 146 the legislature has put an embargo on appeal being filed against the finding of the Civil Court made on a reference under that section. The legislature has also barred the jurisdiction of the Criminal Court to review or revise any such finding of the Civil Court. It was said that the finding given by the Civil Court had merged in the order of the Magistrate and was no longer the decision of a Civil Court, but was in fact order of the Criminal Court, which is subject to the revisional jurisdiction of the Sessions Judge and the High Court. There is an obvious fallacy in this argument. The Magistrate while acting in pursuance of sub-section (1-B) of Section 146 does not exercise his own judgment but rather accepts and adopts the finding given by the Civil Court as final and conclusive, so that the finding of the Civil Court is an integral part of the order of the Magistrate with the result that the order of the Magistrate cannot be set aside without disturbing the finding of the Civil Court. Indeed, the finding of the Civil Court is inseparable from the order of the Magistrate. Take away the finding and the order of the Magistrate ceases to exist. How can it then be argued with any show of reason that although the finding of the Civil Court is immune from attack, the order of the Magistrate based on such finding is liable to be set aside by way of revision?

12. The learned counsel referred to the case of *Raja Singh v. Mahendra*

Singh, AIR 1963 Pat 243 (FB) in support of his argument that an order of the Magistrate passed in terms of sub-section (1-B) of Section 146 can be interfered with by the High Court in exercise of its revisional jurisdiction. Dealing with this question Misra, J. observed:

"In my opinion, however, sub-section (1-B) cannot be read in that form. If the legislature intended to curtail the power of the High Court in regard to the order passed under Section 146, Cr. P. C. there should have been side by side an amendment of Sections 435 and 439 of the Code. The same not having been done, sub-section (1-D) must be given a narrow interpretation so as to confine it only to the finding of the Civil Court as such and not to extend it to the position which results when such a finding has been adopted by the Magistrate and order passed upon its basis."

With great respect, the reasoning adopted by the learned Judges of the Patna High Court seems to us to be based on a misconception. The learned Judges seemed to think that the bar created by sub-section (1-D) was in respect of the finding of the Civil Court only. The provisions of the Code of the Criminal Procedure relate to procedure in respect of criminal matters, such as, investigation, inquiry, trial or right of appeal or revision etc. The Code does not and cannot make provision for a right of appeal or revision against a finding or order of the Civil Court. That is a matter which falls within the exclusive province of the Code of Civil Procedure. The learned Judges were misled into thinking that the Civil Court recording a finding in terms of Section 146, Cr. P. C. was exercising a criminal jurisdiction and not a civil jurisdiction. At page 246 of their judgment the learned Judges said:—

"It is true, no doubt that against a finding of the Civil Court no appeal, review or revision will lie under the Code of Civil Procedure inasmuch as the Civil Court while adjudicating a reference made by the Magistrate, does not act as a Civil Court independently but only records a finding as a tribunal which in itself will not be operative unless it is adopted by the Magistrate, although the latter is bound to act in conformity with it." The above view of the learned Judges of the Patna High Court is clearly untenable in view of the decision of the Supreme Court in *Ram Chandra Agarwal v. State of U. P.* 1966 All LJ 1122 = (AIR 1966 SC 1888). Mudholkar, J., speaking for the Court stated as follows:

"No doubt, the Magistrate, while discharging his function under the Code of Criminal Procedure under Section 145 (1), would be exercising his criminal

jurisdiction because that is the only kind of jurisdiction which the Court confers upon the Magistrate but when the Magistrate refers the question to a Civil Court he does not confer a part of his criminal jurisdiction upon the Civil Court. There is no provision under which he can clothe a Court or a tribunal which is not specified in the Criminal Procedure Code with criminal jurisdiction."

There can, therefore, be no doubt that the finding given by the Civil Court in pursuance of the provision of sub-section (1-B) of Section 146 is a finding of a Court of civil jurisdiction, and as such, it is not subject to the jurisdiction of Criminal Court. In so far as sub-section (1-D) bars appeal from such finding and prohibits review or revision of such finding, it clearly envisages that in so far as the order of the Magistrate is based on the finding of the Civil Court, the same cannot be interfered with in any way. The order being an integral part of that finding cannot be set aside in revision.

13. We are, therefore, of the opinion that the points raised by the learned counsel for the applicant are without merit and must fail.

14. The revision application is without merit and is accordingly dismissed.
Revision dismissed.

AIR 1970 ALLAHABAD 122 (V 57 C 13)

B. D. GUPTA, J.

Babboo, Applicant v. State, Opposite Party.

Criminal Revn. No. 1743 of 1967, D/- 18-2-1969, against order of S. J. Allahabad, D/- 18-9-1967.

(A) Prevention of Food Adulteration Act (1954), Section 13 — Sample of Cow's milk — Schedule of time for deterioration — Sample kept according to Rules — Sample retains its character and is capable of analysis for 10 months — Prosecution before 10 months — Accused held not deprived of benefit of Section 13 — 1968 All LJ 916, Not foll.

Sample of Cow's milk, to which necessary quantity of formaline has been added according to Rules and which has been kept in normal circumstances, retains its character and is capable of being usefully analysed for a period of about ten months. (Para 4)

Hence, where the accused from whom the sample of Cow's milk was taken, was sought to be prosecuted after six months before the expiry of 10 months from the date on which the sample was collected, it could not be said that the accused was deprived of an opportunity to avail

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himself of the benefit of the provisions contained in Section 13, if the necessary precautions prescribed by the Rules for preserving the same have been taken. Cr. Rev. No. 1612 of 1962, D/- 30-9-1965 (All); Foll.; AIR 1967 SC 970, Disting.; 1968 All LJ 916 held not correctly decided and Not Foll. (Para 4)

(B) Prevention of Food Adulteration Rules (1955), Rule 20 — Rule as to addition of preservative mandatory.

Where the prosecution failed to establish that the necessary preservative was added to the sample, it could not be said as to what may have happened to the sample by the time it was examined by the Public Analyst, and no reliance on the result of the analysis by the Public Analyst can be placed for sustaining the conviction. (Para 5)

Cases Referred: Chronological Paras

(1968) 1968 All LJ 916 = 1969
All Cri R 172, Net Ram v. State 3, 4
(1967) AIR 1967 SC 970 (V 54) =
1967 Cri LJ 939, Municipal Corporation of Delhi v. Ghisa Ram 3
(1965) Cri. Revn. No. 1612 of 1962,
D/- 30-9-1965 (All), Gokul Chand v. State 4

P. S. Misra, for Applicant; Government Advocate, for Opposite Party.

ORDER:— This is a revision by one Babboo who stands convicted for the offence punishable under Section 16 of the Prevention of Food Adulteration Act, hereinafter referred to as the Act.

2. The prosecution case was that, on the morning of the 21st of July, 1966, the applicant was found on the Rewa Road near village Sarangpur, within the jurisdiction of police station Ghurpur in the district of Allahabad, transporting cow's milk for sale, sample whereof was purchased by Sri B. L. Sharma, a Food Inspector, and, on examination of the said sample by the Public Analyst, the same was found deficient in non-fatty solid contents. The applicant pleaded not guilty and stated that he was transporting the milk for his own use and not for sale. The learned Magistrate accepted the prosecution case, rejected the defence and convicted the applicant, awarding him rigorous imprisonment for a period of one year. An appeal to the learned Sessions Judge having failed the applicant filed this revision.

3. At the hearing of this revision learned counsel for the applicant raised two substantial points. The first was that, by reason of delay in starting the prosecution of the applicant, the applicant was deprived of the valuable right conferred on him by the provisions contained in Section 13 of the Act to get the sample analysed by the Director of the Central Food Laboratory because by the time the applicant learnt of his pro-

secution the sample must have deteriorated to such an extent that it would have defied analysis. Reliance in support of this contention, was placed by learned counsel on my decision in the case of Net Ram v. State, 1968 All LJ 916. The second point raised by learned counsel was that, on the material on record it could not appropriately be held that when the Food Inspector took the sample he added thereto the necessary quantity of formaline as required by the rules framed under the Act. Having heard learned counsel for the parties I am of the opinion that, whilst the first contention must be negatived, the second must be accepted and this revision must be allowed.

4. The facts relevant to the first contention are that the sample in question was taken on the 21st of July, 1966. The report of the Public Analyst is dated the 3rd of November, 1966. The complaint filed by the Food Inspector, which was duly forwarded to the Court of the Magistrate concerned, is dated the 30th of November, 1966. The case was registered and, on the 14th of December, 1966, summons was directed to be issued to the applicant requiring the applicant to appear on the 27th of December, 1966. Nothing appears to have been done by the office of the learned Magistrate in compliance with the above order with the result that, on the 27th of December, 1966, the learned Magistrate passed another order for the issuance of fresh summons requiring the applicant to appear on the 22nd of February, 1967 and on the latter date the applicant appeared in Court for the first time. Keeping in view the fact that the sample in question was alleged to have been taken from the applicant on the 21st of July, 1966, it was urged that more than six months had passed by the time the applicant had the opportunity to avail himself of the benefit of the provisions contained in Section 13 of the Act and the sample must have deteriorated and analysis thereof by the Director of the Central Food Laboratory must have been rendered useless. This case is no doubt fully covered by the decision recorded by me in the case of 1968 All LJ 916 (supra), in which I applied the schedule of time in regard to deterioration of curd which had been accepted by the Supreme Court in the case of Municipal Corporation of Delhi v. Ghisa Ram, AIR 1967 SC 970 on the basis of evidence given by one Dr. Satya Prakash. Mr. Girdhar Malaviya, appearing for the State, however, drew my attention to the decision recorded by D. S. Mathur, J., on the 30th of September, 1965, in Criminal Revn. No. 1612 of 1962 (All), Gokul Chand v. State, in support of the contention that in case of cow's milk, to which the necessary

quantity of formaline had been added and which had been kept in normal circumstances, the sample retains its character and is capable of being usefully analysed for a period of about ten months. A perusal of the judgment makes it clear that the above conclusion was recorded by brother Mathur after a thorough investigation into the question and, if I may say so with respect, I see no reason why the said conclusion should not be accepted as correct and followed in cases dealing with cow's milk. After reading the material set forward by brother Mathur in support of the conclusion recorded by him I have no hesitation in recording my feeling that, in accepting in regard to milk the schedule of time accepted by the Supreme Court in regard to curd in the case of AIR 1967 SC 970 (supra) I committed an error, and that the schedule of time which should be applied to cases of milk should be the one incorporated by brother Mathur in Criminal Revn. No. 1612 of 1962, D/- 30-9-1965 (All). It is unfortunate that the above decision, even though approved for reporting, does not appear to have been reported in any law reports even though more than three years have passed since it was recorded. If this decision had been reported or had otherwise been brought to my notice when I decided the case of 1968 All LJ 916 (supra) my conclusion, I trust, would have been in line with the result of a thorough investigation into the matter by brother Mathur in Criminal Revn. No. 1612 of 1962, D/- 30-9-1965 (All) referred to above. Therefore, in the present case, since only about six months had passed since the date on which the sample of milk was collected by the Food Inspector I am unable to accept that the sample was bound to have deteriorated by the time the accused had the opportunity to avail himself of the benefit of the provisions contained in Section 13 of the Act. The first contention must, therefore, fail.

5. As regards the next contention, learned counsel for the State concedes that, apart from such statements of the Food Inspector as are on record, there is no other material on record to make out that the required quantity of formaline was added to the sample of milk purchased by the Food Inspector from the applicant. There is no controversy that none of the three bottles into which the sample was divided was before the Court. A perusal of the provisions contained in Section 11 of the Act makes it clear that of the three containers into which the sample is divided one is handed over to the person from whom the purchase is made, another is sent for analysis to the Public Analyst and the third container is retained by the Food

Inspector for production in case any legal proceedings are taken or for analysis by the Director of the Central Food Laboratory under sub-section (2) of Section 13 of the Act, as the case may be. In the case before me the third container which the Food Inspector must have retained for production in case any legal proceedings were taken was, however, not produced by the Food Inspector at the trial. During the course of his examination-in-chief the Food Inspector, Sri B. L. Sharma, made a statement that he had added preservative to the sample purchased by him. He did not mention the substance which he had added as preservative, nor the quantity or proportion thereof. The matter was pursued in cross-examination and the Food Inspector stated that there was nothing on the record of the file with him to indicate that preservative had been added to the sample purchased by him. He stated that in the labels which are pasted on the containers a mention is made of the preservative which is added but he confessed that he had before him neither any label nor any container. If he had retained the third container and brought the same with him whilst the trial was going on and had produced the same the label thereon would have disclosed the fact of the adding of preservative as also the nature and quantity of the preservative actually added. Learned counsel for the State has been unable to place before me any material which might furnish any explanation for this omission on the part of the Food Inspector.

I am thus left with the bald statement made by the Food Inspector more than ten months after the date on which he had purchased the sample of milk that he had added preservative to the sample purchased by him. I find it impossible to accept that the Food Inspector remembered, as a fact the adding of preservative to the sample purchased by him from the applicant after a lapse of such a long time. It appears manifest that during this long period, in his capacity as Food Inspector, he must have taken samples in numerous cases, and the best that can be said about his assertion that he had, in fact, added preservative in the case in question is that this assertion was merely the result of belief that he must have done so, and not the result of actually remembering, as a fact, that he had done so on the date and time when he purchased the sample in question. The provisions contained in Rule 20 are mandatory and I find it impossible to accept that the prosecution has established compliance with the rule. Failure on the part of the prosecution to establish that the necessary preservative was added would lead to the result that it cannot

be said as to what may have happened to the sample by the time it was examined by the Public Analyst, and no reliance on the result of the analysis by the Public Analyst can, therefore, be placed for sustaining the conviction of the applicant.

6. Accordingly this revision is allowed and the conviction of the applicant and the sentence of one year's R. I. awarded to him are set aside. The applicant is on bail. He need not surrender. His bail bonds are discharged.

Revision allowed.

AIR 1970 ALLAHABAD 125 (V 57 C 14)

SATISH CHANDRA, J.

Asharfi Lal, Plaintiff-Appellant v. Vaid Mohan Lal, Defendant-Respondent.

Second Appeal No. 3437 of 1963, D/- 3-1-1969 against judgment of Civil J., Moradabad, D/-20-8-1963.

(A) Houses and Rents — U. P. Temporary Control of Rent and Eviction Act (3 of 1947), Section 3 — Commissioner's order under Sec. 3 effective on the date of filing of suit — Cancellation by State Government subsequent to filing of suit — Suit is maintainable — Jurisdiction of Civil Court — AIR 1965 All 498 (FB) Held overruled by (1968) All WR (HC) 713 (SC).

The Commissioner grants permission to sue and thereupon a suit is instituted. An order of the State Government passed after the institution of the suit revoking the permission is ineffective. In such a case the power of the State Government itself becomes exhausted after the institution of the suit, and the competence of the suit remains unaffected. Thus, even though the statute provides a remedy to the tenant against the order of the Commissioner granting permission, the event of the filing of the suit renders it illusory. The tenant gets no real relief under S. 7-F. The purpose of attaching finality to the order of the Commissioner by Section 3(4) apparently was the existence of an effective remedy under Section 7-F at the hands of the State Government. But, if in a given class of cases the remedy against an order is infructuous, much less adequate, the attachment of finality would not preclude the Civil Courts from adjudicating upon its validity or correctness. AIR 1965 All 498 (FB) held overruled by 1968 All WR (HC) 713 (SC) and (1968) All LJ 1023 (SC), Rel. on. (Paras 3 and 9 and 11)

(B) Houses and Rents — U. P. Temporary Control of Rent and Eviction Act (3 of 1947), Section 16 — Finality to Commissioner's order is attached by Sec-

tion 3 (4) and not Section 16 — Provisions do not affect orders of Commissioner — Civil Court competent to adjudicate such orders. (Para 4)

(C) Civil P. C. (1908), Section 9 — Jurisdiction of Civil Courts — Exclusion by Special Statutes — Principles for determination stated — U. P. Temporary Control of Rent and Eviction Act.

Although U. P. Temporary Control of Rent and Eviction Act does not contain an express bar to the jurisdiction of the Court, yet the statute attaches a finality to the order of the Commissioner. The Civil Courts would be entitled to see whether in making the impugned order, the statutory authority complied with the provisions of the statute or whether it acted in conformity with the fundamental principles of judicial procedure. The jurisdiction of the Civil Courts would be barred if it is found that the scheme and machinery of the Act provides adequate or sufficient remedy to the person aggrieved against the impugned order. AIR 1969 SC 78, Rel. on. (Para 6)

(D) Houses and Rents — U. P. Temporary Control of Rent and Eviction Act (3 of 1947), Section 3 (3) — Commissioner in hearing revision entitled to take into consideration subsequent events either of facts or law which are germane to the existence of power of revision — He can act on compromise. (1968) 22 STC 26 (All) Dissented from. (Paras 18 and 20)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 78 (V 56) =
1968-22 STC 416, Dhulabhai v.
State of Madhya Pradesh 5
(1968) 1968 All LJ 1023 = 1968 All
WR HC 892 (SC), Purshottam
Das v. Smt. Rajmani Devi 10
(1968) 1968 All WR HC 713 (SC),
Bhagwan Das v. Paras Nath 3, 9, 10
(1968) 1968-22 STC 26 (All), Commr.
Sales Tax, U. P. v. Ujjal Singh
Autar Singh 18
(1965) AIR 1965 All 498 (V 52) =
1964 All WR (HC) 617 (FB),
Bashi Ram v. Mantri Lal 9
(1947) AIR 1947 Nag 17 (V 34) =
ILR (1946) Nag 824 (FB), Jiwbai
v. Ram Kuwar Shrinivas 15
(1936) AIR 1936 Lah 583 (V 23) =
165 Ind Cas 274, Rasul Shah v.
Diwan Chand 16
(1891) ILR 13 All 272 = 1891 All
WN 61 (FB), Jang Bahadur Singh
v. Shankar Rai 15
S. P. Gupta, for Appellant; P. K. Misra,
for Respondent.

JUDGMENT:— The plaintiff-appellant came to Court for the ejectment of the defendant and for recovery of arrears of rent.

2. The plaintiff was the landlord of the accommodation in dispute of which the defendant was a tenant on Rs. 12.50 p. m.

The plaintiff applied for permission under Section 3 of the U. P. (Temporary) Control of Rent and Eviction Act (hereinafter called the Act). The Rent Control Officer after hearing the parties rejected this application on 15th April, 1960. The plaintiff preferred a revision. The Commissioner decided it on 11th July, 1960, and granted the requisite permission to sue the tenant in ejectment in terms of a compromise filed by the parties' counsel. The tenant then went up to the State Government under Section 7-F of the Act. He challenged the validity of the compromise. The State Government cancelled the Commissioner's order on 21st October, 1961. In the meanwhile, on 7th January, 1961, the plaintiff had filed the present suit. In defence, it was pleaded that the permission granted by the Commissioner having been revoked by the State Government the suit was not maintainable. The validity of the notice to quit was also contested.

The trial Court held that the State Government's order did not affect the maintainability of the suit. It was validly instituted because the Commissioner's permission was in operation on the date of the institution of the suit. The notice to quit was held valid. The suit was, therefore, decreed for ejectment and recovery of the arrears of rent. The defendant-tenant went up in appeal. The appellate Court held that the ultimate order passed by the State Government was the only effective order. Consequently the plaintiff had no permission to sustain the suit. It dismissed the suit for ejectment, but decreed the relief for arrears of rent.

3. Aggrieved, the plaintiff has come to this Court in second appeal. In *Bhagwan Das v. Paras Nath*, 1968 All WR (HC) 713 (SC) the Supreme Court has held that the Commissioner's order under Section 3 (3) of the Act remains effective notwithstanding its cancellation by the State Government, provided the State Government's order is passed after the institution of the suit. The present suit was, therefore, maintainable, and liable to be decreed on the basis of the Commissioner's order granting permission.

4. Mr. H. N. Seth for the respondent sought to challenge the correctness of the Commissioner's order. For the appellant Dr. Gyan Prakash raised an objection that in view of the provisions of the Act, the order of the Commissioner could not be called in question in a Civil Court. He relied on Sections 16 and 3 (4) of the Act. Section 16 provides that no order made under this Act by the State Government or the District Magistrate shall be called in question in any Court. This provision does not mention the Commissioner. It cannot, therefore, be said that there is any express exclusion of the Court's juris-

diction to adjudicate the correctness of an order made by the Commissioner. Section 3 (4) of the Act states that the order of the Commissioner under sub-section (3) shall, subject to any order passed by the State Government under Section 7-F, be final. Under this provision, the order of the Commissioner would be final so far as the Civil Courts are concerned. Under Section 7-F, the State Government can make such order as may appear to it necessary in the ends of justice. It can look into the propriety, correctness or legality of the Commissioner's order.

5. The true import and effect of statutory provisions, which expressly or by necessary implication exclude the jurisdiction of the Civil Court, was considered at length by the Supreme Court in *Dhulabhai v. State of Madhya Pradesh*, (1968) 22 STC 416 = (AIR 1969 SC 78). After considering the various decisions of the Privy Council and the Supreme Court *Hidayatullah, C. J.*, laid down the following principles:—

- "1. Where the statute gives a finality to the orders of the special tribunals the Civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
2. Where there is an express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the Civil Court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with action in Civil Courts are prescribed by the said statute or not.

3. Challenge to the provisions of the particular Act as ultra vires cannot be brought before tribunals constituted under that Act. Even the

High Court cannot go into that question on a revision or reference from the decision of the tribunals.

4. When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

5. Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

6. Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

7. An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

6. In the present case though there is no express bar to the jurisdiction of the Court, yet the statute attaches a finality to the order of the Commissioner. The present case would, therefore, be governed by the principles enunciated in paragraphs 1 and 6 mentioned above. The Civil Courts would be entitled to see whether in making the impugned order, the statutory authority complied with the provisions of the statute or whether it acted in conformity with the fundamental principles of judicial procedure. The jurisdiction of the Civil Courts would be barred if it is found that the scheme and machinery of the Act provides adequate or sufficient remedy to the person aggrieved against the impugned order.

7. The Act places restrictions on the right of the landlord to evict a tenant from an accommodation, on termination of his tenancy. He cannot sue for the ejection of the tenant without the permission of the District Magistrate unless he makes out one or the other ground mentioned in Section 3 of the Act. The order of the District Magistrate on an application for such a permission is subject to the orders that may be passed by the Commissioner in revision. In turn, the order of the Commissioner has been made subject to the jurisdiction of the State Government which can also go into facts, and pass an appropriate order. The Act, therefore, provides an heirarchy

of authorities to adjudicate upon and determine the rights and liabilities of the parties in relation to the question of ejection of a tenant from an accommodation. Prima facie, the Act provides a remedy against the orders of the Commissioner, and the constituted authority, namely the State Government, could determine the said rights or liabilities just as the Civil Courts would do.

8. But the remedy provided by the Act ought to be adequate or sufficient. If the remedy is, by reason of the inter-action of the provisions of the Act, nugatory or illusory, it cannot be said that the Act in substance or in reality gives any relief.

9. In 1968 All WR (HC) 713 (SC) the Supreme Court has held that a suit validly instituted after obtaining the requisite permission does not cease to be maintainable even if the State Government revokes it after the institution of the suit. If the State Government revokes the permission granted before the institution of the suit, then there would be no valid permission to sue and the suit would become incompetent. In other words, the State Government's power to revoke the grant of permission under S. 3 of the Act gets exhausted, once the suit has been validly instituted. In that respect, the Supreme Court overruled the Full Bench decision in *Bashi Ram v. Mantri Lal*, 1964 All WR (HC) 617 = (AIR 1965 All 498) (FB).

10. In a subsequent decision in *Purshottam Das v. Smt. Raj Mani Devi*, 1968 All LJ 1023 (SC) the Supreme Court approved its decision in the case of *Bhagwan Das*, 1968 All WR (HC) 713 (SC) (supra) but held that if even after the institution of a suit for ejection based upon a permission granted by the District Magistrate, the Commissioner revokes it but that order of the Commissioner is cancelled by the State Government, the permission granted by the District Magistrate revives and a suit which was pending when the State Government's order became effective, could be decreed.

11. The result of both these decisions of the Supreme Court appears to be that if the Commissioner grants permission to sue and thereupon a suit is instituted, an order of the State Government passed after the institution of the suit revoking the permission is ineffective. In such a case the power of the State Government itself becomes exhausted after the institution of the suit, and the competence of the suit remains unaffected. Thus, even though the statute provides a remedy to the tenant against the order of the Commissioner granting permission, the event of the filing of the suit renders it illusory. The tenant gets no real relief under Section 7-F. The purpose of attaching finality to the order of the Commissioner by Section 3 (4) apparently was the existence of an effective remedy under Section 7-F

at the hands of the State Government. But, if in a given class of cases the remedy against an order is infructuous, much less adequate, the attachment of finality would not preclude the Civil Courts from adjudicating upon its validity or correctness.

12. Here, the tenant feeling aggrieved against the order of the Commissioner granting the permission, went to the State Government under Section 7-F. The State Government in the interests of justice cancelled the order of the Commissioner; but, in view of the decisions of the Supreme Court the State Government's order provides no relief at all to the tenant. The Commissioner's order continues to be operative and binding between the parties. The tenant-appellant can hence legitimately require the Civil Court to go into the validity of that order.

13. Mr. H. N. Seth contended that the Commissioner in acting upon the compromise did not comply with the provisions of the Act and also did not act in conformity with the fundamental principles of judicial procedure, because he acted upon a compromise signed and verified by the counsel for the tenant who had no authority to do so. No provision of the Act expressly or by an implication authorises the Commissioner to decide the revision on the basis of a compromise made by a person who is not a party or his duly authorised agent. The action of the lawyer appearing for the appellant being without authority was not at all recognisable by the Commissioner. It was also urged that in view of the language of Section 3 (3), which confers jurisdiction on the Commissioner, the Commissioner could not in law decide the revision merely on the basis of a compromise entered into between the parties after the date of the order of the District Magistrate. He was obliged to look into the propriety, correctness and legality of the order passed by the District Magistrate and base his decision exclusively on such grounds.

14. The defendant tenant engaged one Sri T. J. K. Ayyer, Vakil, as his counsel before the Rent Control and Eviction Officer. The counsel concerned filed a vakalatnama (power of attorney) duly signed by the tenant Mohan Lal. The vakalatnama authorised the counsel to do various kinds of acts in that case. It expressly authorised him to compromise the case. The vakalatnama, authorised the counsel to act for the appellant till the conclusion of the case.

15. For the appellant it was urged that firstly the revision before the Commissioner was a continuation of the case initiated before the Rent Control and Eviction Officer and so the vakalatnama in favour of Mr. Ayyer enured in his favour in the revision also, especially when by a

writing signed by him, Mr. Ayyer informed the Commissioner that he was appearing for Mohan Lal in the revision also. In the next place it was urged that all counsel in India have an inherent and implicit power to compromise the case on behalf of their clients and even if the vakalatnama be deemed not to be available in the revision, Mr. Ayyer had the requisite and the necessary authority in himself to compromise the case without specific instructions or authority from his client.

For the respondent, Dr. Gyan Prakash placed reliance upon the Full Bench decision of Nagpur High Court in *Jiwibai v. Ramkuwar Shrinivas*, AIR 1947 Nag 17 (FB). The Full Bench held that counsel in India, whether Barristers, Advocates, or pleaders, have inherent powers, both to compromise claims, and also to refer disputes in Court to arbitration, without the authority or consent of the client, unless their powers in this behalf have been expressly countermanded; and this rule applies whether the law requires a written authority to "act" or "plead" or not. But, I am afraid, I cannot give effect to this Full Bench decision, because, a Full Bench of our Court has ruled to the contrary. In *Jang Bahadur Singh v. Shankar Rai*, (1891) ILR 13 All 272 (FB) it was held that an advocate of the High Court has by virtue of his retainer and without need of further authority full power to compromise a case on behalf of his client; but, the Bench specifically observed at page 277 that when the authority of vakils to bind their clients is called in question that authority must depend entirely on the terms of the particular vakalatnama. That would indubitably suggest that vakils were not recognised to have any inherent power to compromise the case on behalf of the client. Mr. Ayyer signed the vakalatnama as well as his memorandum of appearance as a vakil. There is nothing to suggest that he was an advocate of the High Court. He could not, therefore, claim any inherent powers.

16. For the plaintiff-appellant it was also urged that in view of the decision of the Lahore High Court in *Rasul Shah v. Diwan Chand*, AIR 1936 Lah 583 that an appeal is a continuation or a stage in the progress of the suit and the power of attorney would continue to govern the purpose in appeals. The vakalatnama executed by the tenant-appellant in favour of Mr. Ayyer before the Rent Control and Eviction Officer would govern him in the revision pending before the Commissioner, especially when Mr. Ayyer informed the Commissioner that he was appearing for the appellant in the revision. Mr. Seth countered this submission and argued that the Lahore case is based upon an interpretation of O. III, R. 4, Civil P. C. Clause (3) of that R. 4 expressly by a fic-

whether the provisions of Sections 48 and 49 have been complied with. A civil Court is not granting permission to sell or purchase; all that it is concerned with is to direct the defendant to apply for permission and on the permission being obtained, to execute a sale deed. That apart, this point has not been taken either in the suit or before the appellate Court; nor has it been taken as one of the grounds of appeal. On the second question, we cannot interfere in second appeal with the findings of fact; nor have we the least doubt that, that finding has been properly arrived at after a due appreciation of the evidence. The third point also, in our view, has no validity, having regard to what we have stated above. There is nothing inconsistent with the grant of specific performance in the manner stated by us.

40. Sri Upendralal Waghray has urged a further contention based on Section 50-B of the Tenancy Act introduced by the Amending Act, 6 of 1964. Section 50-B (1) is as follows:—

"Notwithstanding anything in this Chapter, where any alienation or other transfer of agricultural land took place on or after the 10th June 1950, but before the 21st February, 1961, and where possession of such land was given to the alienee or transferee before the 21st February, 1961, he may, within one year from such date as may be prescribed, apply to the Tahsildar for a certificate declaring that such alienation or transfer is valid."

The other provisions of that section deal with the procedure to be followed on receipt of such an application. On the basis of this provision, he contends that the only course open to the vendee was to apply to the Tahsildar within one year from the date of the commencement of the amending Act, and that the civil Court has no jurisdiction to entertain a suit in respect thereof, as the exclusive jurisdiction under Section 99 is vested in the Tahsildar alone.

It is not possible to read this section as ousting the jurisdiction of the Civil Court. This provision is intended to legalise de facto transfers even without resort to Section 47. This being the intention of the amending legislation, and there being no express prohibition ousting the civil Court's jurisdiction, the civil Court's jurisdiction is not barred. Once the impediment under Section 47 is taken away, there is no bar for a party from approaching a civil Court for an alternative though expensive remedy, as its jurisdiction is not taken away. Apart from this, this point was not raised in any of the Courts below, and, if it has been raised, the purchaser would have had a choice to have recourse to Section 50-B within one

year after the commencement of the amending Act. This argument therefore, fails. The appeal is dismissed and the decree of the learned Chief Judge, City Civil Court, granting specific performance, is confirmed. The respondent will have his costs in this appeal.

41. A. S. 26/63 arises out of a suit for perpetual injunction. The suit as framed does not lie, and the appeal is accordingly dismissed with costs. Since we are dismissing the appeal, the further contention that there should be a finding on the question whether the agreement was executed and whether possession was delivered, need not be gone into.

42. C. R. P. 1792/66 is also dismissed with costs, as the orders of both the Sub-Collector as well as the Collector, directing summary eviction under Section 98 cannot be interfered with, as there can be no alienation without the prior permission of the Tahsildar. In cases where we have allowed specific performance, four months' time is granted to the defendant to make the application.

Order accordingly.

AIR 1970 ANDHRA PRADESH 33

(V 57 C 4)

KONDAIAH, J.

Pokuru Rangaiah, Appellant v. Pokur Chinnaiah and another, Respondents.

Second Appeal No. 348 of 1965, D/- 8-7-1968, against decree of Dist. J., Nellore D/- 3-9-1964.

(A) Hindu Law — Maintenance — Hindu woman's right to maintenance and in particular from stepson—(Hindu Adoptions and Maintenance Act (1956), Ss. 18, 21, 22).

Obiter — Under Hindu Law the following were the principles governing the Hindu woman's right to maintenance and in particular from a stepson—(1) Where one of the members of an undivided Hindu family dies leaving a widow and other coparceners, the widow shall have a right of maintenance against the surviving coparcener or coparceners for the share or interest of her deceased husband in joint family property which was in his hands. (2) The obligation to maintain a widow depends upon the taking of the deceased husband's share in the family estate and she will have no right to claim maintenance out of the shares that fall to the other members. (3) The right of a Hindu woman or widow to maintenance is founded on relationship. (4) A stepson has no statutory obligation to maintain his stepmother unless any portion or share of his father in the joint family property is allotted, devolved or taken by him, whereas in the case of a son, natural or adopted, and a hus-

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band, the primary liability to maintain his mother or wife, as the case may be, is a matter of a personal obligation arising out of relationship, irrespective of their possession of ancestral or self-acquired property. Case law discussed.

(Paras 12, 20)

Editorial Note : But now see Explanation to S. 20, Hindu Adoptions and Maintenance Act (1956).

(B) Hindu Law — Maintenance — Charge created by decree for maintenance obtained by wife of manager of joint Hindu family over joint family property — Charge is binding on her stepson subsequent to partition of joint family property. AIR 1944 Bom. 235 (2) Dissent. from.

With regard to the effect of a charge created by a decree for maintenance obtained by the wife of the manager of a joint Hindu family over the joint family property, the following principles of law emerge — (1) A maintenance holder can obtain a decree for maintenance against a member of the undivided family and create a charge over the joint property when their family was joint. (2) When once her right to maintenance has been declared, defined and reduced to a certainty by a decree of Court, such right cannot be taken away by any subsequent alienation of such property by or partition of such property effected amongst the members of that family. (3) Any person including the stepson of a maintenance holder, who was a member of the Hindu joint family at the time of the institution of the maintenance suit and the creation of a charge towards the decree obtained by her on the joint family properties, cannot question her right over such properties, in case such properties or any portion of the same are allotted to him in a subsequent partition or devolved on him. (4) The charge created on those properties prior to the division of the family will be subsisting and continue till the lifetime of the maintenance holder and the rights of any third party, if any, in such properties will be only subject to the charge created in her favour. Sir Raymond West in his "A digest of the Hindu Law" p. 244 and Mayne's Treatise on Hindu Law and Usage (11th Ed.) p. 882 Ref. (1911) 21 Mad LJ 493 & (1907) ILR 30 Mad 324 & AIR 1920 Mad 722 & AIR 1940 Mad 458 Rel. on, AIR 1939 Mad 781 (FB), Disting. AIR 1944 Bom 235 (2), Dissent. from. (Para 20)

Cases Referred: Chronological Paras

- (1965) AIR 1965 SC 1150 (V 52)=
 (1965) 1-SCJ 579, *Devi Lal Modi v. Sales Tax Officer, Ratlam* 19
 (1964) AIR 1964 SC 1013 (V 51)=
 (1963) Supp 1 SCR 172, *Amalga-*

- mated Coal Fields, Ltd. v. Janapad Sabha, Chhindwara* 19
 (1964) AIR 1964 Andh Pra 105
 (V 51)=(1963) 2 Andh WR 400,
Chebrolu Satyanarayanamurthy v. Chebrolu Ramasubbamma 3, 11
 (1944) AIR 1944 Bom 235 (2)
 (V 31)=46 Bom LR 411, *Laxmi Bai v. Radha Bai* 3, 10, 19
 (1940) AIR 1940 Mad 458 (V 27)=
 (1940) 1 Mad LJ 204, *Akki Dodda Basappa v. Akki Mallamma* 18, 19
 (1939) AIR 1939 Mad 781 (V 26)=
 ILR (1939) Mad 877 (FB), *Jonnala Lakshmiddevamma v. Jonnala Veera Reddy* 3, 9, 10, 19
 (1920) AIR 1920 Mad 722 (V 7)=
 ILR 43 Mad 800, *Somasundaram Chetty v. Unnamalai Ammal* 17
 (1911) 21 Mad LJ 493 = 2 Mad WN 148, *T. Subbarayudu Chetty v. T. Kamala Valli Thayaramma* 15
 (1907) ILR 30 Mad 324 = 17 Mad LJ 180, *Subbanna Bhatta v. Subbanna* 16
 (1904) ILR 27 Mad 45, *Jayanti Subbiah v. Alamelu Mangamma* 3, 7
 (1889) ILR 16 Cal 758=16 Ind App 115 (PC), *Hemangini Dasi v. Kedar-nath Kundu Chowdry* 3, 8
 G. Venkatarama Sastry, for Appellant;
 K. Raghava Rao, for Respondent No. 2.

JUDGMENT: This second appeal raises an interesting question of law as to whether a charge created by a decree for maintenance obtained by the wife of the manager of a joint Hindu family over the joint family property is binding on the stepson of the manager who was not a party to the suit for maintenance.

2. The facts are few and they are not in dispute. This appeal is by the plaintiff who sued for partition and possession of the suit property free of charge against the 1st defendant, his father, and the 2nd defendant, his step-mother. The 1st defendant became ex parte. The 2nd defendant contested the suit contending inter alia that the charge created by her maintenance decree in O. S. 196/55, Munsif Court, over the suit property will be binding on the plaintiff and she would be entitled to have a charge on the portion of the property that would be allotted to the share of the plaintiff. The trial Court dismissed the suit. The appellate Court held that the plaintiff was entitled to partition and possession of his half share in the plaint schedule property subject to the charge already created by the maintenance decree. Aggrieved by the judgment and decree of the lower appellate Court, the plaintiff has filed the present second appeal.

3. Mr. Seetharamaiah for the appellant strenuously contends that the 2nd defendant who is the step mother of the plaintiff cannot claim maintenance against

the plaintiff, her step-son, as there is no personal liability for him to maintain her, unless a share of her husband is allotted to him, and cited (1904) ILR 27 Mad 45, (1889) ILR 16 Cal 758 (PC), AIR 1939 Mad 781; AIR 1944 Bom 235 (2), (1963) 2 An. WR 400 = (AIR 1964 Andh Pra 105), and some passages from Mayne's and Trevelyan's Hindu Law in support of his plea that there can be no valid charge in respect of plaintiff's share. Mr. Raghava Rao, for the contesting respondent, contended contra.

4. The real question that arises for determination is whether a charge created by the decree for maintenance obtained by the 2nd defendant, the wife of 1st defendant, over the suit property towards her maintenance when the defendants 1 and 2 constituted members of the joint family, is binding on the plaintiff, a step-son, who was not a party to the maintenance suit.

5. I shall presently consider the legal position with regard to the Hindu woman's right to maintenance and in particular from a step-son and the effect of the charge created over the suit property by virtue of the prior decree.

6. Sir Raymond West, in his "A Digest of the Hindu Law," at page 244, enunciates that "a widow's claim extends only to the interest of her deceased husband in the undivided property." A passage in Hindu Law by Sir Ernest John Trevelyan (second edition) at pages 78 and 79 reads thus:

"A widow who succeeds to no property as heir to her husband, is (whether she has or has not a son) entitled to maintenance out of the whole of the property in which her husband was interested as owner or coparcener at the time of his death, or in which he would have been so interested if he had not been disabled from inheritance, or from being a coparcener, whether she have property of her own or not."

A passage in Mayne's Treatise on Hindu Law and Usage (11th edition) at Page 882 reads thus:—

"While a widow is entitled to maintenance from her son in her character as mother, even if he is not in possession of ancestral property, a similar right against her father-in-law is not admitted. The Smritichandrika expressly states that the obligation to maintain the widow is dependent on taking the property of the deceased. She is entitled to be maintained where her husband's separate property is taken by his male issue. Where, at the time of his death, he was a coparcener she is entitled to maintenance as against those who take her husband's share by survivorship."

7. In Jayanti Subbiah v. Alamelu Mangamma, (1904) ILR 27 Mad 45 at Pp. 48

and 49. Bhashyam Ayyangar, J. speaking for the Division Bench, ruled thus:—

"When an undivided Hindu family consists of two or more males related as father and sons or otherwise and one of them dies leaving a widow, she has a right of maintenance against the surviving coparcener or coparceners, quoad the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving coparcener or coparceners and though such right does not in itself form a charge upon her husband's share or interest in the joint family property, yet when it becomes necessary to enforce or preserve such right effectually, it could be made a specific charge on a reasonable portion of joint family property such portion of course not exceeding her husband's share or interest therein."

8. In Hemangini Dasi v. Kedarnath Kundu Chowdry, (1889) ILR 16 Cal 758 (PC) the Privy Council at p. 766 ruled thus:

"The right of a widow to maintenance is founded relationship and differs from debts...where there are several groups of sons, the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made, the law appears to be that their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her. The step-sons are not under the same obligation."

9. In Jonnala Lakshmiddevamma v. Jonnala Veera Reddi, AIR 1939 Mad 781, the Full Bench of the Madras High Court, while considering the question of liability to maintain a widow after the partition of the joint family, has held that the obligation to maintain the widow depends upon the taking of her deceased husband's share in the family estate and hence, there can be no right in the widow to claim to be maintained out of the shares which fall to the other members.

10. Relying upon the principle enunciated by the Full Bench of the Madras High Court in AIR 1939 Mad 781, a Division Bench of the Bombay High Court, in Laxmibai v. Radhabai, AIR 1944 Bom 235 (2) held that the widow has no vested right on the shares of other members of the family subsequent to the partition except to the share of the persons who got the share of her husband.

11. In Chebrolu Satyanarayanamurthy v. Chebrolu Ramasubbamma (1963) 2 An. WR 400 = (AIR 1964 Andh Pra 105) a Division Bench of this Court has held that the primary liability to maintain a wife by the husband or of the mother by her sons is a matter of personal obligation arising out of relation-

ship between them irrespective of their possession of ancestral or self-acquired property.

12. On the basis of the aforesaid authorities, Mr. Seetharamaiah for the appellant contends that the plaintiff being only the step-son of the 2nd defendant, is not legally bound to maintain the 2nd defendant, as he has not taken or is asking for any share or interest in the properties that are to be allotted to his father who has to maintain the 2nd defendant, after the partition. I am entirely in agreement with the legal principle that a step-son is not bound to maintain his stepmother, as long as he has not taken or asking for the share of her husband who is alive. It is also well settled that a son has to maintain his mother irrespective of the fact whether he inherits any property or not from his father, as he has, on the basis of relationship, the obligation to maintain his mother who has given life to him; where as the position of a step-son is altogether different. Equally so, there can be no dispute with the proposition that the obligation to maintain the Hindu widow depends on the taking of the deceased husband's share in the family estate and to whomsoever her husband's share is allotted, that person will have to maintain her.

13. The moot point for decision is not whether a step-son is bound to maintain legally his stepmother, although he has not been allotted in the partition of the family properties any portion of the property that has fallen to the share of her husband. In the instant case, the 2nd defendant has admittedly obtained a decree for maintenance and a charge was created on the joint family properties before partition of the plaintiff and the 1st defendant. Admittedly when the decree for maintenance and the charge on the joint family properties have been obtained by the wife, the 2nd defendant, the plaintiff and the 1st defendant were joint and the properties on which the charge has been created were joint. On the facts and in the circumstances, the real question that arises for determination in this appeal is whether the decree already obtained, pursuant to which a charge has been created on the joint family properties, will cease in so far as the plaintiff is concerned, subsequent to the date of partition of the joint family properties by him with his father, the 1st defendant.

14. It is relevant and necessary at this stage to consider the impact of subsequent alienation or partition of the joint family properties in respect of which a charge has already been created by a decree obtained by a Hindu woman or a widow towards her maintenance against a member of the Hindu joint family.

I must say that the law in so far as Madras State is concerned, it is fairly settled as seen from the authoritative pronouncements of the Madras High Court, which I shall presently discuss.

15. In *T. Subbarayudu Chetty v. T. Kamala Valli Thayaramma*, (1911) 21 Mad LJ 493, a Division Bench of the Madras High Court ruled that

"a partition effected among the members of a joint Hindu family subsequent to the institution of maintenance suit by an undivided coparcener's widow will not affect her right to a decree charging her maintenance on the whole property of the joint family as it was on the date of the plaint."

16. In *Subbanna Bhatta v. Subbanna*, (1907) ILR 30 Mad 324, it has been held that

"a decree for maintenance obtained against a member of an undivided family, can, after his death, be executed against joint property in the hands of the other members. . . . , if the decree created a charge on the joint family property."

17. In *Somasundaram Chetty v. Unnamalai Ammal*. ILR 43 Mad 800 = (AIR 1920 Mad 722), it was held that a charge created on the joint family properties by a decree obtained by the widow of a member of the joint family towards her maintenance takes precedence over the right of a subsequent purchaser of the same properties in execution of a money decree binding on the family.

18. In *Akki Dodda Basappa v. Akki Mallamma*, 1940-1 Mad LJ 204 = (AIR 1940 Mad 458), the 1st defendant, the widow of a coparcener who died in or about 1918 leaving her and the 2nd defendant, a son by his first wife, and his brother, obtained a maintenance decree in 1929 and got a charge over the joint family properties. Subsequently, her husband's brother, who partitioned the properties with her step-son, filed a suit in the year 1935 that the charge created pursuant to the maintenance decree in favour of the widow was no longer binding on the properties allotted to his share as he has no liability to maintain his brother's wife, as his brother's share has been allotted to his son. In those circumstances, the learned Judge Venkataramana Rao, speaking for the Bench, laid down the law succinctly at page 207 (of Mad LJ) = (at p. 460 of AIR) thus:

"when a member of an undivided family dies leaving him surviving his widow and his sons and brothers, her right to maintenance is against the entire joint family composed of the sons and brothers of the husband. It may be that if she waits until a partition takes place she may have a lesser right, that is, instead of a right over the entire family, a right

over those persons who take her husband's share. But if before a partition is effected, she gets her right declared, defined and reduced to a certainty by a decree of Court, her rights cannot be taken away by any subsequent partition effected among the members of the family".

19. I am unable to agree with the contention of Mr. Seetharamaiah that the decision in (1940) 1 Mad LJ 204 = (AIR 1940 Mad 458), does not lay down the correct law, as it is contrary to the principles laid down by the Full Bench in AIR 1939 Mad 781 (FB). The basis and strength for this plea of Mr. Seetharamaiah is the decision of the Bombay High Court in AIR 1944 Bom 235 (2) which has dissented from the view of the Madras High Court in (1940) 1 Mad LJ 204 = (AIR 1940 Mad 458) and relied upon, the following passage at page 782 in AIR 1939 Mad 781:

"If the obligation to maintain the widow depends on the taking of the deceased husband's share in the family estate, it follows that there can be no right in the widow to claim to be maintained out of the shares which fall to the other members."

It is true that a Division Bench of the Bombay High Court, in AIR 1944 Bom 235 (2) has taken the contrary view from that of the Madras High Court in (1940) 1 Mad LJ 204 = (AIR 1940 Mad 458). The learned Judges of the Bombay High Court relied upon the passage at page 782 in AIR 1939 Mad 781, referred to above and applied that principle to the case of an undivided family. With great respect to the learned Judges of the Bombay High Court, I express my respectful dissent from the view expressed by their Lordships in AIR 1944 Bom 235 (2). Their Lordships have not noticed the very next sentence in the Full Bench decision of the Madras High Court after the passage relied upon in support of their decision, which clarifies the position thus:—

"While the family remains undivided the position is different. The property is held jointly and of necessity the amount required for a widow's maintenance has to be paid out of the estate regarded as a whole . . ."

The above passage would clearly show that the principle of law laid down by the Full Bench to the effect that there can be no right in the widow to claim to be maintained out of the shares which fall to the other members, has to be confined only to the case of the divided members of the joint family and that principle will not apply to a case where admittedly the joint family was in existence. The general observations of the Supreme Court, in *Amalgamated Coal-*

fields, Ltd. v. Janapada Sabha, Chhindwara, AIR 1964 SC 1013 that

"constructive res judicata was an artificial form of res judicata enacted by Section 11 of the Code of Civil Procedure and it should not be generally applied to writ petitions filed under Article 32 or Article 226"

as observed by Chief Justice Gajendragadkar in *Devilal Modi v. Sales Tax Officer*, (1965) 1 SCJ 579 = (AIR 1965 SC 1150)

"must be read in the light of the important fact that the order which was challenged in the second writ petition was in relation to a different period and not for the same period as was covered by the earlier petition."

Hence, any general observations made by the Court in a particular case must be read in the light of the facts and circumstances of that case and the same cannot have universal application irrespective of the facts and circumstances of the case. The principle enunciated by the Full Bench of the Madras High Court in AIR 1939 Mad 781 has no application to the facts of the present case as we are now dealing with the case of a widow who secured a charge on the joint family properties when the joint family was in existence. I am unable to agree with Mr. Seetharamaiah that there is any conflict between the Full Bench decision in AIR 1939 Mad 781 and the subsequent Division Bench decision in (1940) 1 Mad LJ 204 = (AIR 1940 Mad 458).

20. From the aforesaid discussion, the following principles of law emerge:—

(1) Where one of the members of an undivided Hindu family dies leaving a widow and other coparceners, the widow shall have a right of maintenance against the surviving coparcener or coparceners for the share or interest of her deceased husband in joint family property which was in his hands.

(2) The obligation to maintain a widow depends upon the taking of the deceased husband's share in the family estate and she will have no right to claim maintenance out of the shares that fall to the other members.

(3) The right of a Hindu woman or widow to maintenance is founded on relationship.

(4) Where there are several groups of sons, the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate, but when a partition is made, their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her.

(5) A step-son has no statutory obligation to maintain his step mother unless any portion or share of his father in the

joint family property is allotted, devolved or taken by him, whereas in the case of a son, natural or adopted, and a husband, the primary liability to maintain his mother or wife as the case may be is a matter of personal obligation arising out of relationship, irrespective of their possession of ancestral or self-acquired property.

(6) A maintenance holder can obtain a decree for maintenance against a member of the undivided family and create a charge over the joint property when their family was joint.

(7) When once her right to maintenance has been declared, defined and reduced to a certainty by a decree of Court, such rights cannot be taken away by any subsequent alienation of such property by, or partition of such property effected amongst, the members of that family.

(8) The heart of the matter is that the charge secured in lieu of maintenance by a Hindu woman or a widow on the joint family properties is not defeated by any subsequent alienation or partition of those properties, but it is liable to be enforced in respect of such properties in whosoever hands they may be.

(9) Any person including the step-son of a maintenance holder, who was a member of the Hindu joint family at the time of the institution of the maintenance suit and the creation of a charge towards the decree obtained by her on the joint family properties, cannot question her right over such properties, in case such properties or any portion of the same are allotted to him in a subsequent partition or devolved on him.

(10) The charge created on those properties prior to the division of the family will be subsisting and continue till the lifetime of the maintenance holder and the rights of any third party, if any, in such properties will be only subject to the charge created in her favour.

21. In the present case, when the maintenance decree has been obtained by the 2nd defendant against the 1st defendant, her husband, the family consisting of the 1st defendant and his son the plaintiff was joint and the charge created on the joint family property at that time was perfectly valid and justifiable. Any subsequent alienation of the charged property by the joint family to any third party even for valid consideration would be only subject to the charge which was created and subsisting on the date of alienation. Subsequent partition of the family property would not affect the rights of the maintenance holder which have been declared, defined and reduced to a certainty by a decree of Civil Court. In the circumstances and for the reasons stated above, I have no hesitation to hold

that there is no merit in the contention of the appellant. Applying the aforesaid principles, I must hold that the plaintiff-appellant in this case cannot sustain his claim to have his share declared in the suit property without any charge that has been created already in favour of the stepmother by the maintenance decree, when admittedly the plaintiff and his father were joint.

22. In the result, this appeal fails and is dismissed with costs. No leave.

Appeal dismissed.

**AIR 1970 ANDHRA PRADESH 38
(V 57 C 5)**

VENKATESWARA RAO, J.

Paramatmuni Hanumantha Rao, Appellant v. Official Receiver, Guntur, Respondent.

A. A. A. Os. Nos. 90 and 91 of 1966, D/- 27-9-1968, against order of Additional District J., Guntur, D/- 3-3-1966.

(A) Provincial Insolvency Act (1920), Ss. 4 and 53 — Transfer by insolvent only voidable — Transferee has full rights in respect of property till transfer in his favour is annulled — Court can, under S. 4 consider whether transfer by transferee from insolvent was valid.

One Seshachalam settled his lands and house in favour of his sister's son Seetharama on 12-6-58. The brother of the settlee and another creditor moved the sub-court at Ongole to adjudge Seshachalam as an insolvent treating the above settlement as an act of insolvency. Seshachalam was adjudged insolvent on 29-9-1959. On 17-3-60, Seetharama sold the lands and house to Hanumantharao and Parameswarudu respectively. On 17-12-62 the Official Receiver in whom the estate of Seshachalam vested, applied under Section 53 of the Provincial Insolvency Act for annulment of the settlement by the insolvent in favour of Seetharama. The vendees were, however, not impleaded in such application. The settlement was annulled and the Official Receiver moved to sell the properties, whereupon the vendees applied under Section 4 of the Act for declaration of their title and for injunction the Official Receiver from interfering with their peaceful possession of the properties. The Official Receiver, inter alia, contended that the vendees were bound by the order of annulment passed in his application under Section 53 filed on 17-12-62.

Held, (1) that the settlement by Seshachalam in favour of Seetharama was, under the provisions of Section 53 of the Act, only voidable and not void and that the vendees were not, therefore, bound by the order of annulment passed by the Court. (Para 9)

Seshachalam was competent to exercise all the rights which the owner of a property is entitled to exercise including the right to further alienate the same, till the transfer is annulled. It is true that the transfer in favour of Seetharama had since been annulled but it could not be said that the vendees were bound by that order as they purchased the property from Seetharama long before then and at a time when he had the right and power to deal with the property as he pleased. The mere fact that the vendees claimed from Seetharama did not justify the contention that they were bound by the order of annulment when their transferor ceased to have any interest whatsoever in the property long before 17-12-62 when the Official Receiver moved the Court to annul the settlement.

(Paras 8 & 9)

and (2) that, notwithstanding the above, the relief as to vendees' title and injunction against Official Receiver could not be granted without the Court going into the question whether the sales in favour of the vendees were valid and were binding on the Official Receiver. Section 4 of the Act confers on the Insolvency Court very wide powers to decide all questions whether of title or priority, or of any nature whatsoever and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. The above is not only within the competence of the insolvency Court but is also necessary. [Matter remitted for consideration of the question.] AIR 1956 Ali 68 & AIR 1943 PC 130 Dist; AIR 1960 SC 70 & AIR 1932 Mad 513 & AIR 1964 Ker 183, Foll. AIR 1960 Punj 24, Ref.

(Para 10)

(B) Provincial Insolvency Act (1920), S. 53 — Provision compared with S. 55 of the Presidency Towns Insolvency Act— (Presidency Towns Insolvency Act (1909), S. 55).

Under Section 55 of the Presidency Towns Insolvency Act the transfer is void against the Official Assignee, whereas it is only voidable as against the Official Receiver under the corresponding Section 53 of the Provincial Insolvency Act. AIR 1960 SC 70 Foll. (Para 7)

(C) Provincial Insolvency Act (1920), Ss. 4 and 53 — Scope.

Under S.53 of the Provincial Insolvency Act the Court has power to deal with the transfers by the insolvent alone and not with those by his transferees. Under Section 4, the latter transfers could also be dealt with. (Para 9)

It is further not correct to say that the transfers by the insolvents' transferees can be dealt with by the Court only on an application by the Official Receiver. Such matters can well be gone into and decided in an application under Section 4 by the transferees claiming declaration of title and injunction. AIR 1932 Mad 513, Foll. (Paras 9 & 10)

Cases Referred: Chronological Paras
 (1964) AIR 1964 Ker 183 (V 51) =
 1963 Ker LJ 738. Cheriyan of
 Poothikottu v. Mathan Chacko 9
 (1960) AIR 1960 SC 70 (V 47) =
 (1960) 1 SCR 616, Ramaswamy
 v. Official Receiver 5, 7, 8, 9
 (1960) AIR 1960 Punj 24 (V 47),
 Kehar Singh v. Raghbir Singh 7
 (1956) AIR 1956 Ali 68 (V 43),
 Sheo Raj v. Abdul Aziz 7
 (1943) AIR 1943 PC 130 (V 30) =
 70 Ind App 93, Md. Siddique v.
 Official Assignee, Calcutta 7
 (1937) AIR 1937 Rang 369 (V 24),
 Hla Gyaw U v. U Tun Kyaw
 Sen 8
 (1932) AIR 1932 Mad 513 (V 19) =
 36 Mad LW 219, Chidambaram v.
 Subramania 9

M. Dwaraknath for Miss K. Padmaja, for Appellant (in each of the appeals); G. V. R. Mohan Rao, for Respondents (in both appeals).

JUDGMENT: These appeals arise out of proceedings under Section 4 of the Provincial Insolvency Act.

2. One Paramatmuni Seshachalam settled his lands and house in favour of his sister's son, Nimmaraju Seelaramachandrarao, by a registered deed dated 12-6-58. Janakirammarao, the brother of the settlee and another creditor of Seshachalam moved the Subordinate Judge, Ongole, in I. P. 21/58 for the adjudication of Seshachalam as an insolvent treating the settlement made by him in favour of Seetharamachandrarao as an act of insolvency. Seshachalam was adjudged insolvent on 29-9-59. On 17-3-60, Paramatmuni Hanumantharao purchased from Seetharamachandrarao the lands which the insolvent settled on him, for Rs. 600/- under a registered sale deed, Ex. A-1. On the same day, Seetharamachandrarao sold the house, which is the only other item of property that was settled on him by the insolvent, to Appala Parameswarudu under Ex. A-2. On 17-12-62, the Official Receiver, in whom the estate of Seshachalam vested consequent on his adjudication as insolvent, filed I. A. 351/62 for annulment of the settlement made by the insolvent in favour of Seetharamachandrarao, under Section 53 of the Provincial Insolvency Act.

He did not however implead the vendees under Exs. A-1 and A-2 as parties

to this application though they purchased the properties from Seetharamachandrarao more than two years before then. This application was allowed and the settlement effected by Seshachalam in favour of his nephew was annulled on 17-12-63. When the Official Receiver thereafter commenced to take steps for bringing to sale, the properties which were the subject matter of the settlement in favour of Seetharamachandrarao, the vendees under Exts. A-1 and A-2 moved the Subordinate Judge, Ongole, under S.4 of the Provincial Insolvency Act, in I. A. Nos. 1597 and 1599 of 1964 for declaration of their title to the properties and also for an injunction restraining the Official Receiver from interfering with their peaceful possession and enjoyment of the same. These petitions were opposed by the Official Receiver who contended inter alia that the petitioners were bound by the order of annulment passed in I. A. 351/62. The learned Subordinate Judge negatived this contention on the ground that the petitioners were not parties to I. A. 351/62 and that the transfers which they obtained under Exs. A-1 and A-2 from Seetharamachandrarao, being only voidable, will continue to be valid till they are set aside and accordingly allowed I. A. Nos. 1597 and 1599 of 64 observing at the same time that "The Official Receiver is at liberty to file a petition under Section 53 or Section 4 of the Provincial Insolvency Act challenging these alienations in favour of the petitioners." On appeal by the Official Receiver, the learned Additional District Judge, Guntur, held that the settlement effected by the insolvent in favour of Seetharamachandrarao was void and that the petitioners are therefore bound by the order which the Official Receiver obtained in I. A. 351/62 though they were not eo nomine parties to that application. He accordingly allowed the appeals and dismissed I. A. Nos. 1597 and 1599 of 64. Aggrieved by this decision, the petitioners in I. A. Nos. 1597 and 1599 of 64 have preferred these Civil Miscellaneous Second Appeals as, according to them, the finding arrived at by the lower appellate Court that the settlement effected by Seshachalam in favour of their transferor was void and that they are consequently bound by the order made in I. A. 351/62 notwithstanding their not having been impleaded as parties thereto, is contrary to law.

3. The points that therefore arise for consideration in these appeals are (1) whether the annulment of the transfer in favour of Seetharamachandrarao, in I. A. 351/62, is binding on the appellants and (2) if not, whether they are entitled to the relief of declaration and injunction sought by them.

4. The answer to point No. 1 turns on the question as to whether the settlement by Seshachalam in favour of Seetharamachandrarao from whom the petitioners purchased the properties is void or only voidable. If it should transpire that the transfer is void, the appellants would necessarily be bound by the order of annulment made in I. A. 351/62 as they cannot get better rights than what their transferor himself had in the properties and as a void transfer is no transfer at all in the eye of law. If, on the other hand, the finding should be that the transfer was only voidable, implying that it is valid till it is avoided, the annulment order, which the Official Receiver obtained in I. A. 351/62, would normally not bind the appellants who were admittedly not parties to it.

5. Great reliance is placed for the appellants on *Ramaswami v. Official Receiver*, AIR 1960 SC 70, in support of their contention that the transfer effected by the insolvent in favour of Seetharamachandrarao was only voidable and not void and that in this view, the order of annulment, which the Official Receiver obtained without impleading them as parties, cannot be considered to be binding on them. In the decision cited, it was held:

"Assuming that when an order is made under S. 54 of the Provincial Insolvency Act annulling a transfer (transfer of a decree in this case), the transfer stands annulled as from the date it was made, even so, the transfer stands till it is annulled and therefore, till then, the transferee has all the rights in the property transferred. So long as the transferee has such rights he is competent to exercise them and such exercise would be legal and fully in accordance with law."

6. This decision was considered inapplicable to the case by the learned Additional District Judge as, according to him, the question that arose for consideration there was whether or not execution petitions filed by the transferee of a decree from the insolvent, prior to the date of annulment of that transfer, would serve as steps in aid of execution to save the petition for execution, filed by the Official Receiver after annulment of the transfer, from the bar of limitation. In that case, one Venkatachalam Chettiar transferred a decree held by him, in favour of his mother, Meenakshi Atchi on 3-2-36. He was subsequently adjudicated insolvent by an order dated 7-1-39 on a petition presented for the purpose on 26-3-36, treating the transfer of the decree by him in favour of his mother as an act of insolvency. The said transfer was annulled by an order dated 9-4-43 in an application made by the Official Receiver under Section 54 of the Provincial Insolvency Act. The Official Receiver

ver thereafter applied for execution of the decree on 27-9-43. This petition was resisted by the judgment-debtors on the ground that it was barred by limitation. The Official Receiver sought to rely upon two earlier applications for execution filed by Meenakshi Atchi, the assignee prior to the date of the annulment of that transfer as steps in aid of execution for the purpose of saving limitation. Having held, as already stated, that the transfer stands till it is annulled, their Lordships of the Supreme Court ruled that till it is annulled, the transferee has all the rights in the property transferred, that so long as the transferee has such rights, he is competent to exercise them and such exercise would be legal and fully in accordance with law, that sub-sections (2) and (7) of S. 28 cannot have the effect of vesting the property in the receiver till its transfer has been annulled and that in this view, the assignee had the right to execute the decree and that the execution petitions which Meenakshi Atchi filed prior to the date of the annulment of the transfer were in order and could be availed of by the Official Receiver as steps in aid of execution to save the subsequent petition filed by him for execution of the decree from the bar of limitation. These facts would clearly show that it was necessary for their Lordships to determine whether the transfer was void or simply voidable for the purpose of arriving at a decision on the question as to whether the execution petitions filed by the assignee, prior to the date of the annulment of the transfer, are valid and could be availed of by the Official Receiver as steps in aid of execution for the purpose of limitation. The principle enunciated in that decision is therefore undoubtedly of direct application here.

7. The lower appellate Court placed reliance on Sheo Raj v. Abdul Aziz, AIR 1956 All 68 in coming to the conclusion that "since the settlement deed in favour of N. Seetharamachandrarao was treated as an act of insolvency and the insolvent was adjudged insolvent on that basis, it is not open to the transferee or his transferees to question the same at a later stage and the remedy of Seetharamachandrarao, if at all was only by way of an appeal against the order adjudicating Seshachalam as an insolvent". The learned Judge who rendered the decision in AIR 1956 All 68 seems to have based it on a decision of the Privy Council in Md. Siddique v. Official Assignee, Calcutta, AIR 1943 PC 130. But AIR 1943 PC 130 was a case that arose out of the Presidency-towns Insolvency Act. This decision was in fact referred to and explained by their Lordships of the Supreme Court in AIR 1960 SC 70

as can be seen from the following passage extracted from their judgment:

"It is therefore abundantly clear that all that the Judicial Committee held in Mohamed Siddique Yousuf's case, 70 Ind. App. 93 = AIR 1943 P. C. 130 was that in a case under the Presidency-towns Insolvency Act, when the act of insolvency upon which an order of adjudication is founded is a transfer amounting to a fraudulent preference, the transferee cannot, so long as the order of adjudication stands, question that finding, namely, that the transfer was a fraudulent preference and that, therefore, in an application by the Official assignee to have that transfer annulled on the ground that it was a fraudulent preference, the order of adjudication is conclusive proof that the transfer was by way of a fraudulent preference to lead evidence to prove that the transfer was not a fraudulent preference. In such a case, therefore, the order of annulment had to be made as a matter of course on proof of the order of adjudication xx xx xx".

It will be useful to notice the relevant provisions of the Presidency-towns Insolvency Act and the Provincial Insolvency Act in this context. Section 55 of the Presidency-towns Insolvency Act lays down:

"Any transfer of property, not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be void against the official assignee."

Section 53 of the Provincial Insolvency Act is, on the other hand, to the following effect:

"Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court".

It can clearly be seen from the provisions of the relevant sections extracted above that under Section 55 of the Presidency-towns Insolvency Act the transfer is void against the official assignee whereas it is only voidable as against the Official Receiver under the corresponding S. 53 of the Provincial Insolvency Act.

That the decision of the Privy Council in AIR 1943 PC 130 is applicable to cases arising under the Presidency-towns Insolvency Act alone and not to orders of adjudication under the Provincial Insolvency Act and that the relevant pro-

visions of the two Acts are different can also be seen from a decision of the Punjab High Court in *Kehar Singh v. Raghubir Singh*, AIR 1960 Punj 24. The learned Additional District Judge was therefore not right in relying upon AIR 1956 All 68 which, as already pointed out, was based on AIR 1943 PC 130, a case that arose under the Presidency-towns Insolvency Act, for the purpose of concluding that the transfer in favour of the appellants' vendor by Seshachalam was void. I must likewise agree with the learned counsel for the appellants that the lower Court erred in thinking that the principle laid down by their Lordships of the Supreme Court in AIR 1960 SC 70, has no application to the facts of this case.

8. It was no doubt held in *Hla Gyaw U v. U Tun Kyaw Sen*, AIR 1937 Rang 369, which is another decision that was referred to by the learned Additional District Judge, that the purchaser from the transferee is bound by the finding that the transfer in favour of the original transferee is void, although he was not a party to the application but in the face of the clear and authoritative pronouncement of their Lordships of the Supreme Court in AIR 1960 SC 70, it has to be said that the settlement in favour of Seetharamachandrarao was only voidable and not void and that he was competent to exercise all the rights which the owner of a property is entitled to exercise, including the right to further alienate the same, till the transfer is annulled.

9. It is true that the transfer in favour of Seetharamachandrarao has since been annulled but it cannot be said that the appellants are bound by that order as they purchased the property from Seetharamachandrarao long before then and at a time when he had the right and power to deal with the property as he pleased. The mere fact that the appellants claim from Seetharamachandrarao does not justify the contention that they are bound by the order of annulment when their transferor ceased to have any interest whatsoever in the property long before the date on which I. A. 351/62 was filed. It is true that the Court has power to deal with transfers by the insolvent alone under Section 53 of the Act and not with transfers by the transferee of the insolvent but this did not in any way prevent the Official Receiver from taking such other steps as are available to him in law for the purpose of avoiding the transfer which the insolvent's transferee made in favour of the appellants.

Chidambaram v. Subramania AIR 1932 Mad 513, is an authority for the position that the Official Receiver can invoke to his aid S. 4 of the Provincial Insolvency

Act for the purpose of avoiding a transfer made by the transferee of the insolvent. It was clearly indicated in this decision that the power of the Court under Section 4 to decide all questions arising in insolvency is undoubted. It was held in *Cheriyian of Poothikottu v. Mathan Chacko* AIR 1964 Ker 183, that the transferee from a transferee of the insolvent is not affected by an order of annulment obtained by the Official Receiver without impleading him as a party to his application. Learned Additional District Judge tried to distinguish this decision on the ground that the particular transfer did not constitute an act of insolvency and that the petition for adjudication was not grounded on that transfer. But it was clearly indicated by their Lordships of the Supreme Court in AIR 1960 SC 70 that even where the order of adjudication is based on an act of insolvency constituted by a transfer of property found to be a fraudulent preference, the transfer stands till it is set aside and that a separate order annulling the transfer would be necessary even in such a case. I have, therefore, no doubt that the transfer of the property by Seshachalam in favour of Seetharamachandrarao, was only voidable and not void and that the appellants are not bound by the order of annulment made in I. A. 351/62 to which they were not parties.

10. The finding recorded above does not however entitle the appellants to straightway walk home with an order declaring their title to the property and also granting them an injunction restraining the Official Receiver from interfering with their possession thereof. It was argued for the appellants that they are entitled to remain in possession of the property till the transfer in their favour is avoided by the Official Receiver in a properly constituted action under the relevant provisions of law but that he cannot raise a defence in an application filed by them for the purpose of protecting their present possession. It is on the other hand contended for the respondent that the question as to whether the transfer obtained by the appellants from Seetharamachandrarao is valid and binding on the Official Receiver has to be gone into in this proceeding itself as it is initiated under Section 4 of the Provincial Insolvency Act and that the appellant cannot automatically get the relief of declaration and injunction for the simple reason that no separate petition is brought by the Official Receiver to avoid the transfer obtained by them.

Section 4 of the Act confers on the insolvency Court very wide powers to decide all questions whether of title or priority, or of any nature whatsoever and whether involving matters of law or of fact,

which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. It is therefore not only within the competence of the insolvency Court to decide the question but it is also necessary that it should decide it in the same proceedings, out of which these appeals arose, for the purpose of doing complete justice and making complete distribution of the property of the insolvent amongst his creditors. In this view, it becomes necessary to remit the matter to the Court of first instance viz., Subordinate Judge, Ongole for enquiring into and deciding the question as to whether the sales covered by Exts. A-1 and A-2 are valid and binding on the Official Receiver after receiving such evidence as the parties might desire to adduce in support of their respective contentions in this regard.

11. The appeals are accordingly allowed and the judgment of the lower Appellate Court, dismissing I. A. Nos. 1597 and 1599 of 1964, is set aside. The petitions will be remitted to the Subordinate Judge, Ongole for final disposal after deciding the question as to whether the transfers obtained by the appellants under Exs. A-1 and A-2 are valid and binding on the Official Receiver. The costs of these appeals will abide the ultimate result and will be provided for the revised order of the learned Subordinate Judge. No leave.

Appeals allowed.

AIR 1970 ANDHRA PRADESH 43

(V 57 C 6)

NARASIMHAM

AND A. D. V. REDDY, JJ.

R. D. K. Sita Devi, Appellant v. C. Anna Rao and others, Respondents.

Spl. Tribunal Appeals Nos. 21 to 23 of 1964 D/- 19-1-1968, against decree of the Court of Estates Abolition Tribunal, Nellore in I. A. Nos. 157 to 159 of 1960.

(A) Limitation Act (1908), Art. 182 and Preamble — Madras Estates Abolition and Conversion into Ryotwari Act (26 of 1948), S. 41—Compensation paid to persons not entitled, by Tribunal—Later Tribunal asking them to re-deposit the amount and ordering petitioner, the rightful claimant, to recover the same — Petitioner filing petition under S. 151 Civil P. C. to direct respondents to re-deposit — Limitation — Whether Art. 182 applies — (Civil P. C. (1908), S. 151).

In a case under Madras Estates Abolition and Conversion into Ryotwari Act, compensation was paid to the respon-

dents not entitled by Tribunal. When it was found later that such persons were not entitled to the same they were asked by the Tribunal to re-deposit the amount and the petitioner who was entitled to it was ordered to recover the amount. In an application by the petitioner under S. 151 Civil P. C. to direct respondents to re-deposit the amount the question was whether Art. 182, Limitation Act applied.

Held that the Limitation Act is a consolidating and amending statute relating to the limitation of suits, appeals and certain types of applications to Courts and must, therefore, be regarded as an exhaustive Code. It is a piece of adjective or procedural law and not of substantive law. Rules of procedure, whatever they may be, are to be applied only to matters to which they are made applicable by the legislature expressly or by necessary implication. They cannot be extended by analogy or reference to proceedings to which they do not expressly apply or could be said to apply by necessary implication.

The Madras Estates Abolition and Conversion into Ryotwari Act is a special enactment and the disputes thereunder are adjudicated by the Settlement Officer and the Tribunal which are not Courts. Article 182 of the Limitation Act will not therefore apply to the proceedings before the Tribunal, as that provision relates to execution of a decree or order of any Civil Court. AIR 1964 SC 227, Foll.

(Para 6)

(B) Tenancy Laws — Madras Estates Abolition and Conversion into Ryotwari Act (26 of 1948), S. 2 (14) — Tribunals adjudicating disputes under Act are not 'Court' within meaning of Art. 192, Limitation Act (1908) — (Words and Phrases — "Court").

(Para 6)

(C) Limitation Act (1908), Art. 181 — Madras Estates Abolition and Conversion into Ryotwari Act (26 of 1948), S. 43—Compensation paid to persons not entitled, by Tribunal — Later Tribunal asking them to re-deposit the amount and ordering petitioner, the rightful claimant, to recover the same — Petitioner filing petition under S. 151, Civil P. C. to direct respondents to re-deposit — Limitation — Whether Art. 181 applies — Civil P. C. (1908), S. 151.

There is a rule under the Madras Estates Abolition and Conversion into Ryotwari Act making certain provisions of the Limitation Act applicable to the proceedings under the Act or under the rules made thereunder before the Tribunal, authorities and officers having jurisdiction under the Act. But it has not been stated that Art. 181 would apply. It would therefore mean that the application of other provisions of the Limitation Act had been deliberately excluded,

Therefore the failure of legislature to make any provision for limitation cannot be deemed to be an accidental omission.

Hence a provision regarding limitation that has not been stipulated either in the enactment or in the Rules cannot be imported into the Act and therefore Art. 181 will not apply, where under Madras Estates Abolition and Conversion into Ryotwari Act (26 of 1948) compensation was paid by Tribunal to persons not entitled to it and later the Tribunal asked them to redeposit the amount and ordered the rightful claimant to recover the same but the petitioner filed a petition under S. 151, Civil P. C. to direct the respondents to redeposit the amount. AIR 1964 SC 752, Foll. Case law Ref. to. (Para 8)

(C) Tenancy Laws — Madras Estates Abolition and Conversion into Ryotwari Act (26 of 1948), S. 67 — Rules under— Civil P. C. (1908), Ss. 48, 114 and 151—Provisions of Civil P. C. can be applied to proceedings before Tribunal under R. 2 — Application for execution of order of Tribunal within 12 years is within time — Civil P. C. (1908), S. 48.

One of the rules (Rule 2) framed under the Madras Estates Abolition and Conversion into Ryotwari Act provides that the provisions of Civil P. C. can be applied to the proceedings before the Tribunal as far as practicable. Therefore although there are no provisions similar to S. 114 or 151, Civil P. C. in the Act, the Tribunal can nevertheless pass an order of restitution by virtue of R. 2 applying provisions of Civil P. C. Under S. 48, Civil P. C. no application can be filed for executing an order or decree of a Court, not being a decree granting an injunction, after 12 years from the date of order. This means that an application for the execution of the order of the Court can be filed within 12 years from the date of the Court's Order and as this provision would apply to the proceedings under the Madras Estates Abolition and Conversion into Ryotwari Act, as per the rules, the application before the Tribunal for redepositing the monies by any of the parties before it as directed by the Tribunal can also be filed within 12 years from the date of passing of the order. In the absence of any other provision regarding limitation, the 12 years period under S. 48 Civil P. C. should be the only limit. 1955 Andh LT 92, Foll. (Paras 9, 10 and 11)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 990 (V 54)=
(1967) 1 SCR 303, Wazir Chand v. Union of India 7
(1964) AIR 1964 SC 227 (V 51)=
(1964) 2 SCR 241, A. S. K. Krishnappa v. S. V. V. Somaiah 6

- (1964) AIR 1964 SC 752 (V 51)=
(1964) 3 SCR 709, Bombay Gas Co. v. Gopal Bhiva 8
(1955) 1955 Andh LT 92, Chairman, Estates Abolition Tribunal, Chittoor 10
(1953) AIR 1953 SC 98 (V 40)=
1953 SCR 351, Sha Mulchand & Co. v. Jawahar Mills Ltd., Salem 7
(1933) AIR 1933 PC 63 (V 20)=
60 Ind App 13, Hans Raj Gupta v. Official Liquidators Dehra Dun Mussoorie Electric Tramway Co. 7
(1883) ILR 7 Bom 213, Bai Manekbai v. Manekji Kavasji 7

K. Ramachandra Rao, for Appellant (in all appeals); A. Bhujanga Rao, for Respondents (in Appeals Nos. 22 and 23).

REDDY, J.: These are appeals by the petitioner in I. A. Nos. 157, 158 and 159 of 1960 in O. P. No. 2452 of 1953 on the file of the Estates Abolition Tribunal, Nellore.

2. Pamur group and other Estates in Nellore and Chittoor districts had been taken over by the Government and compensation amounts were deposited before the Estates Abolition Tribunal. After the deposit of the compensation, there were several claims made against the Estate by charge decree-holders as well as others and the Tribunal held that the charge decree-holders who are 12 in number were entitled to priority and again divided the 12 charge decree-holders into seven categories as per priority among them. The petitioner who is common in these petitions, is one Srimathi Sita Devi, wife of Shri R. D. K. Venkat Mahipal Bahadur Varu. She had obtained a charge decree in O. S. 56 of 1927 on the file of Sub Court, Chittoor towards her maintenance, on the Estate and thereupon she filed O. P. 2542/53 claiming the monies due to her from the Estate and her claim was recognised by the Tribunal for a sum of Rs. 38,472/- and the Tribunal directed that a sum of Rupees 7553/- should be paid immediately out of the amount of Rs. 16,143/- then available in deposit leaving the balance of Rupees 30,919/- still due to her. She along with some three other similar charge decree-holders, was placed in category 2. She contends in the petitions that the first category of creditors were paid in full, while the second category of creditors including herself were only paid in part and the remaining categories of creditors could not be paid any amount and the balance due to her has to be paid to her. The three respondents in these petitions, viz., Sri C. Annarao, Sri R. D. K. V. Varma and Sri M. V. Apparao had been paid certain amounts from the compensation amount available with the Tribunal, as successors-in-interest of the mortgagees who had obtained a mortgage decree against the Estate. Sri An-

narao had drawn Rs. 4950/-, Sri Apparao had drawn a sum of Rs. 4950/- and R. D. K. V. Varma had drawn a sum of Rupees 3000/-. It was subsequently found on enquiry by the Tribunal that they were not entitled to these sums and they were directed to redeposit the amounts and out of this sum, the Tribunal had ordered in O. P. 2452/53 on 25-4-55 that the petitioner Srimathi Sita Devi should recover Rupees 2284/- from Sri Annarao and an equivalent amount from Sri Apparao and a sum of Rs. 1384/- from Sri R. D. K. V. Varma.

3. The petitioner had thereupon filed these three petitions under Section 151 CPC., on 2-3-60 to direct the respondents in each of these petitions to redeposit the amount to enable her to withdraw the same. The Respondents contended that the orders to redeposit the amounts were passed on 25-4-55 behind their back and the petitions filed on 2-3-60, beyond three years from the date of the orders of the Tribunal, were all barred by time. The Tribunal found that Article 182 of the Limitation Act applies and these applications having been filed beyond three years from the date of the orders of the Tribunal, are barred by time and dismissed the petitions. Hence these appeals.

4. The only point to be determined in these appeals is whether the applications are in time?

5. These three applications are for directing the respondents to redeposit the monies paid to them by the mistake of the Tribunal. The compensation monies with regard to Pamur group and other estates were in deposit with the Tribunal and the respondents, claiming to be successors-in-interest of a mortgage decree-holder by reason of gift deeds in their favour had applied for payment and without first enquiring into their claims, the monies were paid and subsequent to the enquiry as it was found that they were not entitled to monies, they were asked to redeposit the monies by an order of the Tribunal. These applications are by a charge decree-holder whose claim has been recognised by the Tribunal and who was also found to be entitled to a certain proportion of the monies taken by the respondents. In these petitions, the petitioner who is common, has approached the Tribunal to direct the Respondents to redeposit those monies into Court. The Tribunal in its order found that though Section 144 CPC., in terms does not apply to the proceeding, still Article 182 of the Limitation Act would apply and as these applications had not been filed within 3 years of the order of the Tribunal, they are barred by time.

6. In this regard, it would be relevant to notice the remarks in A. S. K. Krishnappa v. S. V. V. Somaiah, AIR 1964 SC 227 at p. 232 which are as follows:

"The Limitation Act is a consolidating and amending statute relating to the limitation of suits, appeals and certain types of applications to Courts and must, therefore, be regarded as an exhaustive Code. It is a piece of adjective or procedural law and not of substantive law. Rules of procedure, whatever they may be, are to be applied only to matters to which they are made applicable by the legislature expressly or by necessary implication. They cannot be extended by analogy or reference to proceedings to which they do not expressly apply or could be said to apply by necessary implication."

The Estates Abolition and Conversion into Ryotwari Act (Act XXVI of 1948) is a special enactment and the disputes thereunder are adjudicated by the Settlement Officer and the Tribunal which are not Courts. Article 182 of the Limitation Act will not therefore apply to the proceedings before the Tribunal, as that provision relates to execution of a decree or order of any Civil Court.

7. It has next to be seen whether Article 181 of the Limitation Act will apply to proceedings under the Estates Abolition and Conversion into Ryotwari Act. In Wazir Chand v. Union of India, AIR 1967 SC 990 it was pointed out that applications under Section 20 of the Arbitration Act will not be governed by Article 181 of the Limitation Act, unless any provision in the Arbitration Act indicates a contrary intention. In Sha Mulchand & Co. v. Jawahar Mills Ltd. AIR 1953 SC 98 it was pointed out that Article 181 of the Limitation Act, has in a long series of decisions been held to govern only applications under the Code of Civil Procedure and with approval extracted the passage from Hansraj Gupta v. Official Liquidators, Dehra Dun Mussoorie Electric Tramway Co., 60 Ind App 13 at p. 20 = (AIR 1933 PC 63 at p. 64) wherein it was again pointed that a series of authorities commencing with Bai Manekbai v. Manekji Kavasji, (1883) ILR 7 Bom 213 have taken the view that Article 181 only relates to applications under the Code of Civil Procedure and would not apply to applications under the Indian Companies Act.

8. Even the scheme of the Estates Abolition and Conversion into Ryotwari Act shows that periods of limitation with regard to certain proceedings under the Act itself are prescribed in the Act itself. Section 42 prescribes a period of six months for claims to be made before the Tribunal on the deposit of compensation. Section 51 prescribes a period of 3 months for filing an appeal before the High Court against the decision of the Tribunal. There are rules prescribing periods of limitation for applications to

be made before the Settlement Officer for the issue of ryotwari pattas, for publication of notice, for enquiries to be held and for appeals to be filed before the Tribunal against the orders of the Settlement Officer. But, no rules had been prescribed prescribing any time limit for filing applications of the type which we are considering here. There is a rule which says that the provisions of Sections 4, 5, 12 (1) and (2), 17 (1) and 18 of the Indian Limitation Act of 1908 shall apply to all the proceedings under the Madras Estates Abolition and Conversion into Ryotwari Act of 1948 or under the rules made thereunder, before the Tribunals, authorities and officers having jurisdiction under the Act. But it has not been stated that Article 181 of the Limitation Act would apply. It would therefore mean that the application of the other provisions of the Limitation Act had been deliberately excluded. As pointed out in *Bombay Gas Co. v. Gopal Bhiva*, AIR 1964 SC 752 the failure of the Legislature to make any provision, for limitation cannot be deemed to be an accidental omission. In that case considering that no limitation had been prescribed for applications under Section 33C (2) of the Industrial Disputes Act of 1947, it was observed:

"It may have been thought that the employees who are entitled to take the benefit of Section 33C (2) may not always be conscious of their rights and it would not be right to put the restriction of limitation in respect of claim which they may have to make under the said provision".

Therefore we cannot import into the Act a provision regarding limitation that has not been stipulated either in the enactment or in the Rules. Article 181 of the Limitation Act will not therefore apply to the proceedings under the Estates (Abolition and Conversion into Ryotwari) Act of 1948.

9. We have then to see whether there is any period of limitation prescribed for the applications of the type we are now considering. One of the rules framed under Section 67 of the Act, published in Fort St. George Gazette dated 17-1-1950, reads as follows:

"2. The proceedings of a Tribunal shall be summary and shall be governed as far as practicable by the provisions of the Code of Civil Procedure, 1908, particularly in regard to—

(a) the issue and service of summons;
(b) the examination of parties and witnesses;

(c) the production of documents;

(cc) the payment of compensation or any other money to one person on behalf of another under disability, and in particular to a guardian on behalf of a minor;

(d) the passing of orders."

This would mean that the provisions of the Code of Civil Procedure can be applied to the proceedings before the Tribunal as far as it is practicable.

10. In *Chairman, Estates Abolition Tribunal, Chittoor*, 1955 Andh LT 92 it was held that although there are no provisions similar to Section 114 or Section 151 of the CPC., in Act XXVI of 1948 (Madras Estates Abolition and Conversion into Ryotwari Act), the Tribunal can nevertheless pass an order of restitution in view of Rule 2 of Section 67 of the Act. In proceedings before the Tribunal therefore the provisions of the Civil Procedure Code will become applicable. Under Section 48 of the CPC., no application can be filed for executing an order or decree of a Court, not being a decree granting an injunction, after the expiration of 12 years from the date of order. This means that an application for the execution of the order of the court can be filed within 12 years from the date of the court's order and as this provision would apply to the proceedings under the Estates Abolition and Conversion into Ryotwari Act as per the rules, the application before the Tribunal for repositing the monies by any of the parties before it as directed by the Tribunal, can also be filed within 12 years from the date of passing of the order.

11. Sri Bhujangarao, the learned counsel for the respondents contended that Section 48 of the CPC., only prescribes the outer limit for execution proceedings and it should be read with Article 182 of the Limitation Act, as they go together. For this contention, he sought to rely on a remark in *Bombay Gas Co. v. Gopal Bhiva*, AIR 1964 SC 752 cited above, which runs as follows:—

"Besides, even if the analogy of execution proceedings is treated as relevant, it is well known that a decree passed under the Code of Civil Procedure is capable of execution within 12 years, provided, of course, it is kept alive by taking steps in aid of execution from time to time as required by Article 182 of the Limitation Act. . . ."

It has been held in this very decision that the provisions of the Limitation Act cannot be made applicable by way of analogy to special enactments, unless this was intended by the Legislature. In this case, as already pointed out, there is no such provision prescribing any period of limitation or making Article 181 of the Limitation Act applicable to applications of this type. The working of Section 48 CPC., itself does not show that what is prescribed is only the outer limit and that there must necessarily be an inner limit. If there is any provision in any particular enactment making Art. 182 of

the Limitation Act applicable, then section 48 CPC., can be considered to be the outer limit. In the absence of any such provision, the 12 year period which Section 48 CPC. prescribes will be the only limit. This particular question did not arise for determination in the decision cited above, relied on by the learned counsel for the respondents and the remark relied on was only a chance observation. We therefore find that in so far as the rules framed under the Estates Abolition and Conversion into Ryotwari Act make the provisions of the Code of Civil Procedure applicable to the proceedings under the Act as far as practicable and Section 48 CPC., prescribes a period of 12 years within which applications can be filed from the date of any particular order in execution the applications filed by the petitioner five years after the order of the Tribunal to direct the respondents to redeposit the monies paid to them by mistake are within time. The orders of the Tribunal in the above three applications are therefore set aside. The respondents will redeposit the amounts drawn by them as directed by the Tribunal, within one month from the date of communication of this order to the lower court.

In the result, these three appeals are allowed with costs.

Appeals allowed.

AIR 1970 ANDHRA PRADESH 47
(V 57 C 7)

SHARFUDDIN AHMED

AND VENKATESWARA RAO, JJ.

In re, P. Bapanaiah, Accused Petitioner.
Criminal Revn. Case No. 26 of 1967;
Criminal Revn. Petn. No. 24 of 1967,
D/- 24-11-1967, from order of Principal
S. J.; Hyderabad at Secunderabad, D/-
31-10-1966.

(A) Defence of India Act (1962), S. 3 (1)—Defence of India (Part XII-A, Gold Control) Rules (1962), R. 126-A — Rules are within rule-making power conferred by S. 3 (1)—Burden of proving invalidity of Rules lies on person who challenges their validity.

The Gold Control Rules do serve some, at least, of the purposes mentioned in Section 3 (1) of the Act and are consequently not in excess of the rule-making powers of the Central Government.

(Para 8)

The power conferred under S. 3 (1) to make rules can be exercised by the Central Government if only it is necessary or expedient to do so for securing any one or more of the objects speci-

ed therein. The connection that is required to be established between the rules framed and the purposes prescribed under S. 3 (1) must be a real one and not far-fetched, problematical, hypothetical or too remote though it need not necessarily be proximate. (Para 6)

There is a real connection between the purposes mentioned in Section 3 (1) and the objects sought to be achieved by the Gold Control Rules. The control, under Rule 126-P (2), on possession etc., of gold even by private individuals may not directly promote the defence of India or the other objects enumerated in S. 3 (1) but it does certainly and substantially help the Government in securing some at least of those objects as the rules do promote, though indirectly but not remotely. the defence of India and the maintenance of supplies essential to the life of the community. Since the Legislature has considered framing of rules necessary for controlling the possession etc. of the subjects mentioned in item 33 of Section 3 (2), the burden of proving the invalidity of the Rules lies heavily on the person who challenges the validity of the Rules. AIR 1966 Bom 70 and AIR 1962 SC 316, Rel. on. (Para 6)

(B) Defence of India Act (1962), S. 3 (2)—Scope — Sub-section does not confer any additional power — It is subject to limitation imposed by sub-section (1).

The rule-making power conferred by sub-section (2) of S. 3 is subject to the same limitations as are imposed by sub-section (1) of Section 3 as the clauses thereunder are only illustrative of the matters pertaining to which rules could be framed. The Legislature simply sought to give guidance to the Central Government by means of this sub-section, on the question as to what it can do for securing the purposes mentioned in sub-section (1). Section 3 (2) would neither add to nor take away the powers conferred by Section 3 (1). The mere fact that rules are framed in relation to one or other of the subjects mentioned in sub-section (2) does not by itself render them valid if they are not referable to the powers conferred on the Central Government by sub-section (1). (Obiter).

(Para 9)

(C) Constitution of India, Arts. 21, 22, 352 (1), 359 (1) — Defence of India (Part XII-A Gold Control) Rules (1962), R. 126-P (2) and (4) — Person charged with offence under Rule 126-P (2) — Cannot take recourse to Court during period of emergency, even if his rights under Article 21 are infringed.

(Para 11)

(D) Defence of India (Part XII-A Gold Control) Rules (1962), Rule 126-P (4) read with R. 126-P (2) — Criminal P. C. (1898), Ss. 5, 260, 262 (2) — Summary

trials — Sentence of imprisonment not exceeding three months under S. 262 (2) — Applies only to offences under S. 260 and not to offences under any special enactment — Rule 126-P (2) cannot be questioned on that ground — Rule 126-P (4) prescribes procedure — Rule 126-P (2) read with R. 126-P (4) is not repugnant to Art. 13 (2) of Constitution — Constitution of India, Art. 13 (2).

There is really no conflict between the provisions of Rule 126-P (4) read with Rule 126-P (2) and Ch. XXII of Criminal P. C. (1898) relating to summary trials. (Para 12)

In view of Section 5 (2) Cr. P. C. the maximum sentence of three months provided in Section 262 (2) Cr. P. C. is applicable only to the offences under S. 260 Cr. P. C. and not to the offences which are rendered summarily triable by virtue of the provisions of special enactments such as the Defence of India Rules. So, when an enactment provides for summary trial of an act or omission which is an offence thereunder, it refers only to the procedure to be adopted and not to punishment also. This inference is further strengthened by the use of the words "in the case of any conviction under this Chapter" occurring in Section 262 (2) of the Code. It is further settled law that a special enactment overrides a general one.

(Para 12)

Rule 126-P (4) specifically provides for summary trial of offences under R. 126-P (2) notwithstanding that Section 262 (2) Cr. P. C. limits the sentence to three months. It is thus clear that Rule 126-P (4) simply prescribes the procedure and that Rule 126-P (2), which prescribes a minimum punishment of six months, cannot be questioned, having regard to the fact that the minimum sentence referred to in Section 262 (2) Cr. P. C. is applicable only to offences enumerated in Section 260 of the Code. For the same reason, it cannot also be said that the provisions of those Rules are repugnant to Art. 13 (2) of the Constitution. AIR 1950 Bom 273, Rel. on; AIR 1954 Mad 833, Disting.

(Paras 12, 14)

(E) Defence of India (Part XII-A Gold Control) Rules (1962), Rule 126-P (2) — Constitution of India, Art. 14 — Rule 126-P (2) is not discriminatory and does not offend Art. 14 — Criminal P. C. (1898), S. 262 (2).

Rule 126-P (2) is not discriminatory and does not offend Art. 14 of the Constitution. (Para 15)

While Art. 14 forbids class legislation, it does not prohibit reasonable classification subject of course to the condition that it is founded on an intelligible difference which distinguishes persons or things that are grouped together from others

left out of the group and that difference has a rational relation to the object sought to be achieved by the statute in question. AIR 1958 SC 538, Foll.

(Para 15)

The mere fact that certain offences against Gold Control Rules are punishable with imprisonment of not less than six months while under Section 262 (2) Cr. P. C. no sentence of imprisonment for a term exceeding three months can be passed in the case of a conviction under Chapter XXII relating to summary trials, does not by itself justify the contention that the classification in question is unreasonable.

The Defence of India Act and the rules made thereunder are intended to prevent the commission of certain types of offences during the emergency to ensure the security of the country and the interests of the community. It would not be possible to achieve this object unless higher penalties and deterrent sentences are prescribed for certain types of offences including offences against the Gold Control Rules which are necessary and expedient for securing the defence of India and maintenance of supplies and services essential to the life of the community among other things.

(Para 15)

(F) Defence of India (Part XII-A Gold Control) Rules (1962), Rr. 126-L (16) (aa), 126-M (20) (aa), 126-P (2) — Constitution of India, Art. 20 (2) — Imposition of penalty, besides confiscation of gold on a person by customs authority — Neither confiscation nor infliction of penalty amounts to prosecution contemplated in Art. 20 (2) — Prosecution of such person under S. 135 of Customs Act (1962) and Rule 126-P (2) — Art. 20 (2) not attracted — Customs Act (1962), S. 135 (2) — (Criminal P. C. (1898), S. 403).

Prosecution of a person, on whom, besides confiscation of contraband gold, penalty has been imposed, under S. 135 of Customs Act (1962) and Rule 126-P (2) does not offend Art. 20 (2) of the Constitution. (Para 17)

Confiscation of the contraband gold does not amount to prosecution or punishment of the person. Confiscation of the goods is an order in rem dealing with goods and not a punishment imposed on the person. AIR 1958 SC 845, Rel. on.

(Para 16)

Imposition of penalty by Customs Authorities does not amount to prosecution contemplated by Art. 20 (2) of the Constitution. The term "prosecution" means a proceeding either by way of indictment or information in the criminal Courts in order to put an offender upon his trial. The Deputy Collector, Central Excise, can, by no stretch of imagination, be equated to a Court for the simple

reason that he is vested with certain powers in the matter of effecting searches and seizures, compelling attendance of witnesses and the like by the Rules. The legislature was aware of the distinction between a proceeding before the Customs Authorities and the criminal proceeding before a Magistrate and therefore in the absence of one of the three essential conditions laid down in clause (2) of Art. 20 of the Constitution viz., prosecution, the prohibition against double jeopardy would not become operative. AIR 1959 SC 375, Rel. on. (Para 17)

(G) General Clauses Act (1897), S. 26 — Prohibition under, is against punishment twice for same offence — Simultaneous prosecution under more than one enactment is not barred—Choice of enactment or enactments for prosecution is with prosecutor or authority concerned.

It can be seen from the language employed in section 26 that the emphasis is on the word "punishment" and not so much on "prosecution" as what is ultimately prohibited is imposition of punishment twice for the same offence. The words "shall be liable to be prosecuted and punished under either or any of those enactments" would show that there is no bar against simultaneous prosecution under more than one enactment. If the prosecution is restricted to only one enactment, there would be no question of rendering the offender liable for punishment twice for the same offence. It is therefore obvious that what is intended is prevention of punishment twice for the same act or omission which is an offence under more enactments than one and not prosecution also. It is left to the prosecutor or the authority concerned to choose under which enactment or enactments an offender shall be prosecuted when the act or omission alleged against him constitutes an offence under two or more enactments. But in the event of the prosecution being launched under two or more enactments, the punishment should be under one alone of those enactments. (Para 18)

Cases Referred: Chronological Paras

- (1966) AIR 1966 Bom 70 (V 53)=
67 Bom LR 234, Amichand v.
G. B. Kotak 6, 7, 11
(1962) AIR 1962 SC 316 (V 49)=
1962 (1) Cri LJ 364, Collector of
Customs v. Sampathu Chetty 6
(1959) AIR 1959 SC 375 (V 46)=
1959 Cri LJ 392, Thomas Dana v.
State of Punjab 17
(1958) AIR 1958 SC 538 (V 45)=
1959 SCR 279, Ram Krishna Dal-
mia v. Justice S. R. Tendolkar 15
(1958) AIR 1958 SC 845 (V 45)=
1958 Cri LJ 1355, Sewpujanrai
Indrasanrai Ltd. v. Collector of Cus-
toms 16

- (1954) AIR 1954 Mad 833 (V 41)=
1954 Cri LJ 1267, In re, Guruviah
Naidu 13
(1950) AIR 1950 Bom 273 (V 37)=
51 Cri LJ 1303, Emperor v. Narji
Bhalji 12

T. V. Sarma, for Petitioner; Addl.
Public Prosecutor, for State.

VENKATESWARA RAO, J.: This criminal revision petition, which arises out of a prosecution under Section 135 of the Customs Act and Rule 126-P (2) of the Defence of India Rules, 1962 (Part XII-A Gold Control) has been referred to the Bench by our learned brother, Mohammed Mirza, J., for decision "in view of the important question of law raised" in the case.

2. The facts of the case may briefly be set out here. On receipt of information that Pabbati Bapanaiah, the petitioner herein, would be leaving Hyderabad for Kothagudem by bus on 3-2-65, with contraband gold, the Deputy Superintendent, Customs and Central Excise, Hyderabad, with some members of his staff, lay in wait at the Gowliguda Bus Depot in Hyderabad. The petitioner arrived there at 9 A. M. with a holdall in his hand. On a search of his person and belongings, it was found that he concealed in a pillow, four gold slabs with foreign markings "Johnson Mathey 999-O London 10 tolas". Those slabs were seized and further investigation revealed that no permit was issued to the petitioner, who is a licenced dealer in gold, to import them from abroad. After necessary enquiry, the Deputy Collector, Central Excise, Guntur, imposed a penalty of Rs. 5,000/- on the petitioner under Rule 126-L (16) (aa) of the Defence of India Rules, 1962 (Gold Control) and also ordered confiscation of the gold as provided in R. 126-M (2) (aa) of the same Rules, on 24-7-65. The Assistant Collector, Central Excise, thereafter preferred a complaint against the petitioner before the 4th City Magistrate, Hyderabad for contravening the provisions of section 135 of the Customs Act, 1962 and Rule 126-P (2) of the Defence of India Rules, 1962 (Part XII-A Gold Control). A preliminary objection was raised before the learned Magistrate that the prosecution is untenable in view of the mandatory provisions of Article 20 (2) of the Constitution of India and Section 403, Cr. P. C. as the Deputy Collector of Central Excise, Guntur, had already imposed a penalty of Rs. 5,000/- on the petitioner besides confiscating the gold by his order dated 24-7-1965. It was further urged before him that the prosecution is barred by clause 26 of the General Clauses Act also. The learned Magistrate overruled those objections whereupon the petitioner

carried the matter in revision to the Principal Sessions Judge, Hyderabad at Secunderabad. In addition to the pleas raised before the Magistrate, it was urged before the learned Sessions Judge that the prosecution of the petitioner under Rule 126-P (2) of the Defence of India Rules infringes the right guaranteed to him under Article 21 of the Constitution and is consequently bad. The learned Sessions Judge dismissed the petition negating all the contentions urged for the petitioner and hence this petition.

3. It may be stated at the outset that besides the pleas urged in the Courts below, the learned counsel for the petitioner has raised before us yet another contention that Rules 126-A to 126-Z contained in Part-XII-A of the Defence of India Rules, which will hereinafter be referred as Gold Control Rules, are in excess of the rule-making powers of the Central Government and are therefore liable to be struck down.

4. We will first take up for consideration the learned counsel's argument that the Central Government exceeded the rule-making power conferred on it by sub-section (1) of S. 3 of the Defence of India Act in promulgating the Gold Control Rules. It will be useful to extract here the relevant provisions of S. 3 of the Act.

3. Power to make rules:

"(1) The Central Government may, by notification in the official gazette, make such rules as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for, and may empower any authority to make orders providing for, all or any of the following matters, namely:

xx xx xx

(33) controlling the possession, use or disposal of, or dealing in coin, bullion, bank notes, currency notes, securities or foreign exchange."

It might be recalled that the President of India declared, on the 26th of October, 1962, that a grave emergency existed whereby the security of India was threatened by external aggression, as, by then, there was large scale Chinese invasion against the Indian borders. On the same day he promulgated "The Defence of India Ordinance," in exercise of his powers under Art. 123. This Ordinance was later replaced by the Defence of India Act, 1962 (51 of 1962). It is in

exercise of the powers conferred by S. 3 (1) of this Act that the impugned rules were made.

5. As already stated, Sri T. V. Sarma, the learned counsel for the petitioner contends that the Gold Control Rules, including Rule 126-P (2) which renders possession of any quantity of gold in contravention of any of the provisions of Part XII-A (Gold Control Rules, 1962) punishable with imprisonment and fine are in excess of the rule making powers vested in the Central Government by virtue of Section 3 (1) of the Act. The learned Public Prosecutor has, on the other hand, argued that the rules in question are perfectly within the competence of the Central Government as, according to him, they are made with the avowed object of securing one or more of the purposes specified in Section 3 (1) of the Defence of India Act and that the validity of the rules cannot, in any view, be questioned in view of the fact that the Legislature, in enacting sub-section (2) of Section 3, has declared its intention that rules made under any one or more of the clauses of that sub-section would necessarily be for securing the purposes mentioned in sub-clause (1) of Section 3 and as item 33 listed under sub-section (2) of S. 3 provides for framing rules for controlling possession, use, disposal etc., of bullion which includes primary gold, gold ornaments and gold in any of its forms. We will now proceed to examine the respective merits of these contentions.

6. Going back to Section 3 (1) of the Act, it will be seen that the power conferred thereunder to make rules can be exercised by the Central Government if only it is necessary or expedient to do so for securing any one or more of the objects specified therein viz., the defence of India, civil defence, the public safety, maintenance of public order, or the efficient conduct of military operations and for maintaining supplies and services essential to the life of the community. It is urged by Sri Sarma that the Gold Control Rules do not in any way contribute to the realisation of any one of the objects specified in Section 3 (1) and that Rule 126-P (2), in particular, which seeks to control possession of gold even by individuals for their personal use such as making ornaments is totally unrelated to the purposes to achieve which alone the Central Government is empowered to make rules. There is no gain-saying that "the connection that is required to be established between the rules framed and the purposes prescribed under S. 3 (1) of the Defence of India Act must be a one and not far-fetched, problematical, hypothetical or too remote though it need not necessarily be proximate." But it must at the same

time be remembered that the burden of proving the invalidity of the impugned rules lies heavily on the petitioner in view of the inclusion of item 33 under sub-section (2) of S. 3, indicting that the Legislature considered framing of rules for controlling the possession etc. of bullion and the other subjects mentioned in item 33 to be necessary or expedient for securing one or the other of the objects specified in Section 3 (1).

In the first blush, the contention put forth by Sri Sarma that control over possession of gold by individuals for their personal use has absolutely no connection or bearing on the objects sought to be secured by Section 3 (1). But a careful examination of the matter would reveal that there is a real connection between the purposes mentioned in Section 3 (1) and the objects sought to be achieved by the Gold Control Rules. The control or possession etc. of gold even by private individuals may not directly promote the defence of India or the other objects enumerated in Section 3 (1) of the Act but it does certainly and substantially help the Government in securing some at least of those objects as was held by their Lordships of the Bombay High Court in *Amichand v. C. B. Kotak*, AIR 1966 Bom 70. After referring to the contentions raised before him and adverting to the observations of their Lordships of the Supreme Court in *Collector of Customs v. Sampathu Chetty*, AIR 1962 SC 316 about the need for stringent methods, both legal and administrative, to minimise the evil of smuggling which has a deleterious effect on the national economy by adversely affecting India's position relating to foreign exchange, *Tambe, J.*, made the following observations at page 86 of the decision referred to above.

"The import of gold into India has been stopped from the year 1939. There is very little production of gold in India. Gold available in the internal markets in India is gold which has been brought from countries other than India. People of India have the habit of preparing ornaments and articles of gold as well as of hoarding gold. The prices of gold in India are, therefore, necessarily very high and lucrative as compared with prices of gold in other countries, and that is an incentive and inducement to people to smuggle gold. If gold is to be made available to people in sufficient quantity at prices prevailing in other countries to meet the demands, the Central Government would have to expend about 50 to 60 crores of rupees per year. That would result in expending foreign exchange to that extent for the purchase of gold. The various legislations made have not been sufficiently effective to check smuggling of gold. Smuggling of gold is adversely

affecting to a great extent of India's foreign exchange reserves. For arresting these mischiefs, it was necessary to control the internal market and business in gold for the purpose of conservation of foreign exchange which was very essential in the times of emergency, for the defence of India as well as for maintenance of essential commodities and services, and it is for this reason and to achieve these objects that the Gold Control Rules have been promulgated. In other words, the said rules which, inter alia, drastically restrict dealings in gold have been framed to arrest the root cause that has made gold smuggling such a lucrative business and thereby conserve foreign exchange which is so essential for the defence of India."

It is thus clear that there is a reasonable nexus between the object sought to be achieved by the Gold Control Rules and the purposes mentioned in Section 3 (1) of the Act as the rules do promote, though indirectly but not remotely, the defence of India and the maintenance of supplies essential to the life of the community as indicated in AIR 1966 Bom 70.

7. We feel unable to agree with Sri Sarma that control or possession of gold by individuals for their personal use such as making ornaments can, by no stretch of imagination, be considered necessary for securing the objects specified in Section 3 (1) of the Act, as so long as the unabated demand for gold, consequent on the lure which the people of India have for it, continues unchecked, the smuggling operations would go on merrily and affect the defence of India by causing a drain on the foreign exchange potentialities of the country besides involving the nation in loss of considerable revenue by way of customs duty and also avoidable expenditure on a vast establishment for the purpose of preventing smuggling. The amount that could be saved in the absence of smuggling could be utilised with advantage for the defence of the country and maintenance of supplies and services essential to the life of the community as contemplated by Section 3 (1) of the Act. It will be useful in this context to extract the observations of *Naik, J.*, also who, by a concurring though separate judgment, held in AIR 1966 Bom 70, that the validity of the Gold Control Rules is not open to question (page 106).

"It is undisputed that smuggling of gold involves a heavy drain on the foreign exchange resources of India. Smuggling, therefore, has to be checked. The measures undertaken under the Sea Customs Act and the Foreign Exchange Regulations have not achieved the purpose of checking smuggling. Once gold

is successfully smuggled into this country, it is very easy for the same to find a place in the internal market. It can be easily turned into ornaments and once transformed in the shape of ornaments, it is impossible to recognise that the ornaments have been prepared out of the smuggled gold. The ornaments thus prepared can easily pass off as having been made out of the existing stock or out of indigenous gold. This capacity for quick transformation into ornaments is the principal difficulty in the way of preventing smuggling. Smuggling will continue notwithstanding the enactment of stringent measures so long as it is profitable to smuggle. The trade of smuggling will continue to be profitable so long as the people have a hankering or a lure for gold. The best method of preventing smuggling, therefore, is to bring about a shrinkage in the demand for gold. It is for that purpose that the control and restriction on the manufacture and sale of gold ornaments appears to have been devised."

8. We have therefore no hesitation in agreeing with the learned Public Prosecutor that the Gold Control Rules do serve some at least of the purposes mentioned in Section 3 (1) of the Act and are consequently not in excess of the rule-making powers of the Central Government.

9. In the view expressed above, it is unnecessary to go into the question as to whether the validity of the Gold Control Rules is not open to question, even if it should be found that they do not serve to achieve any one of the purposes mentioned in sub-section (1) of Section 3 of the Act, as the Legislature, by enacting sub-section (2), has declared its intention that rules made under any one or more of the clauses of that sub-section would necessarily be for securing the purposes mentioned in sub-clause (1) of S. 3; and the Gold Control Rules are framed for controlling possession etc. of gold as provided in item 33 of sub-section (2). We may however observe in passing that the rule-making power conferred by sub-section (2) is subject to the same limitations as are imposed by sub-section (1) of Section 3 as the clauses thereunder are only illustrative of the matters pertaining to which rules could be framed. The Legislature simply sought to give guidance to the Central Government, by means of this sub-section, on the question as to what it can do for securing the purposes mentioned in sub-section (1). Section 3 (2) would neither add to nor take away the powers conferred by Section 3 (1). The mere fact that rules are framed in relation to one or other of the subjects mentioned in sub-section (2) does not by

itself render them valid if they are not referable to the powers conferred on the Central Government by sub-section (1). There is however no such difficulty in the instant case as it was already seen that the impugned rules are perfectly within the competence of the Central Government and are not in excess of its powers as they are necessary to secure the defence of India and maintenance of supplies and services essential to the life of the community.

10. It was next contended that R. 126-P (2) read with R. 126-P (4) of the Gold Control Rules would infringe the rights guaranteed to the petitioner by Art. 21 of the Constitution of India. Rule 126-P (4) lays down that notwithstanding anything contained in the Code of Criminal Procedure, 1898 (V of 1898), an offence under (this) Rule, committed after the date of commencement of the Defence of India (7th Amendment) Rules, 1962 shall be tried summarily by a Magistrate. Rule 126-P (2) renders possession or control, purchase, acquisition or acceptance etc. of any quantity of gold in contravention of the provisions of Part XII-A of the Defence of India Rules punishable with imprisonment for a term not less than 6 months and not more than 2 years and also with fine. But Section 262 (2), Cr. P. C. lays down that no sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under Chapter XXII of that Code relating to summary trials. As Rule 126-P (4) provides for summary trial of offences coming within the purview of Rule 126-P (2) which prescribes for such offences a minimum punishment of six months 'imprisonment'; and as this term of imprisonment is in excess of the maximum sentence that could be awarded under Section 262 (2), Cr. P. C., it is argued that Rules 126-P (2) and (4) are unconstitutional as offending Article 21 of the Constitution. It was urged that the procedure prescribed by Rule 126-P (4) cannot be considered to be procedure established by law unless Section 262 (2), Cr. P. C. is repealed, altered or amended by a competent legislature as it continues to be good law till then by virtue of Article 373 of the Constitution and cannot be over-ridden by rules framed by the executive providing for a minimum sentence of six months under Rule 126-P (2). It was further contended that Rule 126-P (2) prescribing a minimum sentence of six months is violative of the petitioner's rights under Article 13 (2) also of the Constitution which lays down that the State shall not make any law which takes away or abridges the rights conferred by Part III of the Constitution and that any law made in contravention of

the same shall, to the extent of the contravention, be void.

11. In the first place, the petitioner is not entitled to invoke the aid of Article 21 of the Constitution even if the impugned rules should deprive him of his personal liberty otherwise than in accordance with procedure established by law as the President, in exercise of his powers under Article 359 (1) of the Constitution of India, declared by a gazette notification dt. 3-11-62 that the right of any person to move any Court for the enforcement of the rights conferred by Article 21 and Art. 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Art. 352 thereof on the 26th October, 1962, is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 or any rule or order made thereunder. (vide AIR 1966 Bom 70 (Page 73)).

12. Even otherwise, the contention in question cannot be sustained as there is really no conflict between the provisions of Rule 126-P (4) read with Rule 126-P (2) and Chapter XXII of the Criminal Procedure Code relating to summary trials. Section 260, Cr. P. C. enumerates the offences that could be tried summarily to which Section 262 (2) thereof limits the maximum sentence that could be imposed in the case of any conviction under Chapter XXII to three months. Section 5 (1) of the Code no doubt provides for all offences under the Indian Penal Code being investigated, enquired into, tried and otherwise dealt with according to the provisions "hereinafter" contained but clause 2 of this section, which deals with offences under any other law, lays down that they shall be tried etc. according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences. Rule 126-P (4) specifically says that notwithstanding anything contained in the Code of Criminal Procedure, an offence under that rule committed after the date of the commencement of the Defence of India Rules, 1962 shall be tried summarily by a Magistrate. This rule thus provides for summary trial of offences under Rule 126-P (2) notwithstanding that Section 262 (2), Cr. P. C. limits the sentence to three months. It is further settled law that a special enactment overrides a general enactment. This part, sentence of imprisonment, not exceeding three months, prescribed by Section 262 (2), Cr. P. C., is applicable only to offences enumerated in Section 260, Cr. P. C., and

not offences which are rendered summarily triable by virtue of the provisions of special enactments such as the Defence of India Rules. So, when an enactment provides for summary trial of an act or omission which is an offence thereunder, it refers only to the procedure to be adopted and not to punishment also. A similar view was expressed by a Division Bench of the Bombay High Court in *Emperor v. Narji Bhalji*, AIR 1950 Bom 273. That case arose out of a conviction awarded under the provisions of the Bombay Prohibition Act which prescribes a minimum sentence of imprisonment in excess of three months for several offences while providing at the same time that those offences shall be tried summarily. It was therefore contended that the accused could not be awarded a sentence of imprisonment exceeding three months in view of Section 262 (2), Cr. P. C. Repelling this contention, Chainani, J. observed as follows at page 274:

"I do not think that this contention is sound. The words "any conviction under this Chapter" in sub-section (2) of S. 262, show that this sub-section applies only in those cases which are tried summarily by reason of the provisions contained in that Chapter XXII, that is, in the case of conviction for any of the offences specified in Ss. 260, 261 of the Code. The question of sentence is also not a matter of procedure. Section 110 prescribes the procedure for the trial of cases arising under the Prohibition Act. Sub-section (2) of S. 262 will, therefore, not apply in such cases."

It is thus clear that Rule 126-P (4), which lays down that offences punishable under Rule 126-P (2) shall be tried summarily, simply prescribes the procedure and that Rule 126-P (2) cannot be questioned having regard to the fact that the minimum sentence referred to in S. 262 (2), Cr. P. C. is applicable only to offences enumerated in Section 260 of the Code. This inference is further strengthened by the use of the words "in the case of any conviction under this Chapter" occurring in Section 262 (2) of the Code. The sentence, if any, to be awarded to the petitioner would be one under the provisions of Rule 126-P (2) and not Chapter XXII of the Code of Criminal Procedure and so, Section 262 (2) of the Code limiting the term of imprisonment to three months does not in any way conflict with what is contained in Rule 126-P (2) of the Gold Control Rules.

13. In re, Guruviah Naidu, AIR 1954 Mad. 833, cited for the petitioner has no application to the facts of the case on hand. It was held in that case that Section 16-A of the Madras General Sales

Tax Act was unconstitutional as it deprived the person brought to book for alleged default in payment of Sales Tax of the right to explain and plead his non-liability therefor either by reason of the invalidity of the assessment or on account of his having discharged the liability by payment and the like. The right to be absolved of liability by pleading or explaining in the course of a statement under Section 342, Cr. P. C. is a substantive right and not a matter of mere procedure. It was therefore held that Section 16-A of the Madras General Sales Tax Act should be considered to be void as it hits against the rights of the accused under the Criminal Procedure Code, the Evidence Act, and the fundamental principles of criminal justice and is also repugnant to Article 14 of the Constitution of India.

14. There is likewise no force in the plea that the provisions of Rule 126-P (2) read with Rule 126-P (4) have the effect of taking away or abridging the petitioner's right not to be sentenced to a term exceeding three months as provided in Section 262 (2) Cr. P. C. and are consequently repugnant to Article 13 (2) of the Constitution as it was already seen that the limit of sentence prescribed by Section 262 (2), Cr. P. C. is applicable only to offences enumerated in Section 260 of the Code and not to offences under other Acts which are triable summarily by virtue of the provisions contained in those Acts.

15. It was next contended that singling out of offenders against Gold Control Rules for being punished with a minimum sentence of six months imprisonment notwithstanding the provision in Rule 126-P (4) for their summary trial cannot be considered a reasonable classification made on any rational basis and is therefore repugnant to Article 14 of the Constitution which lays down that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. We are however unable to see much force in this contention either. It is now well settled that while Art. 14 forbids class legislation, it does not prohibit reasonable classification subject of course to the condition that it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that that differentia has a rational relation to the object sought to be achieved by the statute in question. (vide *Ram Krishna Dalmia v. Justice S. R. Tendolkar*, AIR 1958 SC 538.) It was indicated in the aforesaid decision that a law may be constitutional even though it relates to a single individual if, on account of special circumstances or

reasons applicable to him and not applicable to others that single individual may be treated as a class by himself.

The mere fact that certain offences against Gold Control Rules are punishable with imprisonment of not less than six months while under Section 262 (2) Cr. P. C. no sentence of imprisonment for a term exceeding three months can be passed in the case of a conviction under Chapter XXII relating to summary trials does not by itself justify the contention that the classification in question is unreasonable as the preamble to the Defence of India Act shows that the provisions of that Act and the rules made thereunder are considered necessary to ensure the public safety and interest, the defence of India and civil defence, and the trial of certain offences and of matters connected therewith during the subsistence of the grave emergency whereby the security of India is threatened by external aggression. It is thus manifest that the Defence of India Act and the Rules made thereunder are intended to prevent the commission of certain types of offences during the emergency to ensure the security of the country and the interests of the community. It would not be possible to achieve this object unless higher penalties and deterrent sentences are prescribed for certain types of offences including offences against the Gold Control Rules which, as already stated, are necessary and expedient for securing the defence of India and maintenance of supplies and services essential to the life of the community among other things. We cannot therefore agree that Rule 126-P (2) of the Gold Control Rules is discriminatory and offends Article 14 of the Constitution.

16. It was next urged that the prosecution of the petitioner under the provisions of Section 135 of the Customs Act and Rule 126-P (2) of the Defence of India Rules offends Article 20 (2) of the Constitution inasmuch as the Deputy Collector, Central Excise, Guntur had already imposed a penalty of Rs. 5,000/- on the petitioner besides confiscating the gold seized from him pursuant to the provisions of Rule 126-L (16) (aa) and Rule 126-M (20) (aa) of the Gold Control Rules. Article 20 (2) of the Constitution lays down that no person shall be prosecuted and punished for the same offence more than once. But it cannot for a moment be said that confiscation of the contraband gold would amount to prosecution or punishment of the person viz., the petitioner nor was any such contention put forth by Sri Sarma, the learned counsel, evidently because confiscation of the goods is an order in rem dealing with goods and not a punishment imposed on the person as was held in

Sewpujanrai Indrasanrai Ltd. v. Collector of Customs, AIR 1958 SC 845.

17. The next point that remains to be considered is as to whether the petitioner can be considered to have been prosecuted and punished by the Deputy Collector, Central Excise when he imposed on him a penalty of Rs. 5,000/-. Their Lordships of the Supreme Court, who had occasion to deal with a similar question in *Thomas Dana v. State of Punjab*, AIR 1959 SC 375 held that proceedings before the Sea Customs Authorities under S. 167 (8) of the Sea Customs Act are not "prosecution" within the meaning of Art. 20 (2) of the Constitution and that the fact that in such proceedings the Customs Authorities have confiscated the goods and also inflicted a penalty on the person does not therefore bring into operation the provisions of Article 20 (2) so as to prevent his prosecution and imprisonment under S. 167 (81) of the Act read with S. 23 and S. 23-B, Foreign Exchange Regulation Act and under Section 120-B, Penal Code. Their Lordships also observed that the term "prosecution" means a proceeding either by way of indictment or information in the Criminal Courts in order to put an offender upon his trial, that the Chief Customs Officer or any other officer lower in rank than him in Customs department is not a Court, that the legislature was aware of the distinction between a proceeding before the Customs Authorities and the criminal proceeding before a Magistrate and that in the absence of one of the three essential conditions laid down in clause (2) of Art. 20 of the Constitution viz., prosecution, the prohibition against double jeopardy would not become operative. His Lordship, Subba Rao, J., as he then was no doubt pointed out in his dissenting judgment in AIR 1959 SC 375 that the word "Prosecuted" is comprehensive enough to take in a prosecution before an authority other than a magisterial or a criminal Court; but we are bound by the majority view which, as already stated, is that imposition of penalty by Customs Authorities does not amount to prosecution contemplated by Art. 20 (2) of the Constitution. The learned counsel, Mr. Sarma tried to argue that on the facts of that particular case, their Lordships of the Supreme Court held that the Chief Customs Officer or his Subordinate was not a Court but that the Deputy Collector, Central Excise, who imposed penalty of Rs. 5,000/- has all the trappings of a Court and that it should therefore be deemed that the petitioner was prosecuted and punished by a Court. We however feel unable to appreciate this contention as the Deputy Collector, Central Excise, can, by no stretch of imagination, be equated to a Court for the

simple reason that he is vested with certain powers in the matter of effecting searches and seizures, compelling attendance of witnesses and the like by the Rules. It may also be noted that the powers of the concerned authorities both under the Sea Customs Act and the Gold Control Rules are almost similar. It therefore follows that the decision in AIR 1959 SC 375 that infliction of penalty by the Customs Authority does not amount to prosecution of the person so as to attract Article 20 (2) of the Constitution holds good in the instant case also. The plea based on Art. 20 (2) of the Constitution is therefore untenable.

18. There is likewise no substance in the contention that the petitioner's prosecution both under the Sea Customs Act and the Gold Control Rules is contrary to Section 26 of the General Clauses Act. Section 26 of this Act reads:

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

It can be seen from the language employed in this section that the emphasis is on the word "punishment" and not so much on "prosecution" as what is ultimately prohibited is imposition of punishment twice for the same offence. The words "shall be liable to be prosecuted and punished under either or any of those enactments" would show that there is no bar against simultaneous prosecution under more than one enactment. If it is intended to create an absolute bar not only against punishment for an act or omission which constitutes an offence under two or more enactments but also against prosecution, there would be no need for the words "but shall not be liable to be punished twice for the same offence". If the prosecution is restricted to only one enactment, there would be no question of rendering the offender liable for punishment twice for the same offence. It is therefore obvious that what is intended is prevention of punishment twice for the same act or omission which is an offence under more enactments than one and not prosecution also. It is left to the prosecutor or the authority concerned to choose under which enactment or enactments an offender shall be prosecuted when the act or omission alleged against him constitutes an offence under two or more enactments. But in the event of the prosecution being launched under two or more enactments, the punishment should be under one alone of those enactments. The trial before the Magistrate has not yet commenced.

ed in this case and it is still open to the Magistrate to confine trial of the petition to one of the two enactments alone. Even if he should try the petitioner under both the Customs Act and the Gold Control Rules, the propriety thereof can still not be questioned if ultimately the petitioner is not rendered liable for punishment under both the enactments. We are inclined to think that it is enough if the Magistrate is directed to bear this in mind but that the legality of the prosecution both under the Customs Act and the Gold Control Rules cannot however be assailed at this stage.

19. Though it was urged in the grounds of revision that Section 403, Cr. P. C. is also a bar to the prosecution of the petitioner under the provisions of the Customs Act and the Gold Control Rules, no argument was advanced to this effect obviously because this section comes into play only after the acquittal or conviction of the petitioner of the offences in question and if and when he is thereafter sought to be tried once again for the same offence or on the same facts for a different offence while the acquittal or conviction are in force.

20. For the several reasons stated supra, we feel unable to agree with the petitioner that the order sought to be revised is vitiated by any illegality.

21. In the result, therefore, the petition fails and is dismissed.

Petition dismissed.

AIR 1970 ANDHRA PRADESH 56

(V 57 C 8)

FULL BENCH

P. JAGANMOHAN REDDY, C. J.,
SAMBASIVA RAO AND
KUPPUSWAMI, JJ.

Chirala Goverdhanareddy and another, Petitioners v. Election Tribunal, Bapatla and others, Respondents.

Writ Petns. Nos. 1522 and 1684 of 1964, D/- 27-12-1967.

Panchayats — Andhra Pradesh Gram Panchayat Act (2 of 1964), Ss. 14, 16 and 217 (2) (i) — Rules under S. 217 (2) (i) — Rr. 8, 16 and 59 (c) — Election Tribunal can enquire into age qualification of candidate despite fact that his name appears in electoral roll, as a voter — Representation of the People Act (1950), Ss. 19, 62 (1), 100 — Constitution of India, Art. 326.

A mere entry in an electoral roll is not final or conclusive in regard to the age of the candidate and it is open to the Election Tribunal constituted under the Andhra Pradesh Gram Panchayat Act, 1964, to enquire, in an election peti-

tion, into the age of the candidate and to find out whether he was duly qualified to seek the election. If a person does not complete the age of 21 years, when his name is registered in the electoral roll he suffers a constitutional disability and, therefore, the very entry of his name in the electoral roll is null and void and is non est. When such is the case, the Election Tribunal can set aside the election, as the election has been vitiated by non-compliance with the Act and the rules made thereunder. AIR 1954 SC 520 and AIR 1955 Andhra 109 and (1960) 2 Andh WR 308 and AIR 1960 SC 1049 and AIR 1967 Mad 244, Rel. on; (1961) 2 Andh WR 23, Explained and Disting.; AIR 1959 All 357 (FB) and AIR 1963 SC 458 and AIR 1967 Bom 232, Disting. (Paras 22 and 30)

Section 16 has to be read in the light of the provisions of the Constitution, the Representation of the People Act and Section 14 of the Act. Simply because a person's name appears on the electoral roll, he is not qualified by that reason alone, to file a nomination or to be elected as a member of a Gram Panchayat. It is true that he must satisfy the requirement of his name appearing in the electoral roll. But, it does not follow that because a person's name appears in the electoral roll he is entitled to have his name included in it or that he is entitled to file his nomination or to be elected as a member of the Gram Panchayat. While Section 14 (5) which corresponds with Section 62 (1) of the R. P. Act, 1951 declares both positively and negatively the right of every person, whose name appears in the electoral roll to vote and thereby ensures the right of every person whose name so appears in the electoral roll to vote, Section 16 significantly puts the right to be nominated, only in the negative form. That is why R. 8 of the Rules provides for the scrutiny of the nomination papers and rejection of the nomination papers if certain grounds exist. Had Section 16 unqualifiedly declared the qualification and right of every person, whose name appears in the electoral roll, to be nominated and elected as a member of the Gram Panchayat, then Rule 8 would become wholly otiose. In the same manner as Rule 25 provides for two questions being put to every voter, who seeks to vote, regarding his registration as a voter in the electoral roll rules would also have limited the scrutiny of the nomination paper only to the appearance of the name of the nominated person in the electoral roll. Rule 8 is clearly, not only consistent but also in conformity with the provisions of Rule 16. It provides for examination as to whether the nominated candidate satisfies the other requirements prescribed

under law in this behalf and Section 16 of the Act leaves full scope to this. The age of the candidate is certainly one of such requirements. If he is of less than 21 years of age he does not have the qualification prescribed by the Constitution and the law, which is necessary for him to be registered as a voter. Despite the lack of qualification if he is enrolled, such entry would be unconstitutional and, therefore, null and void. (Para 15)

The Election Tribunal has every jurisdiction under Rule 59 (c) to examine whether the election has been vitiated for any of the reasons mentioned therein. In order to examine whether the election has been materially affected by improper reception of a nomination paper or by any non-compliance with the provisions of the Act it must necessarily have the jurisdiction to go into the question whether the nominated candidate had the necessary qualification to be registered as a voter and thus had the qualification to contest the election.

(Para 16)

Cases Referred: Chronological Paras

- (1967) AIR 1967 Bom 232 (V 54) = 29
68 Bom LR 928; Dhondba Adku v. Civil Judge Jr. Division, Hinganghat
- (1967) AIR 1967 Mad 244 (V 54) = 21
ILR (1968) 1 Mad 1, S. V. Viswanathan v. Rangaswamy
- (1963) AIR 1963 SC 458 (V 50) = 27
(1963) 3 SCR 479, Ramaswamy v. B. M. Krishna Murthy
- (1961) 1961-2 Andh WR 23 = 25
ILR (1961) 2 Andh Pra 260, Ramachandram v. Seshayya i, 23, 25
- (1960) AIR 1960 SC 1049 (V 47) = 20
(1960) 3 SCR 650, Brijendra Lal v. Jwalaprasad
- (1960) (1960) 2 Andh WR 308 = 25
ILR (1961) 1 Andh Pra 331, Radhakrishna Murthy v. Sub Judge Bapatla 1, 19, 23, 24, 25
- (1959) AIR 1959 All 357 (V 46) = 26
ILR (1959) 1 All 157 (FB), Ghulam Mohiuddin v. Election Tribunal for Town Area, Sakit 23, 26
- (1955) AIR 1955 Andhra 109 (V 42) = 18
1955 Andh LT (Civil) 75 = 1955 Andh WR 133, Viswanadhuni Venkata Kondayya v. Election Commr. Kanigiri
- (1954) AIR 1954 SC 520 (V 41) = 17
1955 SCR 267, Durga Shankar Mehta v. Raghuraj Singh
- (1929) AIR 1929 Mad 727 (V 16) = 19
ILR 52 Mad 732 (FB), Selvarangaraju v. Doraiswami Mudaliar

I. Koti Reddy and K. Krishna Rao, for Petitioners (In W. P. No. 1522 of 1964); G. Balaparameswari Rao and E. S. Ramachandra Murthy, for Petitioner (In W. P.

No. 1684 of 1964); Prl. G. A., for Respondent No. 1 (in W. P. No. 1522 of 64), and 2nd and 3rd Respondents (in W. P. No. 1684 of 1964); P. Ramachandra Reddy and A. S. Prakasam, for 2nd Respondent (in W. P. 1522 of 64); D. V. Reddi Pantulu, for 1st Respondent (In W. P. No. 1684/64).

SAMBASIVA RAO, J.: A common question that arises in both these writ petitions is whether the Election Tribunal, constituted under the Andhra Pradesh Gram Panchayat Act, can enquire into the age of a candidate in order to find out whether he was qualified to stand as a candidate on the date of his nomination. A Division Bench consisting of our learned brothers, Basi Reddy and Gopalrao Ekbote JJ, referred the two writ petitions to a Full Bench as they raised the question which is of great importance and is frequently raised and in view of the conflict between two Division Bench decisions of this Court (viz In Radhakrishna Murthy v. Sub Judge, Bapatla, (1960) 2 Andh WR 308 and K. Ramachandram v. Seshayya, (1961) 2 Andh WR 23.

2. The material facts which are necessary for the determination of this question may be stated briefly.

3. In Writ Petition No. 1522 of 1964 the petitioner was declared to have been elected as a member of the Gram Panchayat of Nallamothuvaripalem Panchayat in the Guntur District from Constituency No. 3 with a majority of seven votes, in an election held on 2-6-1964, under the Andhra Pradesh Gram Panchayats Act (2 of 1964) which will hereinafter be referred to as the Act). The respondent filed an election petition in O. P. No. 24 of 1964 before the Election Tribunal, at Bapatla, under Rule 49 (1) of the Rules framed under the Act, for conduct of election of members to Gram Panchayats, for setting aside the election of the petitioner on two grounds. The first was that the petitioner had not the requisite age of 21 years when he was enrolled as a voter in the voters list and also when he filed the nomination and that, therefore, he was not entitled to be included in the voters list and to contest in the election held on 2-6-1964. The second ground was that the petitioner committed or abetted the commission of various election offences. However, when the matter came up for trial the second ground was given up. It was contended for the petitioner before the Election Tribunal that his name was found on the electoral rolls of the Panchayat and, therefore, he had every right to be nominated as a candidate and to contest the election and that the Election Tribunal cannot go behind the electoral roll and investigate into the question of

age of a candidate. The Election Tribunal found on the basis of a birth extract filed before it that the petitioner was only 19 years of age and that he being below the requisite age of 21 years, which gives him the qualification to be enrolled as a voter, could not contest for the election. Holding that it had the jurisdiction to go into the question of the age of the candidate it set aside the election of the petitioner and directed a fresh election to be held. The petitioner, therefore, filed the present writ petition for quashing the said order of the Election Tribunal.

4. Similarly in the Writ Petition No 1684 of 1964 the petitioner's election, as a member of the Repaka Gram Panchayat, in the election held on 4-6-64 from Constituency No. 2, was questioned by the first respondent in the election petition O. P. No. 24 of 1964 on the file of the Election Court, Rajam. The ground there also was that the petitioner was below 21 years of age and that therefore, he had no right to be included in the voters list and to seek election on 4-6-1964. The election tribunal found that the petitioner was aged less than 21 years at all material times and therefore, his inclusion in the electoral roll and his nomination as a candidate, was illegal and contrary to the provisions of law and in that view set aside his election. Aggrieved by that decision the petitioner came up to this Court by way of this writ petition for quashing that order.

5. The age of the two petitioners is a question of fact and the Election Tribunal found in both the cases that the petitioners were below 21 years of age at the material times. That question cannot be canvassed in writ petitions and the learned counsel have not sought to question those findings before us. They have proceeded to argue on the basis that the two petitioners were below the age of 21 years when they were enrolled as voters when they were nominated as candidates for election, and also when the election actually took place.

6. What they have, however, contended is that it is a fact that they were enrolled as voters and their names were found in the electoral rolls. The electoral roll prepared under the Act is final and conclusive. A person, whose name is entered in the electoral roll is qualified to stand as a candidate. The election Tribunal has no jurisdiction to go behind what is contained in the electoral roll and to make an enquiry in regard to the age of a candidate and to hold that he was not entitled to contest the election. It has been contended that the Act does not prescribe the qualification of age but merely adopts the assembly roll as the basis of election and it is not, therefore,

competent for the Tribunal to go behind the roll.

7. On the other hand, it has been contended by the Government Pleader for the respondents that the very fact the assembly roll is adopted for the purpose of the Gram Panchayat Election also brings in its wake the objections which can be raised in regard to the qualification and lack of qualification of a voter, as well as a candidate. Article 326 of the Constitution of India lays down the principle of adult suffrage for the Assembly and Parliament elections and it is on the basis of that adult suffrage prescribed by the Constitution that the electoral roll for the legislative assembly is prepared. Therefore the electoral roll prepared for the election to the legislative assembly must be in conformity with the Constitutional provisions. Since that electoral roll is adopted for the Gram Panchayat Election also the electoral roll for the Gram Panchayat election should also be in consonance with the Constitutional provisions. Since a person below the age of 21 years cannot be enrolled as a voter, in view of the provisions of the Constitution read with the Representation of the People Act, 1950, the inclusion of a person below the age of 21 years in the electoral roll of the Gram Panchayat also is null and void. Therefore, it has been contended for the respondents that the inclusion of the petitioners' names in the electoral rolls must be deemed to be non est and the election Tribunal has every jurisdiction to go into the question and set aside the election of the petitioners, as their election was vitiated by non-compliance with the provisions of law.

8. In order to appreciate the relative merits of these contentions, it is necessary to notice the scope and extent of the relevant provisions of the Act and the Rules made thereunder as also the provisions of the Constitution and the Representation of the People Act, 1950. Section 14 of the Act which relates to the preparation and publication of the electoral roll for a Gram Panchayat lays down.

"Preparation and publication of electoral roll for a gram panchayat:

(1) The person authorised by the prescribed authority in this behalf shall prepare every calendar year for the gram panchayat a draft of electoral roll, which shall consist of such part of the electoral roll for the Assembly Constituency published under the Representation of the People Act, 1950 as revised or amended under the said Act, up to a date to be specified by the Government in this behalf, as relates to the village or any portion thereof, and shall cause such draft

to be published in such manner as the Government may direct.

Explanation: Where in the case of any Assembly Constituency there is no distinct part of the electoral roll relating to the village, all persons whose names are entered in such roll under the registration area comprising the village and whose addresses as entered in such roll are situated in the village shall be entitled to be included in the electoral roll for the gram panchayat prepared for the purpose of this Act.

(2) After the expiration of thirty days from the date of the publication of the draft of the electoral roll under sub-section (1), the person authorised by the prescribed authority in this behalf shall publish in such manner as the Government may direct, the final electoral roll for the gram panchayat, incorporating therein such alterations or amendments as are necessary for the purpose of bringing it into accord with the electoral roll for the relevant Assembly Constituency as it stands on the date of expiration of the thirty days aforesaid.

(3) The final electoral roll published under sub-section (2) shall be the electoral roll for the gram panchayat and it shall remain in force till a fresh electoral roll for the gram panchayat is published in the succeeding calendar year in the manner specified in the foregoing sub-sections.

(4) The electoral roll for the gram panchayat shall be divided into as many parts as there are constituencies so that the parts relating to all constituencies shall have equal number of voters;

Provided that the surplus number of voters, if any, remaining after such division shall be included in the part relating to the last constituency.

(5) Every person whose name appears in the part of the electoral roll relating to a constituency shall subject to the other provisions of this Act, be entitled to vote at any election which takes place in that constituency while the electoral roll remains in force and no person whose name does not appear in such part of the electoral roll shall vote at any such election.

(6) No person shall vote at an election under this Act in more than one constituency or more than once in the same constituency and if he does so all his votes shall be invalid.

Explanation: In this section, the expression "Assembly Constituency" shall mean a constituency provided by law for the purpose of the elections to the Andhra Pradesh Legislative Assembly." Section 16 which deals with qualification of candidates provides:

"No person shall be qualified for election as a member of a Gram Panchayat

unless his name appears on its electoral roll."

Section 17 deals with disqualification of officers and servants of State or Central Government or of local authorities and Section 18 deals with disqualification of persons convicted of election offences. Then Section 19 which provides for disqualification of candidates lays down—

"(1) A person who has been sentenced by criminal court—

(a) to imprisonment for an offence under the Untouchability (Offences) Act, 1955,

(b) to imprisonment for a period of not less than two years for any offence other than an offence not involving moral delinquency, such sentence not having been reversed or the offence pardoned, shall be disqualified for election as a member while undergoing the sentence and for five years from the date of expiration thereof;

Provided that the Government may direct that such sentence shall not operate as a disqualification.

(2) A person shall be disqualified for being chosen as a member, if on the date fixed for scrutiny of nominations for election, or on the date of nomination under sub-section (2) of Sec. 13;

(a) of unsound mind and stands so declared by a competent court;

(b) a deaf, mute or suffering from leprosy;

(c) an applicant to be adjudicated an insolvent or an undischarged insolvent;

(d) interested in a subsisting contract made with, or any work being done for, the gram panchayat;

Provided that a person shall not be deemed to have any interest in such contract or work by reason only of his having a share or interest in—

(i) a company as a mere share-holder but not as a director;

(ii) any lease, sale or purchase of immovable property or any agreement for the same; or

(iii) any agreement for the loan of money or any security for the payment of money only; or

(iv) any newspaper in which any advertisement relating to the affairs of the gram panchayat is inserted;

(e) employed as paid legal practitioner on behalf of the gram panchayat or as legal practitioner against the gram panchayat;

(f) an honorary magistrate under the Code of Criminal Procedure, 1898, with jurisdiction over any part of the village;

(g) already a member of the gram panchayat whose term of office will not expire before his fresh election can take effect or has already been elected as a member of the gram panchayat whose term of office has not yet commenced;

(h) in arrears of any dues otherwise than in a fiduciary capacity, to the gram panchayat up to and inclusive of the previous year, in respect of which a bill or notice has been duly served upon him and the time, if any, specified therein for payment has expired."

Thus, while S. 19 provides for disqualifications of candidates, Section 14 (1) adopts the electoral roll for the assembly constituency, published under the Representation of the People Act, 1950, as the draft of the electoral roll, for the Gram Panchayat and that such draft shall be published in the manner prescribed. Sub-section (2) requires that after the expiration of 30 days from the date of the publication of the draft of the electoral roll, the final electoral roll for the Gram Panchayat, shall be published incorporating therein such alterations or amendments as are necessary for the purpose of bringing it into accord with the electoral roll for the relevant Assembly Constituency as it stands on the date of expiration of the aforesaid 30 days. It should be noted in this context that the alterations or amendments that can be made in the draft of the electoral roll are only such as would be necessary to bring the electoral roll of the Gram Panchayat into accord with the Electoral roll for the relevant Assembly Constituency. Thus the scope of the amendments or alterations is strictly limited. It is also to be noticed that there are no separate rules framed for the purpose of making the alterations or amendments. The reason is obvious. Since the electoral roll for the Assembly Constituency as prepared under the Representation of the People Act, 1950 is adopted for the Gram Panchayat Election also there is no need, and the legislature did not think it necessary to provide for the independent and separate procedure, in regard either to the preparation of the electoral roll for the Gram Panchayat or for preferring any objections thereto. Even the alterations or amendments that are to be made at the time of the preparation of the final roll are for the very limited purpose of bringing it into accord with the assembly electoral roll. It is thus clear that the electoral roll for the relevant assembly constituency, as it stands on the date of the expiry of the 30 days after the publication of the draft, is the roll for the Gram Panchayat election. It is also significant to note that the Act does not lay down any qualifications for enrolment as a voter in the electoral roll for the Gram Panchayat. It must necessarily follow that the qualifications for being a voter in the Gram Panchayat election are identical with the qualification, for being a voter in the assembly election. To put it in other words, it follows from the lan-

guage of Sub-sections (1) and (2) of Section 14 that only those persons who are qualified to be enrolled as voters in the electoral roll for the assembly constituency are to be enrolled as voters in the electoral rolls for the Gram Panchayat. If one is not qualified to be registered as a voter for the assembly constituency he has neither the qualification nor the right to be enrolled as a voter in the electoral roll for the Gram Panchayat.

9. At this stage it is necessary to examine the material provisions of the Constitution and the Representation of the People Act, 1950, that are relevant for the purpose of preparing electoral roll for the Assembly Constituency, because it is these provisions that determine the basis on which the electoral roll to the Gram Panchayat also, is prepared. Article 326 of the Constitution lays down that—

"The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election."

This Article not only lays down the qualifications for persons being registered as a voter in so far as the elections to the House of the People and the legislative assemblies are concerned, but also the disqualifications. The two qualifications that are prescribed under this Article are firstly, one should be a citizen of India and secondly he should not be less than 21 years of age, on the date prescribed in that behalf, in order to be entitled to be registered as a voter. It is important to note that the provision that elections to the House of the People and the legislative assemblies shall be on the basis of adult suffrage is mandatory. Therefore, the Constitutional requirements in regard to the qualification of person for being registered as a voter are that one should not only be a citizen of India but should also be not less than 21 years of age on the prescribed date. If these two Constitutional requirements are not satisfied a person has no right to be registered as a voter. In order to implement these constitutional requirements the Representation of the People Act, 1950 also lays down in Section 19 the conditions of registration in the following terms:

"Subject to the foregoing provisions of this Part, every person who—

(a) is not less than twenty-one years of age on the qualifying date, and

(b) is ordinarily resident in a constituency,

shall be entitled to be registered in the electoral roll for that constituency."

Section 19 of the Representation of the People Act, 1950, merely carries out and implements the principle and mandate of the Constitution, by fixing the minimum age for qualification to be registered as a voter as 21 years. It is true that a law can be made prescribing the minimum qualifying age as more than 21 years. But, in view of Art. 326 it cannot be less than 21 years. Even if the Representation of the People Act, 1950 or any other Act lays down any age limit less than 21 years of age as a qualification for a person to be registered as a voter for an assembly it would be unconstitutional and, therefore, invalid. On the same reasoning, it ought to follow that if any person who is less than 21 years of age is registered as a voter such registration is null and void, though he may be a citizen of India and does not incur the other disqualifications provided in Article 326. The same rule should apply to the electoral roll for the Gram Panchayat also because by virtue of Sec. 14 of the Act, the electoral roll for the legislative assembly is made the electoral roll for the Gram Panchayat also. If a person has no qualification to be registered as a voter of the legislative assembly, he cannot be a voter for the Gram Panchayat also. If follows that a person who is less than 21 years of age shall not be registered as a voter in the assembly electoral roll, and, therefore, in the Gram Panchayat electoral roll as well. If any such registration is made it is unconstitutional, as it is repugnant to the provisions of Art. 326 of the Constitution.

10. We have already observed that neither the Act nor the Rules provide for any procedure in regard to the registration of voters. It simply adopts the electoral roll prepared for the assembly constituency under the Representation of the People Act, 1950. Rules providing for the registration of voters, preparation of electoral rolls and preferring of claims and objections in regard thereto, are made under the Representation of the People Act under the name and style of "the Registration of Electors Rules, 1960". Rules 10 to 27 of the said rules provide for an elaborate procedure for the publication of draft rolls for lodging claims and objections, procedure to be adopted in hearing the claims and objections, enquiries into claims and objections and appeals from the orders of the electoral officer and for the preparation of the final rolls.

11. Section 100 of the Representation of the People Act, 1951 lays down the procedure for declaring an election as void. The relevant provision of that section is—

(1) "Subject to the provisions of sub-section (2) if the High Court is of opinion—

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act (or the Government of Union Territories Act); or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i) by the improper acceptance of any nomination, or

xx xx xx
(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act."

It can be seen that rule 59 (c) made under the Act for conduct of the elections largely corresponds with the aforesaid provision, Section 100 of the Representation of the People Act, 1951. It is very significant to note that Section 100 (1) (a) provides for declaring an election of a returned candidate void on the ground that on the date of his election he was not a qualified candidate. If he was not qualified to be registered as a voter then he would not be a qualified candidate, and for that reason his election can be set aside.

12. Coming back to the provisions of the Act a comparative reading of sub-section (5) of Section 14 and Section 16 brings out the distinction between the right to vote and the qualification for becoming a candidate in the election of Gram Panchayat. Sub-section (5) to Section 14 puts the right to vote in both positive and negative forms. It lays down that every person whose name appears in the electoral roll shall be entitled to vote at any election held during the time while that electoral roll remains in force and it also forbids any person whose name does not appear in the roll from voting in any such election. It is, therefore, to be seen that in so far as the right to vote at an election of the Gram Panchayat is concerned it is sufficient if the person's name appears in the electoral roll. If his name appears in the electoral roll, he shall have the right to vote and if it does not so appear, he has no such

right. But, Section 16 of the Act which deals with the qualification of candidates puts the position only in a negative form. According to it unless his name appears in the roll, no person shall be qualified to be elected as a member. From this it follows that the mere appearance of a person's name in the electoral roll is not by itself, sufficient to qualify him to seek election as a member. He must satisfy the other requirements of law.

13. This distinction between the qualification to be a voter and the qualification to be a member is also brought out by the relevant rules framed under Section 217 (2) (i) of the Act for the conduct of election of members to Gram Panchayats. Rule 25 of the said Rules provides that —

"When a person presents himself to vote and at any time before a ballot paper is supplied to him, the polling officer may of his own accord and shall, if so required by a candidate or polling agent, put to such person either or both of the following questions:

(i) are you the person enrolled as follows: (reading the whole entry from the roll)?

(ii) have you already voted at the present election at this polling station or at any other polling station?

and the person shall not be supplied with a ballot paper unless he gives an unqualified answer to the question or questions put to him and unless his answer to the first question is in the affirmative and the second is in the negative. Except as mentioned herein, every person whose name is found on the electoral rolls shall be entitled to be supplied with a ballot paper."

14. Thus every person whose name is found in the electoral roll, subject to his answers to the aforesaid two questions is entitled to vote. The position in regard to the nomination of candidates is different. Rule 4 (1) of the aforesaid Rules provides that every nomination of every candidate shall be made in form No. 1. Form No. 1, framed as per R. 4 (1), prescribes the form of the nomination paper. Item 5 in the nomination form relates to age. The candidate who filed the nomination paper should not only give his age in item (5) of the form, but also should make the following declaration.

"I declare that I am willing to stand for election and my age as shown above is correct."

Rule 8, which corresponds with Sec. 36 of the Representation of the People Act, 1951 provides for procedure for scrutiny of nomination papers. Under the provisions of that rule any nomination is liable to be rejected on certain stated grounds. The first and third of such grounds are—

"(1) that the candidate is ineligible as a member of Gram Panchayat under Sections 16, 17, 18 or 19 of the Act; or

(3) that the candidate or his proposer has failed to comply with any of the provisions of Rule 4 or 6."

Therefore, if a person's name does not appear in the electoral roll, or if he is subject to any of the disqualifications mentioned in Sections 17, 18 or 19 his nomination paper will be rejected. Similarly, if the nomination paper of a candidate fails to comply with the requirement of Rule 4 (1) viz., requirement of the nomination paper as prescribed by Form No. 1, the nomination paper is liable to be rejected. That shows that if the declaration as to the age is not done by a candidate in accordance with Form No. 1 his nomination paper can be rejected. Rule 8 (2) also provides that—

"The Election Officer shall then examine the nomination papers and shall decide all objections which may be made at the time to any nomination and may either on such objection or on his own motion after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds."

Then a number of grounds on which a nomination can be rejected are enumerated. Then Sub-rule (3) of Rule 8 further lays down that:

"The Election Officer shall endorse on each nomination paper, his decision accepting or rejecting the same and, if the nomination paper is rejected, he shall record in writing a brief statement of his reasons for such rejection. The scrutiny shall be completed on the date appointed in this behalf under rule 3 and no adjournment of the proceedings shall be allowed."

Then Rule 9 provides for an appeal to the Revenue Divisional Officer or to the Deputy Collector against any order of the Election Officer, rejecting the nomination of a candidate. Then Rule 59 of the Rules provides for the decision of an election petition filed questioning the validity of an election. It provides that—

"If in the opinion of the election Court

(c) the result of the election has been materially affected by any irregularity in respect of a nomination paper or by the improper reception or refusal of a nomination paper or vote or by any non-compliance with the provisions of the Act or the rules made thereunder."

The election of such returned candidate shall be void."

Either the improper reception or refusal of a nomination paper or vote or any non-compliance with the provisions of the Act

or the Rules can be a ground for declaring the election as void.

15. Section 16 of the Act has to be read in the light of the above provisions of the Constitution, the Representation of the People Act and Section 14 of the Act. Simply because a person's name appears on the electoral roll, he is not qualified by that reason alone, to file a nomination or to be elected as a member of a Gram Panchayat. It is true that he must satisfy the requirement of his name appearing in the electoral roll. But, it does not follow that because a person's name appears in the electoral roll he is entitled to have his name included in it or that he is entitled to file his nomination or to be elected as a member of the Gram Panchayat. While Section 14 (5) which corresponds with Section 62 (1) of the R. P. Act, 1951 declares both positively and negatively the right of every person, whose name appears in the electoral roll to vote and thereby ensures the right of every person whose name so appears in the electoral roll to vote, Section 16 significantly puts the right to be nominated, only in the negative form. That is why Rule 8 of the Rules provides for the scrutiny of the nomination papers and rejection of the nomination papers if certain grounds exist. Had Section 16 unqualifiedly declared the qualification and right of every person, whose name appears in the electoral roll, to be nominated and elected as a member of the Gram Panchayat, then Rule 8 would become wholly otiose. In the same manner as Rule 25 provides for two questions being put to every voter, who seeks to vote, regarding his registration as a voter in the electoral roll rules would also have limited the scrutiny of the nomination paper only to the appearance of the name of the nominated person in the electoral roll. Rule 8 is clearly not only consistent but also in conformity with the provisions of Rule 16. It provides for examination as to whether the nominated candidate satisfies the other requirements prescribed under law in this behalf and Section 16 of the Act leaves full scope to this. The age of the candidate is certainly one of such requirements. If he is of less than 21 years of age he does not have the qualification prescribed by the Constitution and the law, which is necessary for him to be registered as a voter. Despite the lack of qualification if he is enrolled, such entry would be unconstitutional and, therefore, null and void. It means that though his name appears in the registered list in black and white, it is non est for all election purposes and it has no existence. That means, his name is not in the voters' list. Therefore, by virtue of the bar contained in Section 16 he cannot file his nomination and

he cannot be a valid candidate in the election.

16. Rule 59 (c) of the Rules provides that an election can be set aside and declared void, if the result of the election has been materially affected by an improper reception or refusal of a nomination paper or a vote or by any non-compliance with the Act and the Rules made thereunder. Since the nominated person's name formally appears in the electoral roll, and no objection was raised at the time of scrutiny despite the fact that he was below 21 years of age, the case may not strictly come within the first limb of the rule, viz., improper reception of the nomination paper. But it is certainly covered by the latter limb of the rule viz., "by any non-compliance with the provisions of the Act or the Rules made thereunder." Because the very registration of the name of the nominated person in the voters' list is repugnant to the Constitution and to the Representation of the People Act which by necessary implication have been imported into the preparation of the electoral roll for a Gram Panchayat by Section 14 of the Act. Such registration would be vitiated by non-compliance with those provisions. The Election Tribunal has every jurisdiction under Rule 59 (c) to examine whether the election has been vitiated for any of the reasons mentioned therein. In order to examine whether the election has been materially affected by improper reception of a nomination paper or by any non-compliance with the provisions of the Act it must necessarily have the jurisdiction to go into the question whether the nominated candidate had the necessary qualification to be registered as a voter and thus had the qualification to contest the election. The afore-said examination of the relevant provisions of law and the Rules made thereunder can lead only to this conclusion that the Election Tribunal can enquire into the age of the candidate in order to find out whether he was qualified to stand as a candidate on the date of his nomination and at the time of the election.

17. An examination of the case law on the point would also lead to the same conclusion. In *Durga Shankar Mehta v. Raghuraj Singh*, AIR 1954 SC 520, the Supreme Court considered the scope and the applicability of Ss. 36 and 100 (1) (c) and (2) (c) of the Representation of the People Act, 1951. As already stated, these two provisions roughly correspond to Rules 8 and 59 of the Rules relating to the Election Disputes framed under the Act. The election of one of the two successful candidates to an assembly constituency was under dispute in the case before the Supreme Court and the substantial ground on which that

election petition was filed was that the candidate who was declared to have been elected was under 25 years of age at all material times and was consequently not qualified to be chosen to fill the seat in the Legislative Assembly. No objection was, however, taken before the returning officer in respect of the nomination of the successful candidate. Upholding the contention of the appellant and setting aside the election of the successful candidate, Their Lordships of the Supreme Court held—

"If the want of qualification of a candidate does not appear on the face of the nomination paper or of the electoral roll, but is a matter which could be established only by evidence, an enquiry at the stage of scrutiny of the nomination papers is required under the Act only if there is any objection to the nomination. The Returning Officer is then bound to make such enquiry as he thinks proper on the result of which he can either accept or reject the nomination. But when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination, the Returning Officer has no other alternative but to accept the nomination. This would be apparent from section 36, sub-section (7) of the Act, under which the electoral roll is conclusive as to the qualification of the elector except where a disqualification is expressly alleged or proved. The acceptance of the nomination paper by the Returning Officer in the latter case must be deemed to be proper acceptance. It is certainly not final and the Election Tribunal may, on evidence placed before it, come to a finding that the candidate was not qualified at all. But the election should be held to be void on the ground of the constitutional disqualification of the candidate and not on the ground that his nomination was improperly accepted by the Returning Officer. A case of this description comes under sub-section (2) (c) of Section 100 and not under sub-section (1) (c) of the section as it really amounts to holding an election without complying with the provisions of the Constitution." Their Lordships also held that—

"The expression "non-compliance with the provisions of the Constitution" in Section 100 (2) (c) is sufficiently wide to cover such cases where the question is not one of improper acceptance or rejection of the nomination by the Returning Officer, but there is a fundamental disability in the candidate to stand for election at all." Their Lordships proceeded further and observed that—

"When a person is incapable of being chosen as a member of a State Assemb-

ly under the provisions of the Constitution itself but has nevertheless been returned as such at an election, it can be said without impropriety that there has been non-compliance with the provisions of the Constitution materially affecting the result of the election. There is no material difference between "non-compliance" and "non-observance" or "breach" and this item in clause (c) of sub-s. (2) may be taken as a residuary provision contemplating cases where there has been infraction of the provisions of the Constitution or of the Act but which have not been specifically enumerated in the other portions of the clause." Under Section 98 of the Act this is one of the orders which the Election Tribunal is competent to make. If it is said that Section 100 of the Act enumerates exhaustively the grounds on which an election could be held void either as a whole or with regard to the returned candidate, we think that it would be a correct view to take that in the case of a candidate who is constitutionally incapable of being returned as a member there is non-compliance with the provisions of the Constitution in the holding of the election and as such sub-section (2) (c) of S. 100 of the Act applies."

Thus the Supreme Court, construing the provisions of Sections 36 and 100 of the Representation of the People Act, 1951, which are practically in *pari materia* with Rules 8 and 59 of the Rules under the Act, upheld the power of the Election Tribunal to declare the election of a candidate to be void, when the successful candidate has suffered the constitutional disability of not having the age qualification. It was also held in that case that if a candidate, who is constitutionally incapable of being returned as a member, his election would be vitiated by non-compliance with the provisions of the Constitution, in holding the election.

18. Satyanarayana Raju J., (as he then was) considered an identical question, as in the instant case, in *Viswanadhuni Venkata Kondayya v. Election Commissioner, Kanigiri, 1955 Andh LT (Civil) 75 = 1955 Andh WR 133 = (AIR 1955 Andhra 109)*. That case arose under the Madras Village Panchayats Act, which is a predecessor to the present Andhra Pradesh Gram Panchayat Act and whose provisions are largely in *pari materia* with the provisions of the present Act. In that case also, the petitioner's name was in the electoral roll, but he was, however, actually found to be below 21 years of age. Therefore, the Election Commissioner set aside his election. Rejecting the writ petition filed by the petitioner whose election has been set aside by the Election Commissioner, the learned Judge held that—

(1966) AIR 1966 SC 1529 (V 53)=
 (1966) 3 SCR 106, Divisional Personnel Officer Southern Railway Mysore v. Raghabendra Char 31
 (1963) AIR 1963 SC 1552 (V 50)=
 1964-4 SCR 135, Ranendra Chandra v. Union of India 6, 31
 (1958) AIR 1958 SC 36 (V 45)=
 1958 SCR 828, Parshotam Lal Dhingra v. Union of India 6, 8, 29
 (1957) AIR 1957 SC 886 (V 44)=
 1958 SCJ 148, Hartwell Prescott Singh v. Uttar Pradesh Government 31
 A. R. Barthakur and B. P. Saikia, for Petitioner; A. R. Barooah, for Opp. Party.

PATHAK, J.: This petition under Article 226 of the Constitution of India has been filed by the petitioner against the notice of termination of his services dated 31-1-68 issued by P.A. to the Chief Engineer, N. F. Railway, Maligaon.

2. The petitioner's case is that he got his Diploma in Civil Engineering from the University of Roorkee in the year 1958 obtaining First Class. Thereafter he was appointed in 1959 as a Draftsman in the N. F. Railway under the Chief Engineer and was posted at Maligaon. He was selected for this job by the Chief Engineer, N. F. Railway and this was subsequently approved by the N. F. Railway Recruiting Committee. The petitioner worked in that capacity for 3 1/2 years and in the year 1962 when a vacancy for Senior Draftsman occurred, the authority issued an advertisement in the press for filling up the said vacancy. The notice that was issued by the authority for this post has been quoted in Annexure 'A' to the petition, which runs as follows:

**"NORTH-EAST FRONTIER RAILWAY
 EMPLOYMENT NOTICE NO. 1/62**

CATEGORY No. 7: One (1) post of Senior Draftsman (Civil). Post temporary but likely to be made permanent. Scale of pay: Rs. 335-15-485 plus usual allowances as per rules.

Minimum Qualification: A Degree in Civil Engineering or L. C. E. with 3 years practical experience in Civil Engineering designs.

Age limit: Between 20 and 30 years."

2. In response to the said advertisement, the petitioner submitted an application and he was selected by the N. F. Railway Recruiting Committee and he occupied the first place amongst the competing candidates. Thereafter, an appointment letter was issued and the petitioner was temporarily posted to officiate as Senior Draftsman under the Deputy Chief Engineer, Workshop, N. F. Railway, Pandu. The posting and transfer order passed by the Chief Engineer

(P) dated 18-12-1962 is as follows:

"N. F. Railway

Following posting and transfer are ordered with immediate effect:

x x x

2. Shri S. Mehra, Draftsman in scale 205-280 (A) who has been approved for the post of Sr. Draftsman in grade Rupees 335-485 by the N. F. Railway Recruitment Committee and offered appointment as such under SPO (R)'s No. E/227/III/64 Pt. I (Rect) dated 16-11-62, is appointed against a regular vacancy of Sr. D/man of CE's office in grade Rs. 335-485 and is temporarily posted under Dy. S. E. (WS) BNGN at PNO vice Shri R. N. Adhya."

Thereafter the following office order dated 18-12-62 has been passed which has been annexed as Annexure 'C' to the petition:

"In terms of CE/P/PNO's office order No. E/41/III/38/III(E) dt. 18-12-62 Shri S. L. Mehra D/man in scale of Rupees 205-280/- (A) who has been approved for the post of Sr. D/man in grade Rupees 335-485 (A) by the N. F. Railway Recruitment Committee and offered appointment as such under SPO/Rs No. E 227/III/64 PL. I (Rect) dt. 16-11-62, is hereby temporarily posted to officiate as Sr. D/man in scale Rs. 335-485/- (As) in this office with effect from 18-12-62 (A. N.) against the existing vacancy vice Shri R. N. Adhya Sr. D/man in scale 335-485/- who is being spared from this office on 18-12-62 (A. N. to report to CE's drawing office)"

The petitioner worked in the said capacity from 18-12-62 till 31-1-68 when he was reverted to the post of lower category, namely Junior Grade Draftsman in which capacity he was made to work for a period of one month. On 31-1-68 a notice was served on him by the P. A. to the Chief Engineer, N. F. Railway, Maligaon terminating his services with one month's notice with effect from 31-1-68 on the expiry of which the petitioner's service in the Railway would terminate on 1-3-68. By that notice, however, the petitioner was given an alternative appointment as a Trainee Assistant Station Master. The petitioner has come against this notice dated 31-1-68 terminating his services as Senior Draftsman.

3. The learned counsel for the petitioner has submitted that the petitioner was appointed against a regular vacancy of Senior Draftsman of Chief Engineer's office in grade Rs. 335-485 and he was temporarily posted under the Deputy Chief Engineer (Workshop), Bongaigaon at Pandu. He has further submitted that the petitioner was appointed in the said post as probationer for one year with effect from the date of his appointment, namely 18-12-1962 and he worked there

for more than five years and therefore he must be deemed to have been made permanent on the completion of his probationary period and as such the order of termination of his services is illegal. The learned counsel has submitted that the termination order was passed and issued by P. A. to the Chief Engineer, who was not the appointing authority of the petitioner and on that ground also the termination order was bad.

4. Mr. Barooah, the learned counsel appearing on behalf of the Opposite Parties, has submitted that the post to which the petitioner was appointed was a temporary one and he was only a probationer but he was not confirmed in the said post and as such he has no right to the post and he cannot question the order of termination of his services as irregular and bad in law.

5. From annexure I to the affidavit in opposition filed on behalf of the Railway Department, it is found that the petitioner was offered a temporary appointment as Senior Draftsman on Rs. 335/- in grade Rs. 335-485/- plus usual allowances as admissible from time to time on certain conditions, of which conditions 2, 3 and 4 are as follows:

"2. All appointments will be made on probation for one year. For students or apprentices appointed to a working post after completion of their training, the probationary period commences from the date of such appointment.

3. It must be clearly understood that the appointment is terminable on 14 days' notice on either side except that no such notice is required if the termination of service due to the expiry of the sanction to the post you will hold or on return to duty of the absentee in whose place you may be engaged in which case your service will be automatically terminable from the date of expiry of the sanction or from the date the former resumes his duty, as the case may be. Also no such notice will be required if the termination of your service is due to your mental or physical incapacity or to your removal or dismissal as a disciplinary measure after compliance with the provisions of Clause II of Article 311 of the Constitution of India.

4. You will not be eligible for any pension or any benefit under the State Railway Provident Fund or Gratuity Rules or to any absentee allowance beyond those admissible to temporary employees under the rules in force from time to time during such temporary service."

On a consideration of the advertisement to the post and the conditions under which the petitioner was appointed, it is quite clear that the post of senior

Draftsman to which the petitioner was appointed was a temporary post and the petitioner's appointment was also temporary. The petitioner's services have not been terminated by way of any punishment and as such it does not amount to an order of dismissal, removal or reduction in rank. The impugned notice, by which the petitioner's services have been terminated, states that consequent on reduction of establishment and abolition of certain temporary/work-charged posts of Senior Draftsman and Draftsman in open line, the petitioner had been rendered surplus to the requirement of the Railway and therefore he was given one month's notice, on the expiry of which the petitioner's services were terminated. This notice of termination of the petitioner's service appears to be quite in conformity with the conditions of service of appointment as is found in the notice No. E/227/III/64 Pt. I (Rect) dated 16-11-1962 addressed to the petitioner by the Chief Personnel Officer, N. F. Railway, Pandu, which is annexure I to the affidavit-in-opposition.

6. The learned counsel for the petitioner further submitted that the petitioner was appointed against a regular vacancy of Senior Draftsman and he was appointed as a probationer for one year and that under Rule 2202 (13) of the Indian Railway Establishment Code, Volume II, a probationer means a railway servant employed on probation in or against a substantive vacancy in the cadre of a department and therefore the petitioner must be deemed to have been confirmed in his post after the expiry of his one year's period of probation and as such his services could not be terminated in the manner in which it has been done.

In this connection, Mr. Barooah, the learned counsel for the Opposite Parties, has drawn our attention to the decision in Parshotam Lal Dhingra v. Union of India, AIR 1958 SC 36, wherein the following passage occurs at page 42:

"The position may, therefore, be summarised as follows: In the absence of any special contract the substantive appointment to a permanent post gives the servant so appointed a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years' service or the post is abolished and his service cannot be terminated except by way of punishment for misconduct, negligence, inefficiency or any other disqualification found against him on proper enquiry after due notice to him. An appointment to a temporary post for a certain specified period also gives the servant so appointed a right to hold the post for the entire period of his tenure and his

tenure cannot be put an end to during that period unless he is, by way of punishment, dismissed or removed from the service. Except in these two cases the appointment to a post, permanent or temporary, on probation or on an officiating basis or a substantive appointment to a temporary post gives to the servant so appointed no right to the post and his service may be terminated unless his service had ripened into what is, in the service rules, called a quasi-permanent service."

In paragraph 25 of the said decision, it is laid down by the Supreme Court as follows:

"It follows, therefore, that if the termination of service is sought to be brought about otherwise than by way of punishment, then the Government servant whose service is so terminated cannot claim the protection of Article 311 (2) and the decisions cited before us and referred to above, in so far as they lay down that principle, must be held to be rightly decided."

Relying on these passages, Mr. Barooah has submitted that even if the petitioner was on probation he was not confirmed in the post and as such he had no right to hold the post and when his services were terminated, not as measure of punishment, Article 311 (2) is not attracted. Mr. Barooah has also referred to the decision in *Ranendra Chandra v. Union of India*, AIR 1963 SC 1552, wherein it has been held that a government servant who is on probation can be discharged during the period of probation and such discharge would not amount to dismissal or removal within the meaning of Article 311 (2) and would not attract the protection of that Article where the services of a probationer are terminated in accordance with the rules and not by way of punishment. A probationer has no right to the post held by him and under the terms of his appointment he is liable to be discharged at any time during the period of his probation subject to the rules governing such cases.

7. So the point that falls for determination in the instant case is whether the petitioner was on probation in or against a substantive post; if so, whether he completed the period of probation required under the Rules and whether he can be deemed to have been confirmed in the post. The settled law is that the services of a probationer unless he is confirmed in the post are terminable in accordance with the Rules and not by way of punishment. Mr. Barthakur, the learned counsel for the petitioner has submitted that the petitioner who served the probationary period of one year in the instant case and was

serving in the same post for 5 years or more should be deemed to have been confirmed in the post conferring on him the right to hold the post and in this connection, the learned counsel has referred to the decision in *Director of Public Instructions v. Dev Raj*, reported in 1968-17 FLR 9 : (AIR 1968 SC 1210) wherein it has been held to the following effect:

"Where the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negated by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication." The Rules which governed the case before the Supreme Court provide specifically, that the total period of probation including extensions if any shall not exceed three years. But in the rules governing the case before us there is no such rule laying down the maximum period of probation. Moreover the case before the Supreme Court related to a permanent post whereas the post held by the petitioner in the instant case is a temporary one. In the circumstances, I hold that the decision of the Supreme Court referred to above is distinguishable on facts and the law laid down therein is not applicable to the facts of the case before us.

8. In the instant case, the petitioner has not claimed that his service ripened into a quasi-permanent service. I have found that the post which the petitioner held was temporary. Though he was put on probation for one year, the post itself was temporary and he was appointed temporarily to the said post on the specific condition that his appointment was terminable on 14 days' notice. Though the petitioner was appointed against a regular vacancy, there is no doubt that the post to which he was appointed was temporary and his appointment was also temporary. Merely because the petitioner was appointed against a regular vacancy, and put on probation for one year, that would not make the post itself permanent or his appointment to it permanent. It has been laid down by the Supreme Court in the case of AIR 1958 SC 36, referred to above, that

there may be substantive appointment to a temporary post, but that would not give the Government servant so appointed any right to hold the post. In view of the facts and circumstances of the case and the Rules governing the same, though the petitioner completed his probationary period and was serving in the said temporary post beyond the period of probation, it cannot be inferred by implication that he was confirmed in a substantive post and he acquired the right to hold the post. I therefore hold that the provisions of Article 311 (2) of the Constitution are not attracted to the instant case.

9. The next point for consideration is whether the issue of the impugned notice of termination of services of the petitioner by P. A. to the Chief Engineer was valid in law.

10. Paragraph four of the affidavit in opposition filed by the Railway administration is as follows:

"That with reference to the statements of paragraph 5 of the petition I say that the appointment of the petitioner to the post of the Senior Draftsman on 16-12-62 was purely on temporary basis and the post itself was temporary. Due to contraction of the construction projects and abolition of a number of temporary posts in the regular cadre as well as against sanctioned estimates, five Draftsmen including the petitioner in Scale of Rs. 335-485 were rendered surplus to the requirement of Senior Draftsman and as the petitioner who has been holding pro forma position in the category of Draftsman in scale of Rs. 205-380/-, so the petitioner and the four other persons were reverted to their former position of Draftsman. The petitioner joined in the post of Draftsman to which he was reverted. Again it was found that in the category of Draftsman in scale of Rs. 205-380/- the petitioner became surplus according to his seniority position.

The N. F. Railway Administration by its letter dated 31st January 1968 issued notice of termination of service of the petitioner by one month's notice with effect from 31-1-1968 and by the same letter the Railway authority out of sympathy to the petitioner offered an alternative appointment of Trainee Assistant Station Master as no other suitable post in the technical category could be found out for him."

11. From the above statement, it appears that the petitioner has not been dismissed or removed by way of punishment. According to the terms of his appointment, the appointment of the petitioner was terminable on 14 days' notice on either side and that no such notice was required if the termination of service was due to the expiry of the sanc-

tion to the post. The termination of services of the petitioner was in consequence of the reduction of establishment and abolition of certain post of Senior Draftsman, which meant that sanction for certain temporary posts of senior Draftsman and Draftsman expired. That being the position, the services of the petitioner were terminable under the terms and conditions of his appointment. The notice which was issued on 31-1-1968 regarding the termination of the service of the petitioner has been issued by the Railway Administration and the same has been communicated by the P. A. to the Chief Engineer.

In the circumstances, the notice cannot be said to be bad because it was issued by the P. A. to the Chief Engineer. By the notice dated 31-1-68 issued by the P. A. to the Chief Engineer, the petitioner was informed that his services will terminate on 1-3-1968 due to the reasons stated therein and he was offered an alternative appointment as a Trainee Assistant Station Master. The petitioner submitted a representation against this notice, wherein it is found from the record submitted in this Court by letter No. 197-E/1314(E) Maligaon dated 24-2-68, the petitioner was informed that the Chief Engineer carefully considered his representation and decided that the petitioner had no claim for absorption in the category of Junior Design Assistant and as such he had to accept the alternative appointment that had been offered to him and the petitioner also was therefore asked to communicate his acceptance of the offer of alternative appointment as Assistant Station Master; otherwise his service would terminate with effect from 1-3-1968. So this decision as it appears was taken by the Chief Engineer and it was only communicated by the P. A. to the Chief Engineer. In the circumstances, I hold that this petition has no substance.

12. In the result, the petition is dismissed and the Rule is discharged. I, however, make no order as to costs.

Civil Rule No. 46/68.

13. DUTTA, C.J.: I have had the opportunity of going through the judgment of my learned brother Pathak, J. I regret that I cannot agree with his views and conclusion reached. The facts of the case have been elaborately stated by him and I need not repeat the same.

14. The petitioner has come before us against a notice served on him on 31-1-68 by the P. A. to the Chief Engineer, N. F. Railway, Maligaon terminating his service with one month's notice with effect from the above date. His contention is that the said notice is in violation of Article 311 of the Constitution as he was removed from service without any observance of the provisions of the

above Article. It is conceded that the petitioner was appointed as a probationer in the post of Senior Draftsman. The contentions on behalf of the Railways are two-fold, namely, (1) that the post to which the petitioner was appointed was temporary; and (2) that although he was a probationer, he was never confirmed; and therefore Article 311 need not be followed for his removal.

15. As regards the first question, it may be noted that the posting and transfer order passed by the Chief Engineer (P) dated 18-12-62 is as follows:

"N. F. Railway.

Following posting and transfer are ordered with immediate effect:

x x x

2. Shri S. Mehra, Draftsman in scale 205-280 (A) who has been approved for the post of Sr. Draftsman in grade Rupees 335-485 by the N. F. Railway Recruitment Committee and offered appointment as such under SPO (R)'s No. E/227/III/64 Pt. I (Rect) dated 16-11-62, is appointed against a regular vacancy of Sr. D/man of CE's office in grade Rupees 335-485 and is temporarily posted under Dy. S. E. (WS) BNGN at PNO vice Shri R. N. Adhya."

16. The above order will show that the petitioner was appointed "against a regular vacancy". Moreover a person cannot be appointed as a probationer in a temporary post. The term "probationer" has been defined in Rule 2202 (13) in the Indian Railway Establishment Code Vol. II as follows:

"Probationer means a railway servant employed on probation in or against a substantive vacancy in the cadre of a Department."

17. When it has been conceded that the petitioner was appointed as probationer, I do not think that there is any substance in the argument that he was appointed to a temporary post.

18. As regards the question of confirmation, it was held by the Supreme Court in the case between the Director of Public Instructions, Punjab and Dev Raj, reported in 1968-17 FLR 9 : (AIR 1968 SC 1210) that where the service rules fixed a certain period of time beyond which the probationary period could not be extended, and an employee appointed or promoted to a post on probation was allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he could not be deemed to continue in that post as a probationer by implication.

19. Rule 4 of the Indian Railway Establishment Manual fixes the period of probation as follows:

"All appointments will be made on probation for one year. For students or

apprentices appointed to a working post after the conclusion of their training the probationary period commences from the date of such appointment."

It is true that it is not specifically said in the above rule that the period of probation cannot be extended. But there is no rule for extending the said period. I think in the absence of a rule giving the power to extend the period of probation, the period fixed by the above rule cannot be extended. The petitioner continued in the post for five years. In view of the above rule, I am of the opinion that although no order of confirmation was passed, he became confirmed automatically on the expiry of the period fixed by the rule. This period could not be extended by the railway authorities.

20. In the result, therefore, it is held that the petitioner was removed from his service in contravention of Article 311 of the Constitution. The petition is allowed. The petitioner will get his cost. The hearing fee is fixed at Rs. 100/-.

21. K. C. SEN J.: The writ application was heard by a Division Bench of this Court; but there being difference of opinion, it has been referred to me for my opinion.

22. The facts of the case have been dealt with by the Hon'ble Chief Justice and the Hon'ble Mr. Justice Pathak in their respective judgments and they need not be fully reiterated here. I shall only refer to the salient facts which are absolutely necessary for the purpose of my decision.

23. It appears that the petitioner Shankar Lal Mehra was appointed as a Draftsman in the N. F. Railway under the Chief Engineer and was posted at Maligaon. The petitioner worked in that capacity for 3 1/2 years and in the year 1962, when a vacancy for Senior Draftsman occurred, advertisement was issued for filling up such vacancy. In response to the advertisement, the petitioner submitted an application and he was selected by the N. F. Railway Recruiting Committee and he occupied the first place amongst the competing candidates. Thereafter an appointment letter was issued on 18-12-62, the terms whereof will be discussed later on. Such an appointment letter was followed by two office orders. The petitioner worked in the capacity as a Senior Draftsman from 18-12-62 to 31-12-67 when he was reverted to a lower category, namely, Junior Grade Draftsman, in which post he was made to work for period of one month. On 31-1-68, a notice was served upon him terminating his services with effect from 1-3-68. Under this notice, an alternative appointment of a Trainee-Assistant-Station-Master was offered to him. The petitioner has challenged the order of the appropriate authority and has

asked for a writ of mandamus calling upon the Opposite Parties for not giving effect to the impugned order dated 31-1-68 terminating the services of the petitioner as a Senior Draftsman. He has also prayed for such a writ upon the respondents calling upon them to retain him in his post as Senior Draftsman under the Railway Administration after 11-3-68.

24. In this case, Mr. Barthakur appearing for the petitioner has argued that the petitioner was appointed as a probationer against a regular vacancy of Senior Draftsman in the office of the Chief Engineer in the grade of Rupees 335-485/- and was posted under the Deputy Chief Engineer (Works), Bongai-gaon. He was appointed, according to Mr. Barthakur, in the said post as a probationer for one year with effect from 18-12-62 and he worked there for more than five years and therefore he must be deemed to have been made permanent on the completion of his probationary period. His last submission is that the termination order as passed and issued by the Personal Assistant to the Chief Engineer is invalid as he was not the appointing authority.

25. Mr. Barua appearing for the respondents has submitted that the post to which the petitioner was appointed was out and out a temporary one. Although in the appointment letter he was described as a probationer; there was no order of confirmation during the period of his service. He served in a purely temporary capacity and as such he had no right to the post and cannot question the order of termination of his service as irregular. He also submits that in such circumstances, the provisions of Article 311 (2) of the Constitution cannot be attracted in aid of the petitioner's case.

26. In order to appreciate the arguments, it is first of all necessary as to what were the terms of the advertisement which was issued by the Railway authority. The employment notice as given in Annexure 'A' to the petition runs as follows:

"Category No. 7: One (1) post of Senior Draftsman (Civil). Post temporary but likely to be made permanent. Scale of pay : Rs. 335-15-485/- plus usual allowances as per rules.

Minimum Qualification: A degree in Civil Engineering or L. C. E. with three years practical experience in Civil Engineering designs. Age limit: Between 20 and 30 years".

It will be important to note that there is a condition in this employment notice that the post was temporary, but was likely to be made permanent. In the appointment letter—Annexure 'I' of

the Affidavit-in-opposition filed on behalf of the Railway Administration, it appears that it was issued on 16-11-62 to the petitioner stating that the appointment as Senior Draftsman on Rs. 335/- in the grade of Rs. 335-15-485/- plus usual allowances, as admissible under the rules from time to time was temporary. It is important to note that although the appointment was given on a temporary basis, in the second paragraph of the letter it is clearly stated that "All appointments will be made on probation for one year". Further in paragraph 3 also, it is stated that "the appointment is terminable on 14 days' notice on either side except that no such notice is required for the termination of service due to the expiry of the sanction to the post you will hold or on return to duty of the absentee in whose place you may be engaged in which case your service will be automatically terminable from the date of expiry of the sanction or from the date the former resumes his duty, as the case may be."

From this appointment letter, it appears quite clear that the petitioner was appointed as a temporary hand and if this document has to be treated as the sheet anchor of the case, the petitioner cannot make out any case and say that Article 311 (2) of the Constitution has not been complied with. Although the caption of Annexure I shows that the appointment was temporary there is a specific condition that he was made a probationer for one year. This fact requires careful consideration with reference to subsequent orders as to whether since he was appointed as a probationer the other conditions in the said appointment letter should be made ineffective. It has not been stated that the word probationer was used in the said letter loosely. Before dealing with this question I shall refer to the two subsequent orders which were passed after his selection to hold the post of the Senior Draftsman. They are Annexures 'B' and 'C' of the petition which respectively runs as follows:—

"Following posting and transfer are ordered with immediate effect.

1. Shri R. N. Adhya, Sr. D/man in Scale 335-485 (A) under Cy. CE/WS/BNG at Pandu is hereby transferred on his same pay and grade and posted in CE/PNO's drawing office against the vacancy caused due to promotion of Shri S. K. Bhatta as CDM/Matric.

2. Shri S. Mehra, D/man in scale 205-280 (A) who has been approved for the post of Sr. D/man in grade Rs. 335-485 by the N. F. Fly. Recruitment Committee and offered appointment as such under SPO (R)'s No. E/227/III/64 Pt. 1 (Rect), dated 16-11-62, is appointed against a regular vacancy of Sr. D/man

of CE's office in grade Rs. 335-485 and is temporarily posted under Dy. SE(WS) BNGN at PNO vice Shri R. N. Adhya".

"In terms of CE/PNO's office order No. E/41/III/38/III (E), dated 18-12-62 Shri. S. L. Mehra D/man in the scale of Rs. 205-280/-(A) who has been approved for the post of Sr. D/man in grade Rs. 335-485/-(A) by the N. F. Railway Recruitment Committee and offered appointment as such under SPO/R's No. E/227/III/64 PL. 1 (Rect), dated 16-11-62, is hereby temporarily posted to officiate as Sr. D/man in scale Rs. 335-485/-(As) in this office with effect from 18-12-62 (A. N.) against the existing vacancy vice Shri R. N. Adhya Sr. D/man in scale 335-485/- who is being spared from this office on 18-12-62 (A. N.) to report to CE's drawing office".

In the order, Annexure 'C' issued by the Deputy Chief Engineer, it appears that he was temporarily posted to officiate as Senior Draftsman in the scale of Rs. 335-485/- with effect from 18-12-62 against the existing vacancy caused by the transfer of Shri R. N. Adhya, Senior Draftsman. The Annexure 'B' is very significant inasmuch as the petitioner was appointed on being selected by the Recruitment Committee and such appointment was made against a regular vacancy of Senior Draftsman of Chief Engineer's office in the grade of Rs. 335-485/-.

27. Accordingly the aforesaid orders issued by the appropriate authority with special reference to the fact that he was appointed a probationer for one year will give rise to the conclusion that his temporary status as a Senior Draftsman was given a go-by and he was deemed to have served against a substantive vacancy. It is significant to note that the letter of appointment was issued on 16-11-62 and after the lapse of one month the aforesaid letters as per Annexures 'B' and 'C' of the petition were issued on 18-12-62. This is a very significant fact and in the absence of any document to the contrary it may be presumed that the appointing authority had in its mind in the meantime, to treat the appointment as a substantive one, as otherwise the subsequent orders would not have been issued in terms as treated therein and it is also not inconsistent with the employment notice that the post is temporary but likely to be made permanent.

28. Rule 2202 Clause 13 of the Establishment Code Volume II Third Reprint provides that probationer means a Railway servant employed on probation in or against a substantive vacancy in the cadre of a department. From this definition it appears quite clear that unless there is a substantive vacancy, none

can be appointed as a probationer. It could not be shown by Mr. Barua with reference to any other rule as to whether this expression can be used in case of temporary appointments. In order to understand the word 'probationer' reference may also be made to the said Volume of the Establishment Code at Rule 2003 (6). It provides that 'duty' includes service as a probationer or apprentice provided such service is followed by confirmation. It will not be forgotten as appearing from Annexure 'B' of the petition that the petitioner was appointed against a regular vacancy and he was temporarily posted under the Deputy CE (WS) BNGN vice R. N. Adhya, who, it appears from this document, was transferred vice S. K. Bhatta against the vacancy caused by him on account of his promotion. It is also found from the petition and also from the documents annexed thereto that he was allowed to draw the time-scale increments and the question therefore arises that if he was on 'duty' within the meaning of R. 2003 (6), he drew the increments as a permanent incumbent. This definition of duty should be read with Rule 2022 cl. (a) of the said Code which provides that all duty in a post on a time-scale counts for increments in that time-scale and it appears that at the time of notice he was drawing a salary of Rs. 410/- (vide Annexure 'IV' of Affidavit-in-opposition).

29. In the first instance, Mr. Barua contends that the petitioner cannot be considered as a probationer within the said rule as the appointment letter clearly envisages the temporary nature of his appointment and that if he was treated as such his period of probation would have been extended till he was confirmed. In the absence of such a procedure being followed his services were liable to be terminated on the footing that his services were purely temporary. In support of his contention he refers to the decision of the Supreme Court in AIR 1958 SC 36, wherein the following passage occurs at page 42:—

"The position may, therefore, be summarised as follows:— In the absence of any special contract the substantive appointment to a permanent post gives the servant so appointed a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years' service or the post is abolished and his service cannot be terminated except by way of punishment for misconduct, negligence, inefficiency or any other disqualification found against him on proper enquiry after due notice to him. An appointment to a temporary post for a certain specified period also gives the servant so appointed a right to hold the post for

the entire period of his tenure and his tenure cannot be put an end to during that period unless he is, by way of punishment, dismissed or removed from the service. Except in these two cases the appointment to a post, permanent or temporary, on probation or on an officiating basis or a substantive appointment to a temporary post gives to the servant so appointed no right to the post and his service may be terminated unless his service had ripened into what is, in the service rules, called a quasi-permanent service".

30. Further it is laid down in paragraph 25 of the said decision as follows: "It follows, therefore, that if the termination of service is sought to be brought about otherwise than by way of punishment, then the Government servant whose service is so terminated cannot claim the protection of Art. 311 (2) and the decisions cited before us and referred to above, in so far as they lay down the principle, must be held to be rightly decided".

31. It appears clear from the said decision that if during the period of probation the service of an incumbent is sought to be terminated, he cannot claim any right to the post, unless his service had ripened as is called in the service rule a quasi-permanent service. The next case to which reference has been made by Mr. Barua is reported in AIR 1957 SC 886, equal to 1958 SCJ 148, Hart Prescott Singh v. Uttar Pradesh Government. This decision in my opinion cannot be attracted in support of the respondent's case. The next case to which reference is made is reported in (1964) 4 SCR 135 = (AIR 1963 SC 1552). Their Lordships held inter alia in this case that as a probationer, the appellant was liable to be discharged during that period subject to the rules in force in that count. There is no dispute that an incumbent can be discharged during the period of probation. I have perused the judgment of the Supreme Court reported in AIR 1966 SC 1529, The Divisional Personnel Officer, Southern Railway, Mysore v. Raghabendra Char, but I am of opinion that the decision as given by their Lordships in that case has no semblance to the facts in the instant case and as such, such a decision cannot be attracted in aid of the respondents.

32. Now let me turn to the actual facts. I have already quoted the appointment letters as also the subsequent orders passed by the Chief Engineer. The order—Annexures 'B' and 'C' of the petition—speaks of an existing substantive vacancy against which the petitioner was appointed and such appointment was in the chain of vacancy

caused by the promotion of Sri S. K. Bhatta. The expression 'regular' as used in Annexure 'B' in its dictionary meaning means 'permanent' or a post having some stability. These two documents on the face of them clearly go counter to the terms of appointment as given in the first appointment letter as per Annexure 'I' to the Affidavit-in-opposition. Mr. Barua has argued that the fact that he was temporarily posted will go to show that he was temporarily appointed to the post. But I may say in this connection that there is a good deal of difference between a 'temporary appointment' and a 'temporary posting'. There is no inflexible rule that an incumbent taken into permanent cadre cannot be posted temporarily at any post. Therefore, it boils down to a patent fact that he was appointed as (1) a probationer in the first instance and (2) he was appointed against a regular vacancy. Accordingly I am of opinion that the terms in the appointment letter regarding temporary nature of the appointment were deviated from after a month and the petitioner was in fact treated to be holding the post against a substantive vacancy, presumably in terms of the employment notice that the temporary post had the likelihood of being made permanent.

33. The next important point for consideration is whether the period of probation was automatically extended in order that he might be dealt with, without resort being had to the provision of Article 311, in the absence of any rule in this regard. I have already said that a probationer means a railway servant employed on probation in or against a substantive vacancy in the cadre of department as given in the Establishment Code. Furthermore, I have said that under the Code, all appointments will be made on probation for one year. This rule does not say that the authorities have any power either to extend the period of probation or not to do so.

In the absence of such a provision I am of opinion that the period of probation cannot be extended and the said rule appears to be inflexible in the sense that the period of probation should only be limited to the period of 'one year'. Mr. Barthakur contends accordingly that since his period of probation cannot be extended under the rule his continuation in service beyond one year gives him the right to confirmation. In support of his contention he has referred me to the Supreme Court decision in (1968) 17 FLR 9 = (AIR 1968 SC 1210). In this case their Lordships dealt with a rule which provides that on completion of the period of probation the authority competent to make appointment may confirm the member in his appointment

or if his work or conduct during the period of probation has been in his opinion unsatisfactory, he may dispense with his services or may extend his period of probation by such period as he may deem fit provided that the total period of probation including the extension, if any, shall not exceed three years. On this rule, their Lordships have held inter alia as follows:—

“Whereas in the instant case the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negated by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication”.

34. Their Lordships in making the above observation were not oblivious of the earlier Supreme Court decisions in which it was held that where on the completion of the specified period of probation, an employee is allowed to continue in the post without an order of confirmation, the only possible view to take in the absence of anything to the contrary in the order of appointment or promotion or the service rules, is that the initial period of probation has been extended by necessary implication. In all the cases reviewed, the condition of service of the employee permitted extension of the period for an indefinite period and there was no service rule forbidding its extension beyond a certain maximum period.

35. In the instant case the above conditions are not present in the Establishment Code and therefore, in the absence of any rule for extending the period of probation or putting a fetter upon the period of probation, the rule as to probation as it stands is inflexible and it should be given its proper meaning with reference to the terms of appointment given in Annexures ‘A’ and ‘B’ of the petition as discussed before. Accordingly it is permissible to draw the inference that the employee who was permitted to continue beyond the maximum period of probation has been confirmed in that post by implication.

36. I shall at the next place deal with the question of the notice which was served upon the petitioner by the P. A.

to the Chief Engineer, N. E. F. Railway, Maligaon. Regarding notice the condition thereof has been made in Annexure I of the Affidavit-in-opposition. It envisages that the appointment is terminable on 14 days’ notice on either side and that no such notice is required amongst others, if the sanction to the post expires. But it appears from Annexure ‘B’ of the petition that he was given one month’s notice terminating his service as a Draftsman. It is stated therein that consequent on reduction of establishment and abolition of certain temporary work-charged posts of Senior Draftsman and Draftsman, the petitioner was rendered surplus to the requirement of the Railway and therefore, he was given notice of one month with effect from 31-1-68, on expiry of which his service should terminate on 1-3-68 (forenoon). In this notice also, an alternative offer was given to him for appointment as a Trainee Assistant Station Master (vide Annexure ‘E’ of the petition). This is dated 16-1-68, i.e. before his services were terminated by notice as per Annexure ‘D’. Against this notice, an appeal was preferred to the General Manager as per Annexure ‘G’ in which it was said that all of a sudden his pay was reduced with effect from 1-12-67 without giving any notice to him, nor the reason was made known to him for the reduction of pay which amounted to penalty. Against this, no specific reply was given to the petitioner but it appears that his previous representations for alternative posts dated 1-2-68 and 9-8-68 were turned down by the Chief Engineer (vide Annexure V of the Affidavit-in-opposition).

In the Affidavit-in-reply by the petitioner, it was clearly stated that he was not given one month’s notice or 14 days’ notice as the case may be in terms of the letter of appointment for termination of his service as Senior Draftsman. According to the petitioner, such an action was arbitrary and he could not be removed from the post of the Senior Draftsman without requisite notice being served on him. There appears to be no challenge to the statement of the petitioner that he was reduced in rank to the post of the Draftsman on 1-12-67 without assigning any reason and the petitioner under protest accepted this situation. Accordingly the question would arise in such circumstances as to whether appropriate notice as to termination of his service as Senior Draftsman was given to him in terms of the appointment letter. No document has been placed before me to show that the sanction of the post of the Senior Draftsman terminated when he reverted to his original post from 1-12-67, in order to exonerate the department from its liability to issue notice. The

absence of such a document in record warrants the conclusion that he was removed from the post of the Senior Draftsman in clear flagrance of the terms of the appointment letter. In the affidavit-in-opposition it has not been stated as to the time when the sanction to the post terminated. In such circumstances, the notice to terminate the service as per Annexure 'D' of the petition was notice for terminating his services as Draftsman. As such, I am clearly of opinion that this notice cannot be treated to be a notice in accordance with the terms of appointment letter for termination of his service as a Senior Draftsman and as such his removal therefrom and reduction in rank without notice amount to non-observance of the Department's own letter of appointment. I have already stated that no specific case has been made out as to the date when the sanction for the post of Senior Draftsman terminated and as such before he was brought down to the post of Draftsman, notice ought to have been served upon him.

37. As the petitioner succeeds on the points stated above, I need not go into the question whether the notice issued by the Personal Assistant to the Chief Engineer terminating his services as Draftsman is valid or not.

38. In such circumstances, I respectfully differ from the view expressed by the Hon'ble Mr. Justice Pathak and agree with the view and the conclusion arrived at by the Hon'ble Chief Justice.

39. In the result, the application must succeed and the rule should be made absolute. It is held by me that the petitioner was removed from the service as a Senior Draftsman in contravention of Article 311 of the Constitution and therefore a writ in the nature of mandamus should be issued directing the respondents not to give effect to the impugned order dated 31-1-68 terminating the services of the petitioner.

40. The petitioner will get costs. Hearing fee being assessed at Rs. 100/-.

Order accordingly.

AIR 1970 ASSAM & NAGALAND 26
(V 57 C 4)

S. K. DUTTA, C. J.,
AND K. C. SEN, J.

Bhuban Chandra Dutta, Petitioner v. The Accountant-General, Assam and Nagaland, Shillong and another, Respondents.

Civil Rule No. 126 of 1969, D/- 19-5-1969.

(A) Constitution of India, Art. 226 — Appointment of Registrar of High Court by Chief Justice — Accountant General

issuing provisional pay-slip but not in conformity with the terms of appointment on ground that his appointment and its terms were invalid — Petition by Registrar for release of pay — No relief sought against Chief Justice — Chief Justice not being necessary party omission to implead him as such does not make petition defective. (Para 10)

(B) Constitution of India, Art. 229 (1) — Assam and Nagaland High Court Services (Appointment and Conditions of Service and Conduct) Rules (1967), R. 7 (1) — Appointment of Registrar of High Court by Notification issued by Chief Justice under power given under Art. 229 — Order of appointment referring to Rule 7 (1) of (1967) Rules, although they were not published at time of appointment — Reference to Rule 7 (1) held to be redundant — Chief Justice having power to appoint Registrar, wrong reference to R. 7 (1) in Notification cannot make it invalid. AIR 1964 SC 1329 Rel. on. (Para 12)

(C) Constitution of India, Art. 229 — Notification by Chief Justice appointing retired person to post of Registrar of High Court without referring to Rule 142 of Assam Pension Manual — Chief Justice being competent to appoint Registrar under Art. 229 non-reference to R. 142 in Notification cannot make appointment invalid — There being no necessity to refer to Rule 142 or reasons for appointment, notification requires no modification. (Para 13)

(D) Constitution of India, Art. 229 — Appointment of Registrar of High Court by Chief Justice — Terms of appointment notified and Registrar accepting them by joining post — Formal contract between Chief Justice and Registrar as to terms of appointment is not necessary. (Para 13)

(E) Civil Services — Assam High Court Appointment and Conditions of Service Rules (1956), Rr. 3 (1) and 11 (1) — Fundamental Rules, R. 19 — Power of Chief Justice under R. 3 (1) to grant Registrar initial pay upto Rs. 1180 in fixed scale of Rs. 850-50-1000-60-1300 EB-50-1500 — Pay Scale revised by Government and fixed at Rs. 1200-60-1380 EB-60-1500 — Effect — Rule 3 (1) must be adapted accordingly — Power of Chief Justice to grant initial pay upto Rupees 1180/- under R. 3 (1) must be read as substituted by figure Rs. 1500. AIR 1956 SC 285 and AIR 1964 Punj 285 Rel. on. (Para 19)

(F) Constitution of India, Arts. 229 and 245 — Assam High Court Appointment and Conditions of Service Rules (1956), Rule 3 (1) — Power of Chief Justice to fix higher pay-scale of High Court employees under the rule — Rule having approval of Governor — Nothing provid-

ed in Art. 229 that Governor should lay down pay-scale of employees of High Court — Power given to Chief Justice under the Rule cannot be said to be delegated to him by Governor. (Para 21)

(G) Civil Services — Assam Pension Manual, R. 60-A — Does not restrict power of Chief Justice to fix higher initial salary in pay-scale of High Court employee.

The power of Chief Justice to appoint a pensioner on a higher initial pay-scale exceeding the last salary drawn by him is not affected by R. 60A of the Assam Pension Manual. (Para 23)

By R. 60-A, the power of the Governor to fix higher initial salary in the pay-scale of Government employees is delegated to an Administrative Department with the limitation that the Department cannot fix a salary which exceeds the last pay drawn by an Officer. An Administrative Department is not the Government, it is only an unit of the Government. As this Rule does not restrict the power of the Governor to fix higher initial salary in the pay-scale of Government employees, it also cannot restrict the power of the Chief Justice in that respect so far as High Court employees are concerned, since, the Chief Justice exercises the same power of fixing the initial salary of High Court employees as the Governor exercises in respect of employees appointed by the Government.

(Para 23)

(H) Civil Services — Assam High Court Appointment and Conditions of Service Rules (1956), R. 7 (1)—Applicability — Rule equally applies to retired person appointed as Registrar of High Court.

(Para 26)

Cases Referred: Chronological Paras

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| (1964) AIR 1964 SC 1329 (V 51)= | |
| (1964) 6 SCR 857, Hukumchand Mills v. State of M. P. | 12 |
| (1964) AIR 1964 Punj 285 (V 51)= | |
| ILR (1964) 1 Punj 377, Sri Kidar Nath v. Punjab Govt. | 19 |
| (1956) AIR 1956 SC 285 (V 43) = | |
| 1955-2 SCR 1331, Pradyat Kumar v. Chief Justice of Calcutta | 17 |

S. K. Ghose, J. P. Bhattacharjee, S. N. Medhi, for Petitioner; B. C. Barua, Advocate General, Assam and G. K. Talukdar, Sr. Govt. Advocate, for Opp. Parties.

DUTTA, C. J.: The case of the petitioner Shri Bhuban Chandra Dutta in this writ petition is as follows:— He was recruited as a Munsiff from the Bar and after serving in various capacities became an Additional District Judge and then Registrar of the High Court. After retirement, he was appointed as the Presiding Officer of the Industrial Tribunal, Assam and when he was still holding that post, he was selected by the Chief Justice for

appointment as Registrar of the High Court. Accordingly the petitioner was released from his post of Presiding Officer by a notification dated the 26th April 1967 which said as follows:

"Shillong, Dated the 26th April, 1967. No. GLR. 337/66/22. — Shri B. C. Dutta, Presiding Officer, Industrial Tribunal, Assam, Gauhati, is released from the Labour Department with effect from the date he makes over charge to enable him to join the new assignment in the Hon'ble High Court.

Sd. S. J. Das.

Secretary to the Government of Assam,
Labour Department."

On being so released the petitioner was appointed as the Registrar of the High Court and the following two notifications dated 28-4-67 were published in the Assam Gazette of 17-5-67.

"The 28th April, 1967.

No. HC. V-46/67/2824/A/Estt.— In exercise of the powers conferred by Art. 229 of the Constitution of India, read with Rule 7 (1) of the Assam and Nagaland High Court Services (Appointment, Conditions of Service and Conduct) Rules, 1967, the Hon'ble Chief Justice of the High Court of Assam and Nagaland is pleased to appoint Shri Bhuban Chandra Dutta, B. L., at present Presiding Officer of the Industrial Tribunal, Gauhati as the Registrar of the High Court of Assam and Nagaland with effect from the forenoon of 1st May, 1967 vice Shri S. C. Barua, whose services are replaced with the Governor of Assam for posting as District Judge in the regular cadre of District Judges.

Sd. U. N. Rajkhowa,
Deputy Registrar,

High Court of Assam and Nagaland."

"The 28th April, 1967

No. HC. V-46/67/2824/B/Estt. — In exercise of the powers conferred by Art. 229 of the Constitution of India and of Rules 7 and 13 of the Assam and Nagaland High Court Services (Appointment, Conditions of Service and Conduct) Rules, 1967, the Hon'ble Chief Justice of the High Court of Assam and Nagaland is pleased to fix the following terms and conditions of services of Shri Bhuban Chandra Dutta, B. L., who has been appointed as the Registrar of the High Court of Assam and Nagaland as per High Court Notification No. HC. V-46/67/2824/A/Estt. dated 28th April 1967—

(1) He shall be entitled to draw an initial pay of Rs. 1,500/- per mensem less the pension, if any, he has been drawing from the Government.

(2) He shall, in addition to his initial pay of Rs. 1,500/- be entitled to draw a special pay of Rs. 250/- per mensem

admissible under the said Rules to the Registrar of the High Court.

(3) He shall hold the appointment of the Registrar of the High Court of Assam and Nagaland for a minimum period of two years in the first instance. This period may, however, be extended as considered suitable and necessary, by the Hon'ble Chief Justice who happens to be in office at the time of the expiry of this period of two years.

Sd. U. N. Rajkhowa,
Deputy Registrar,

High Court of Assam and Nagaland."

2. In pursuance of the above notifications, the petitioner took over charge as the Registrar of the High Court in the forenoon of the 1st May, 1967 and submitted the charge report to the Accountant-General, Assam. But in spite of repeated requests made by the petitioner who sent several reminders by letters and telegrams, the Accountant-General did not issue any pay-slip to him. On the 25th July, 1968, the Deputy Registrar of the High Court under the direction of the Chief Justice, wrote to the Secretary to the Government of Assam in the Law Department to instruct the Accountant-General to issue provisional pay-slip to the petitioner for Rs. 1500/- as pay plus special pay of Rs. 250/-. Accordingly the Finance Department wrote to the Accountant-General as follows on the 31st July 1968:

"I am directed to say that the Registrar of the High Court, Assam and Nagaland is reported to have not received his pay for the last one year thereby putting him to great financial difficulties, and to request you kindly to issue at least a provisional pay-slip in his favour.

Yours faithfully,

Sd. D. S. Khongdup,
Deputy Secretary to the Govt. of
Assam, Finance Deptt."

3. Thereafter on the 2nd August 1968, the Accountant-General issued a provisional pay-slip for the period from 1-5-67 to 31-10-67 authorising the petitioner to draw a sum of Rs. 870.05 only per month as provisional pay. The special pay of Rs. 250 was not included in the pay-slip. As the pay-slip was not in conformity with the terms of his appointment, the petitioner did not draw his pay on it. Another pay-slip was issued on 26-12-68 authorising the petitioner to draw the above amount from 1st November 1967 to the 31st December 1968.

4. The contention of the petitioner is that the Accountant-General is bound to issue a pay-slip authorising him to draw his salary at the rate of Rs. 1500/- per month minus his pension and plus a special pay of Rs. 250/- per month as per terms of his appointment.

5. The contention of the Government is as follows:

The rules relating to pay, allowance, pension or leave (hereinafter called the financial rules) in the Assam High Court Appointment and Conditions of Service Rules 1961 and also in the Assam and Nagaland High Court Services (Appointment, Conditions of Service and Conduct) Rule, 1967 are invalid as no approval of the Governor was given to the said Rules. The financial rules in the Assam High Court Appointment and Conditions of Service Rules 1956 (hereinafter called the Rules of 1956) are still in force. The Rules of 1967 were published in October, 1967 only. As reference to these Rules was made in the order of appointment of the petitioner dated 28-4-67, his appointment is void ab initio. The Accountant General had no authority to issue the pay-slip on the basis of the notification fixing the pay of the petitioner at Rupees 1500/- per month minus pension and a special pay of Rs. 250/- per month, in the absence of any specific sanction from the Government.

6. The Government also asserts that it was pointed out to the High Court that the appointment should be on the basis of a contract and not under the notification. As a matter of fact, the petitioner asked for an approved form for contract. Then the Deputy Registrar wrote by a letter No. 4561 dated 16-9-67 to the Government that the petitioner might be appointed on a monthly pay of Rs. 1500/- on contract basis in modification of the appointment made by the Chief Justice under the notification of 28-4-67. As the execution of the contract was likely to take time, the request for provisional pay-slip was made. Thus the Chief Justice did not agree to the special pay of Rs. 250 per month. The Chief Minister by a D. O. letter dated the 4th March 1968, pointed out to the Chief Justice the difficulty of allowing Rs. 1500/- as the basic pay. Under a Rule in the Assam Pension Manual, on re-employment, a person could not draw a higher salary than his last pay minus pension. The last pay of the petitioner was only Rupees 1150/-. After that there was a series of correspondence between the Chief Minister and the Chief Justice and before a final decision was taken, the writ petition was filed.

7. The case of the Accountant-General is that the Chief Justice was competent under the rules to fix the initial salary of the Registrar at a figure up to Rs. 1180/- per month. The pension of the petitioner was Rs. 238.10 per month. His pension equivalent to gratuity was Rs. 71.85 per month. Hence the Accountant-General issued a pay-slip for Rupees 870.05 which represented the maximum

initial salary fixable by the Chief Justice minus the pension.

8. The learned Advocate-General has taken two preliminary points. Firstly he set out some material facts by not disclosing that the petitioner has suppressed some correspondence passed between the High Court and the Government subsequently. Secondly, the Chief Justice is a necessary party and the petition is defective on account of the omission to make him a party. So, it is submitted that the petition should be dismissed in limine.

9. There is no force in the above contentions. The petitioner was appointed by a notification dated 28-4-67. By another notification of the same date the terms of his appointment were laid down. All that we have to examine is whether or not the appointment is valid and the terms are in conformity with law. These notifications were never modified and we are not concerned with the correspondence that passed subsequently between the High Court and the Government.

10. The petitioner is not seeking any relief against the Chief Justice. His contention is that the appointment made by the Chief Justice and the terms given by him are valid. The Chief Justice, is, therefore, not a necessary party.

11. As stated above, the Government contends that the financial rules in the Assam High Court Appointment and Conditions of Service Rules of 1961 as well as in the Rules of 1967 are invalid and that the financial rules in the Rules of 1956 have been in force. For the purpose of this case, we need not examine whether the financial rules in the Rules of 1961 and 1967 are valid or not. We shall assume that the financial rules of 1956 only are in force and examine whether the pay and allowance given to the petitioner are valid under these rules.

12. The order of appointment of the petitioner was stated to have been made in exercise of powers conferred by Article 229 of the Constitution of India read with Rule 7 (1) of the Rules of 1967. It is pointed out that the appointment was made in April 1967 whereas the Rules of 1967 were published only in October of that year. Hence it is contended that the notification is vitiated. There is no force in this argument. The reference to Rule 7 (1) of the Rules of 1967 was redundant and such reference does not in any way affect the Notification regarding the petitioner's appointment and fixation of salary. The appointment was made under Article 229 (1) of the Constitution of India which says—

"Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other officer of the Court as he may direct." In

fact, as pointed out by the Supreme Court in *Hukumchand Mills v. State of Madhya Pradesh*, AIR 1964 SC 1329, even a reference to a wrong source of power, does not vitiate the power exercised. But in the instant case, the reference to Article 229 is there in the notification appointing the petitioner.

13. The learned Advocate-General has submitted that the above appointment being that of a retired person, should be deemed to be an appointment under Rule 142 of the Assam Pension Manual which allows re-employment on public grounds and that the notification appointing the Registrar should be modified accordingly. The argument is not understood. All that Rule 142 of the Assam Pension Manual says is that a retired person shall not be re-employed except on public grounds. There is no necessity to refer to this rule in the notification or to give there the grounds for the appointment. Therefore, the question of modification of the notification does not arise. The Chief Justice is competent to make the appointment under Article 229 of the Constitution and hence the appointment made by him is valid. The learned Advocate General, however, after a long argument as to the validity of the petitioner's appointment, has conceded that in so far as the petitioner's appointment as Registrar is concerned, no question can be raised as the Chief Justice made the appointment under Article 229. His contention now is limited to the factum of fixation of pay and allowance, which we shall deal with hereafter. It is not understood why the Government insisted on a formal contract between the petitioner and the Chief Justice. The terms of appointment were notified and these were accepted by the petitioner by joining the post. No question of a formal contract could arise. The only question is whether the Chief Justice was competent to give the terms which he gave viz. pay of Rs. 1500/- minus pension and a special pay of Rs. 250/-.

14. Under the Rules of 1956 the pay-scale of the Registrar was laid down as Rs. 850-50/1-1,500/- per mensem. Then Rule 3 (i) read as follows:

"The post of the Registrar, when filled up from the Service will carry a special pay of Rs. 150 per mensem in addition to the Grade pay as admissible to the members of the Assam Judicial Service (Senior) Grade I. In any other case the Chief Justice will have power to fix, without the previous approval of the Governor, the initial pay up to Rs. 1,200/- a month according to the experience, ability and age of the person concerned."

15. Subsequently the pay-scale was fixed at Rs. 850-50-1000-60-1300 EB-50-1500. Hence a consequential alteration

was made in Rule 3 (i) by authorising the Chief Justice to fix the initial pay without the approval of the Governor, up to Rs. 1180/-. The above rule thus meant that where at the time of appointment as Registrar a person was already a District Judge or Additional District Judge, he would get a special pay of Rs. 150/-. In all other cases, the Chief Justice could fix the initial pay without approval of the Governor, up to Rs. 1180/-.

16. The Government revised the pay-scale of the Registrar to Rs. 1200-60-1380 EB-60-1500/-. This revision was given effect to from the 1st of April 1964. With effect from that date, a special pay was also sanctioned if the Registrar was "borne on the Judicial Service." This sanction was communicated to the High Court by Government letter No. LJJ. 96/62/132 dated the 4th September 1967.

17. When the initial pay of the Registrar became Rs. 1200/-, the authority to fix the initial pay at Rs. 1180/- became meaningless. Hence, by implication the figure Rs. 1180/- should be read as Rupees 1500/-. When the initial pay was Rupees 850/- in the pay-scale of Rs. 850-50-1000-60-1300 EB-50-1500/- the Chief Justice could fix the initial pay at Rs. 1180/- i.e. the Chief Justice could allow six increments. So when the initial pay became Rs. 1200/- in the pay-scale of Rs. 1200-60-1380 EB-60-1500/-, the authority to fix the initial pay must be up to Rs. 1500/-. In fact six increments will bring the salary to Rs. 1560/-. But the maximum in the pay-scale is Rs. 1500/-. Rule 3 (i) must be adapted accordingly. In this connection the decision of the Supreme Court in Pradyut Kumar v. Chief Justice of Calcutta, AIR 1956 SC 285 may be referred to. Although under Article 229 (2) of the Constitution of India, the Chief Justice has to make rules prescribing the conditions of service of the High Court employees, no such rules were made by the Chief Justice of the Calcutta High Court so far as the Registrar of the Original Side was concerned. The Civil Service Rules remained in force so far as the said Registrar was concerned, by virtue of Article 313 which says that until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an all India Service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.

18. The Supreme Court pointed out that the continued application of the Civil Service Rules without adaptation would

result in anomaly. So, it held that in the continued application of the Civil Service Rules, the word "Governor" had to be read as substituted by the word "Chief Justice".

19. We, therefore, hold that in view of the revision of the pay-scale the figure "Rs. 1180" in Rule 3 (1) has to be read as substituted by the figure "Rs. 1500", as otherwise it would lead to anomaly. If the above adaptation is not made, the authority given to the Chief Justice to fix the initial salary at Rupees 1180/- without approval of the Governor, becomes infructuous when the pay scale is Rs. 1200-1500. In that case we have to fall on Rule 11 of the Rules of 1956 and that Rule reads as follows:

"11. (i) In regard to pay, allowances, leave, leave salary or pension, the rules and regulations applicable to the members of the services under the rule-making power of the Government of Assam shall apply, mutatis mutandis to persons serving in this High Court and subject also to such amendments and variations as may be made by the Chief Justice from time to time with approval of the Governor, where necessary:

Provided that the powers exercisable under the said rules and orders by the Governor or by any authority subordinate to the Governor shall be exercisable by the Chief Justice or by such person as he may, by special or general order, direct.

(ii) Any question arising as to which rules or orders are applicable to the case of any person serving on the staff attached to the High Court shall be decided by the Chief Justice."

20. It cannot be disputed that the Governor is competent to fix the initial salary of a Government employee at any stage in a pay scale. Fundamental R. 19 says that the fixation of pay is within the competence of the Governor. Obviously this power belongs to the Chief Justice so far as the High Court employees are concerned under the proviso to R. 11 (i). So the Chief Justice becomes competent to fix the pay of the Registrar at Rs. 1500/- in the scale of Rs. 1200-1500/-. In this connection the decision of the Punjab High Court in Sri Kidar Nath v. Punjab Government, AIR 1964 Punj 285 may be referred to. Rule 29 of the Punjab High Court Establishment Rules, made the Punjab Civil Services Rules applicable to persons serving on the staff attached to the High Court, but according to the proviso to the said rule the powers exercisable under those rules by the Governor or Government were to be exercised by the Chief Justice or such other person as he may, by general or special order, direct. The Punjab High Court held that the Finance Department:

being only a unit of the Punjab Government, the powers conferred on the said Department by the Punjab Civil Service Rules could be exercised by the Chief Justice in regard to persons in the staff of the High Court.

21. The learned Advocate-General has submitted that if the power of the Governor to fix the initial salary has been delegated to the Chief Justice, it is a case of excessive delegation amounting to abdication. There is no force in this argument. The question of delegation cannot arise when the Chief Justice makes a rule under Article 229 (2) of the Constitution of India relating to pay, allowance etc. of High Court employees and such a rule has the approval of the Governor. The above Article does not say that it is the Governor who can lay down the conditions of service of a High Court employee relating to pay, allowance etc. Had it said, so, there could be the contention that this power could not be given up by the Governor. But all that the provision in Article 229 (2) lays down is that the Chief Justice can make rules laying down the conditions of service of High Court employees and if such a rule relates to pay, allowance etc. it must have the approval of the Governor. If a rule lays down that the Chief Justice can decide the pay-scales of the High Court employees and this rule has the approval of the Governor, the rule will be valid and no question of delegation of power will arise. It is nowhere provided that it is the Governor who can lay down the pay scales of employees whom the Chief Justice alone can appoint under Article 229 (1). If the Governor does not have this power, the question of delegation does not arise. The conditions of service of High Court employees have been made subject to legislative control by Article 229 (2). But if such conditions are not laid down by legislation, the Chief Justice can certainly make a rule laying down that he would have the power to grant higher initial salary and such a rule will be valid if it has the approval of the Governor. It will not be a case of delegation of some power by the Governor which he himself possesses. The Governor possesses the power of fixing higher initial salary of employees appointed by him only. It is the Chief Justice who can sanction the pay scale of a High Court employee by rule with the approval of the Governor. An approving authority is not the sanctioning authority.

22. The learned Advocate General then submits that Rule 60A in the Assam Pension Manual applies to the High Court employees and therefore, the Chief Justice cannot allow a person on re-employment a higher initial salary than the

last pay drawn by him. Rule 60A reads as follows:

"The Administrative Departments are competent to fix pay and allowances of all re-employed officers when the pay on re-employment together with pension, where allowed to be drawn separately, including the commuted portion of pension and pension equivalent of death-cum-retirement gratuity, if any, does not exceed the last pay drawn by the officer immediately before retirement."

23. As already pointed out the Chief Justice exercises the same power of fixing the initial salary of a High Court employee as the Governor exercises in respect of employees appointed by the Government. The power of the Chief Justice is not restricted to the power of an "Administrative Department." The Governor has the power of fixing a higher initial salary in the pay-scale of a Government employee. By the above R. 60A in the Assam Pension Manual this power has been delegated to an Administrative Department with the limitation that the Department cannot fix a salary which exceeds the last pay drawn by the officer. An Administrative Department is not the Government, it is only a unit of the Government. Hence this rule does not restrict the power of the Chief Justice in the fixation of initial salary in the pay-scale of a High Court employee inasmuch as it does not restrict the power of the Governor in that respect so far as a Government employee is concerned.

24. The Chief Justice is expected to follow the same principles as the Governor in fixing a higher initial salary. A higher initial salary is given to get a good and efficient man. If a Chief Justice exercises this power arbitrarily or capriciously, his action may be struck down by the Court. In the instant case, the Government thought that the petitioner deserved the pay of Rs. 1500/-. The Government also took the stand that in certain cases, it did allow to a re-employed person a salary higher than the last pay drawn by him. This is obvious from the following passage from D. O. letter No. LJJ. 59/67/10 dated the 29th September 1967, written by the Secretary of the Law Department to the Accountant General, Assam viz.—

"In appropriate cases Government have appointed a retired Government servant on a salary higher than his last pay drawn. I need not cite instances on this point. I may only indicate that appointment of Shri B. C. Dutta on a monthly salary of Rs. 1500/- on contract basis will be only reasonable having regard to the experience of the officer concerned. Under the High Court Rules, the Hon'ble Chief Justice can exercise the same

power as the Governor in relation to the officers of the High Court".

25. As regards the allowance of Rs. 250/- the Government has sanctioned it to a Registrar who is "borne on the Judicial Service". Rule 7 (1) of the Rules of 1956 says as follows:

"The Registrar shall be a member of the State Judicial Service (Senior)". This rule is repeated in the Rules of 1961. That is why the petitioner's pay had to be fixed within the pay-scale prescribed for a member of the Judicial Service, Senior Grade I. In the Assam Judicial Service Rules of 1952 as well as of 1967 also, the post of the Registrar is shown as being borne on the Judicial Service Senior Grade I."

26. The learned Advocate-General contends that the above rule will not apply if a retired person is appointed as a Registrar. There is nothing in the wording of the rule to support such an interpretation. The rule clearly means that whoever is the Registrar, will be a member of the State Judicial Service (Senior). The petitioner, on his appointment, became such a member and he was thus borne on the State Judicial Service. He is, therefore, entitled to the special pay of Rs. 250/-.

27. There is another aspect of the matter. The petitioner was holding the post of Presiding Officer, Industrial Tribunal, Assam when he was appointed as the Registrar of the High Court with effect from 1-5-67. On the 17th August 1967 the Government made the Assam Judicial Service Rules 1967 and the posts of the Presiding Officers of the Industrial Tribunals and Labour Courts were included in the Assam Judicial Service Grade I. The age limit for a Presiding Officer laid down in Section 7C of the Industrial Disputes Act is 65 years. The petitioner was only 63 years 10 months old when he joined as the Registrar. He could continue as the Presiding Officer till he was 65 years. Moreover, if he continued as the Presiding Officer, he would have become a member of the Assam Judicial Service Grade I with effect from the 17th August, 1967 when the posts of the Presiding Officers were included in the said Service. When the Government has included posts for which the age-limit is 65 years in the Judicial Service, the contention that a retired man cannot be a member of the Judicial Service has lost all force. It is interesting to note that under section 7A of the Industrial Disputes Act a retired High Court Judge can be appointed to the post of a Presiding Officer of the Industrial Tribunal, which is borne on the Assam Judicial Service. This also shows that there is

no bar to appoint a retired man to the Assam Judicial Service.

28. The petitioner was appointed as Registrar for two years with effect from the 1st of May 1967. For this period he will get his salary at the rate of Rupees 1500/- per month minus his pension and plus a special pay of Rs. 250/- per month. The Accountant General (Respondent No. 1) is directed to issue pay-slip accordingly within two weeks from the date of receipt of a copy of this judgment by him. This Court passed an interim order directing the Accountant-General to issue pay slip to the petitioner for a pay of Rs. 1200/- per month minus pension and plus special pay of Rs. 250/- per month. The money already drawn by the petitioner shall be adjusted. The petition is allowed with costs. Hearing fee is fixed at Rs. 150/-. The rule is made absolute.

29. K. C. SEN, J.: I agree.

Petition allowed.

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Mahendra Nath Pathak, Petitioner v. State of Assam and others, Opposite Parties.

Civil Rule No. 364 of 1968, D/- 1-5-1969, against order of Govt. of Assam in Forest Dept. D/- 24-9-1968.

(A) Assam Forest Regulations (5 of 1891), S. 3 (4) — "Forest Produce" — Definition of, is not exhaustive — Anything which is usually found in forest is a forest produce — Sand in land at the disposal of Government will be 'forest produce' within the definition.

(Para 3)

(B) Constitution of India, Arts. 15 and 226 — Tenders invited for working Sand Mahal—Settlement by Conservator of Forest with the highest bidder — Government setting aside that settlement and making settlement with another person on ground that he belongs to Scheduled tribes — Such person not submitting requisite certificate to support his claim of belonging to Scheduled tribes — No other enough material to show that he belongs to Scheduled tribes — Discrimination in favour of such person will be arbitrary and capricious and in violation of Art. 15 — Settlement by Govt. with such person liable to be struck down.

(Paras 9, 10)

Dr. J. C. Medhi, B. P. Saikia, M. C. Barthakur, for Petitioner; G. K. Talukdar, Sr. Govt. Advocate, for Opposite

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of the order of the Tribunal reads as under:

"16. In the result, we set aside the three assessments for all the years and direct that — (a) the assessee should be given an opportunity of proving his case that Ramnath was an individual who had a right to dispose of his self-acquired properties in the manner he did; if it is found that he was an individual then the impugned payments will be allowed as a deduction; and

(b) the correct profit should be worked out by making specific add backs for the specific defects noticed."

3. The appeals with respect to the assessment years 1954-55 and 1955-56 were decided by the Appellate Tribunal by its order dated 13-11-1961. In those appeals also similar questions were raised and in view of the decision already given by the Tribunal in the earlier cases on 22-1-1960 and for the reasons stated therein, the Tribunal set aside both the assessments for proper re-assessments after an investigation on the following points:

(1) As there are no defects established in the system of accounting, the proviso to Section 13 cannot be applied to either of the two years; only individual defects, if any, in each year require to be evaluated and added on a proper basis.

(2) The extent to which it could be claimed for Ramnath that his correct status for assessment during his lifetime was in fact individual and not HUF as described in all the assessment orders on him.

3-A. The Income-tax Officer passed similar orders for the assessment years 1956-57 and 1957-58. For these two years there were two separate appeals before the Appellate Assistant Commissioner and by two separate orders these appeals were decided by the Appellate Assistant Commissioner on 31-7-1964. Similar questions were raised in these appeals as were raised before the Appellate Tribunal and following the decision of the Income-tax Appellate Tribunal, the Appellate Assistant Commissioner of Income-Tax also set aside the assessment for these two years, giving similar opportunity to the assessee.

4. On 6th of April 1967 the Income-Tax Officer, Central Circle III, Nagpur, issued notices dated 6th April 1967 for each of these seven years to the assessee under Section 23(2) of the Indian Income-Tax Act, 1922 or Section 143(2) of the Income-tax Act, 1961. All the notices are similar in substance excepting the year of assessment and the dates on which the assessee was required to attend the Income-Tax Office. One such notice may be reproduced below. It runs:

1970 Bom./3 II G—17

"NOTICE

Under S. 23(2) of the Indian Income-Tax Act, 1922/under Section 143(2) of the Income-Tax Act, 1961.

Dated: 6-4-1967.

No. R. 201.

To,

Ramkrishna Ramnath (HUF).

Kamptee.

Dear Sir

Dear Madam,

There are certain points in connection with the return of income submitted by you for the assessment year 1951-52 in regard to which I should like some further information. You are hereby required to attend my office at Nagpur on 20-4-1967, at 11.00 A. M. either in person or by a representative duly authorised in writing in this behalf, or to produce or cause to be there produced at the said time any documents, accounts, and other evidence on which you may rely in support of the return filed by you.

(Sd) G. Lakshmi Narasimhan,
Income-Tax Officer,
Central Circle III,
NAGPUR. . ."

The petitioner has challenged the seven notices issued to the petitioner by the Income-Tax Officer and has asked for a writ of certiorari to quash the notices dated 6th April 1967 issued under Section 23(2) of the Indian Income-Tax Act, 1922 by the Income-tax Officer and has further asked for a writ of mandamus restraining the said officer from proceeding in pursuance of the said notices.

5. As regards the Appellate Assistant Commissioner's order dated 31-7-1964 for the assessment years 1956-57 and 1957-58, a further complaint has been made by the petitioner that the only question involved in the appeals before him was regarding the validity of the will of late Seth Ramnath. The Appellate Assistant Commissioner set aside the assessment as a whole not only giving an opportunity to the petitioner to prove the validity of the said will, but also on other questions for making fresh assessment according to law. While, we are here, I might refer to the last paragraph of the Appellate Assistant Commissioner's order dated 31-7-1964 in Appeal No. 3 Spl. Inv. Cir. 'D'/61-62, which relates to the assessment year 1956-57 and is as follows:

"3. Since the assessments are set aside on the above mentioned contention, it is unnecessary for me to deal with the other contentions in this order. However, Shri Salve in the course of his submissions in respect of the genuineness of the hundi loans invited my attention to the letter of the assessee dated 28-3-61 inviting the

Income-Tax Officer's attention to certain facts regarding the manner in which the hundi loans were arranged and in particular to the fact that it was Mangumal Atmasingh, a well-known party of Raipur having office in Bombay who had arranged the hundi loans in question. The Income-Tax Officer will in the course of re-assessment proceedings examine the point made out in this letter and give the appellant a reasonable opportunity for producing evidence that he wants to produce in this regard."

It will thus appear that with regard to these transactions of hundi loans it was the petitioner himself through his counsel who has asked for an opportunity to produce the evidence in that regard.

6. The petitioner raised three contentions before us for challenging the impugned notices. In the first place, it was contended that the assessment had to be made within a period of four years from the end of the assessment year and if for any reason that period of four years elapsed, then there could be no assessment under sub-section (3) of Section 34. It was next contended that by the second proviso to sub-section (3) of Section 34, the bar of four years provided in sub-section (3) of Section 34 is sought to be removed and fresh assessment could be made only under that proviso beyond the period of 4 years prescribed in sub-sec. (3), but the said second proviso to sub-section (3) of Section 34 is ultra vires Article 14 of the Constitution and hence could not be availed of by the Department and if the said proviso is not available, then no assessment could be made against the petitioner in pursuance of the notices dated 6-4-1967, which are much beyond the period of 4 years from the end of all the assessment years in question. The third ground of attack was that even if the second proviso is available to the Department, then the directions or findings which have been given by the Income Tax Appellate Tribunal or the Appellate Assistant Commissioner are not such which enable or attract the application of the second proviso to sub-section (3) of Section 34 as no such directions or findings are existing in this case. This last ground was subsequently given up at the hearing.

7. Mr. Natu, the learned counsel for the Department, raised some preliminary objections to the petition. He urged that the orders of the Appellate Tribunal and the Appellate Assistant Commissioner were not challenged by the petitioner in this petition, but only the notices issued have been challenged and since the orders of the Tribunal and the Appellate Assistant Commissioner have become final, the petitioner is not entitled to any relief of

quashing of the notices inasmuch as the Income-Tax Officer to whom the cases are remanded by the Appellate Tribunal and the Appellate Assistant Commissioner is bound to obey the orders of his superiors. It is also urged that the orders of the Appellate Assistant Commissioner and the Tribunal should have been further challenged by the petitioner by way of appeal and reference and under Articles 226 and 227 of the Constitution within reasonable time and the petitioner not having done so, he is now not entitled to challenge the notices which have been issued in pursuance of the orders of the Tribunal and the Assistant Appellate Commissioner. In reply, it is urged on behalf of the petitioner that it was only the notices issued by the Income-Tax Officer which gave him a cause to challenge the same and if the notices were quashed, the assessment also could not be made as directed by the Tribunal or the Appellate Assistant Commissioner and they would become ineffective automatically as soon as the notices are quashed and hence the relief of quashing the orders of the Appellate Tribunal and the Appellate Assistant Commissioner being only incidental to quashing of the notices issued, it was not necessary to challenge the orders of the Tribunal or the Appellate Assistant Commissioner. It is further urged that the petitioner is challenging the vires or the constitutionality of the second proviso to sub-section (3) of Section 34, which goes to the root of the case and if the said proviso is held to be ultra vires, then the authority of the Income-Tax Officer to issue a notice after the lapse of the period vanishes and the notices and further proceedings in pursuance thereof would be illegal and without jurisdiction. There is much substance in the contentions raised by Mr. Bobde for the petitioner on the preliminary objections taken and we have, therefore, heard the case fully on all the questions that have been raised before us.

8. In order to appreciate the contentions raised on behalf of either party, it would be necessary to refer to some of the relevant provisions of the Income-Tax Act, 1922, as amended from time to time. Section 22(1) requires the Income-Tax Officer to give a public notice on or before the 1st day of May in each year, requiring every person whose total income during the previous year exceeded the maximum amount, which is not chargeable to income-tax, to furnish return within the prescribed period. If a person does not file any return, then under sub-section (2) the Income-Tax Officer can issue a notice to a person who, in his opinion, is liable to income-tax, to furnish the return of his income within the time specified in the notice.

Section 23(1) gives power to the Income-Tax Officer to make the assessment, if he is satisfied, without requiring the presence of the assessee or the production by him of any evidence, that the return made by the assessee under Section 22 is correct and complete. Under sub-section (2) if the Income-tax Officer is not satisfied about the correctness or completeness of the return, then he can call upon the assessee to attend his office or to produce or cause to be produced any evidence in support of his return. Under sub-section (3), the Income-tax Officer on hearing such evidence, as may be produced before him, has to assess the total income of the assessee and determine the sum payable by him on the basis of such assessment. If the assessee fails to make a return in spite of the notice given to him, then the Income-tax Officer is authorised to make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment. Section 23 as such does not prescribe a period within which an assessment could be made by the Income-tax Officer but it appears that it is controlled by sub-section (3) of Section 34 which provides that:

"No order of assessment or re-assessment, other than an order of assessment under Section 23 to which clause (c) of sub-section (1) of Section 28 applies or an order of assessment or reassessment in cases falling within clause (a) of sub-section (1) or sub-section (1A) of this section shall be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable."

Section 30 provides for appeals against the assessment made by the Income-tax Officer to the Appellate Assistant Commissioner. Amongst others an assessee can object to the amount of the income assessed under S. 23 or the amount of tax determined under Section 23 or to make a fresh assessment under Sec. 23. Under Section 31(3)(b), the Appellate Assistant Commissioner is empowered to set aside the assessment and direct the Income-Tax Officer to make a fresh assessment after making such further enquiry as the Income-Tax Officer thinks fit or he might direct and the Income-Tax Officer shall thereupon proceed to make such fresh assessment and determine where necessary the amount of tax payable on the basis of such fresh assessment. Section 33 provides for appeals against the order of the Appellate Assistant Commissioner to the Appellate Tribunal. Under this section the Department also is entitled to prefer an appeal against the order of the Appellate Assistant Commissioner. Under sub-section (4) of section 33 the Appellate Tribunal is

authorised to pass such orders on the appeal as it thinks fit. Section 33A is the power of the Commissioner to revise the orders of the authorities subordinate to him, which are the Income-tax Officer and the Appellate Assistant Commissioner and after making such enquiry, he is empowered, subject to the provisions of this Act, to pass such order thereon, not being an order prejudicial to the assessee as he thinks it. There are, however, certain restrictions on his power to revise the order given in the proviso to that section. Section 33B empowers the Commissioner to call for and examine the record of any proceeding if he considers that any order passed therein by the Income-Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue and after giving the assessee an opportunity of being heard to pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment and directing a fresh assessment. There is, however, limit to his power which is specified in clause (b) to sub-section (2), namely, he cannot pass any order after the expiry of two years from the date of the order sought to be revised. The provisions of sub-section (3) to section 34 have already been reproduced by us above and the provisos to the said sub-section are reproduced below:

"Provided that where a notice under clause (b) of sub-section (1) has been issued within the time therein limited, the assessment or re-assessment to be made in pursuance of such notice may be made before the expiry of one year from the date of the service of the notice even if at the time of the assessment or re-assessment the four years aforesaid have already elapsed.

Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or re-assessment may be made, shall apply to a re-assessment made under section 27 or to an assessment or re-assessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 31, section 33, section 33A, section 33B, section 66 or section 66A."

It is well established that where a return under section 22 of the Income-Tax Act is made there is no escaped assessment during the period prescribed for making the assessment by section 34(3) of the Income-Tax Act. This is because though no period for making the assessment is prescribed by section 23, it is controlled by section 34 (3) which puts a limit of four years from the end of the year in which the income was assessable. However, once the period of four years elapses without making any assessment even

though the return may be filed, the assessee could be reached only by issuing a notice under section 34(1) of the Act. In such a case, the case has to be brought within the four corners of section 34(1) of the Act. It has been contended on the strength of this provision under section 34(3) read with section 23 that the Appellate Assistant Commissioner in appeal as well as the Income-Tax Appellate Tribunal in second appeal must complete the assessment or must pass the final orders of assessment within a period of four years from the end of that assessment year. The further submission is that since the order of the Tribunal has been passed more than 8 years from the end of the assessment years in question, no notice could be issued to the petitioner under either of the clauses of section 34(1) as the period mentioned in those clauses has already expired.

9. The first part of the contention that the final assessment order by the Appellate Assistant Commissioner or the Appellate Tribunal must also be passed within a period of four years from the end of the assessment year cannot be accepted. When the Income-Tax Officer makes an assessment, he makes it under section 23 of the Act and the limit on his powers to make the assessment within a particular period has been put by section 34(3). This limit is for making of the assessment by the Income-Tax Officer under Section 23 and from this bar of limitation is excluded an order of assessment under section 23 to which clause (c) of sub-section (1) of section 28 applies. This would show that the bar under section 34(3) applies to the assessment to be made by the Income-Tax Officer under section 23 as it is the Income-Tax Officer who makes the assessment. When the assessment made by the Income-Tax Officer is challenged by the assessee, the Appellate Assistant Commissioner does not make an assessment, but only finds out as to whether the assessment made by the Income-Tax Officer is correct and legal and if he finds that it is either not correct or legal in respect of the whole or any part of it, then he either sets aside the assessment or modifies it giving relief to the assessee. Similarly, when an appeal is taken to the Appellate Tribunal by the assessee he only finds out as to whether that part of the order of the Appellate Assistant Commissioner which is against the assessee is a correct order and passes suitable orders in respect thereof either maintaining the order of the Appellate Assistant Commissioner or gives the further relief to the assessee. Such orders by the Appellate Assistant Commissioner or the Tribunal could not, therefore, be said to be orders of assessment or re-assessment so as to fall within the meaning of section 34(3) of the

Act. If the contention that is put forward on behalf of the assessee were to be accepted, then the provisions of appeal to the Appellate Assistant Commissioner or the Tribunal and further preparing of records and the decision by the High Court on reference would become nugatory or illusory. Section 30 gives a right of appeal to an assessee objecting to the amount of income assessed under section 23 and the other provisions of the Act which prescribe a period of limitation of 30 days for preferring an appeal. After the appeal is presented, there is bound to be some time to elapse before the appeal can be decided by the Appellate Assistant Commissioner. Similar is the case where a further appeal is taken to the Tribunal. Cases can be contemplated where the orders of assessments are made by the Income-Tax Officer almost towards the end of the period of 4 years prescribed by section 34(3) or even on the last day of limitation. In the last case which (is) the extreme case, the presentation of the appeal itself could not be within a period of 4 years from the end of the assessment year and that appeal will be infructuous and only an empty formality if no relief could be given by the Appellate Assistant Commissioner to the assessee on such appeal. There may be cases where the Income-Tax Officer passes the assessment order well within a period of 4 years and the appeal is also presented within the period of 4 years, from the end of the assessment year, but for some reason or the other the appeal cannot be decided by the Appellate Assistant Commissioner within the period of 4 years from the end of the assessment year. Again in such a case the appeal would become infructuous and the assessment made by the Income-Tax Officer would remain intact rendering the appeal infructuous. There may again be cases where the order of the Appellate Assistant Commissioner is passed within a period of 4 years from the end of the assessment year and thereafter a further appeal is filed before the Tribunal. If the Tribunal did not decide the appeal within the period of four years from the end of the assessment year, then again the appeals before the Tribunal will be rendered infructuous. Before the Department both the assessee as well as the Department could prefer appeals and if by the time the order is passed by the Income-Tax Officer or the Appellate Assistant Commissioner, the period of 4 years has already elapsed, then the right which has been given to the assessee or the Department to challenge the orders of the Appellate Assistant Commissioner before the Tribunal would be an illusory right. This would not have been the intention of the Act. It could well be that the reasonable time limit had to be pro-

vided within which an assessment must be made by the Income-Tax Officer so as not to keep the sword hanging on the assessee and avoid harassment to him. A limit of 4 years, therefore, has been prescribed for the Income-Tax Officer to make the assessment which is the outer limit so far as the Income-Tax Officer is concerned. If the whole process including the appeal to the Tribunal had to be conveyed within a period of 4 years, then different limits would have been placed for the orders to be made by the Income-Tax Officer, Appellate Assistant Commissioner and the Tribunal so as to make the total period of 4 years. It cannot be expected that the appeals before the Appellate Assistant Commissioner and the Tribunal must be decided soon after the appeals are presented. They have to deal with the several appeals and naturally that is bound to take some time for decision. It is not possible, therefore, to accept the contention raised on behalf of the petitioner-assessee that not only the assessment by the Income-Tax Officer, but the appeals by the Appellate Assistant Commissioner and the Appellate Tribunal must also be decided within a period of 4 years from the end of the assessment year in question. However, where the Appellate Assistant Commissioner or the Tribunal were to enhance the assessment made on the assessee by the Income-Tax Officer, different considerations may arise in such cases.

10. It was contended by the learned counsel for the petitioner that if the Income-Tax Officer himself could not make an order of assessment after the expiry of 4 years of the end of the assessment year, then the Appellate Assistant Commissioner and the Tribunal could also not make any order after a period of 4 years. He placed reliance on the decision of the Supreme Court in *State of Orissa v. Debaki Debi*, AIR 1964 SC 1413=1964-15 STC 153. This was a case under the Orissa Sales Tax Act and the Collector of Sales Tax purported to revise an order passed by the Assistant Collector of Sales Tax in appeal acting under his powers under Section 23 (3) of that Act. The Collector revised the Orders of the Assistant Collector by raising the taxable turnover allowed by him to be deducted. It was held on the provisions of the said Act that the Collector had no power to make such an order beyond the period of 36 months after the expiry of the quarter in respect of which the assessment had originally been made. This was not a case of an appeal against the order of assessment made by the original Court. In the Orissa case the Collector made an assessment which the Sales Tax Officer and the Assistant Collector had not made. This was, therefore, a case of an assessment

made by the Collector for the first time with respect to the items of amounts for which deductions were given by the lower authorities. In that context, it was held that the assessment made by the Collector was beyond the period of limitation and he was not competent to make the same. This would not apply to the facts of the present case where the assessment had already been made by Income-Tax Officer and the Appellate Assistant Commissioner or the Tribunal did not make a fresh or an additional assessment, but were only considering the validity or the correctness of the order made by the Income-Tax Officer and to such an appeal, there could not be any limitation. In my view, the decision of the Supreme Court in AIR 1964 SC 1413 =1964-15 STC 153, referred to above, has no application to the facts of the present case.

11. The question then arises is what kind of assessment is made by the Income-Tax Officer when proceedings are remanded either by the Appellate Income Tax Commissioner or the Tribunal to the Income-Tax Officer. Are they proceedings under section 23, or section 34 or any other kind of proceedings? The Income-Tax Officer having already made an assessment, it could not be said that he is making the assessment again on remand by the appellate authority. It may not, therefore, fall under section 23 of the Act and such a further proceeding on remand by the Income-Tax Officer could be under section 34 or some other kind of assessment. It could be a re-assessment as contemplated by Section 34, but whether it is a reassessment under Section 34 or whether it is some other kind of assessment, that would not make any difference in view of lifting of the bar of limitation prescribed by section 34(3) by the second proviso added to the same. If it is not an assessment or re-assessment under sections 23 and 34 and is a different kind of assessment altogether, then the question of limitation does not in fact arise and there is no question of lifting the bar of limitation. Such a situation was considered by the Allahabad High Court in *Jawaharlal Maniram v. Commissioner of Income-Tax U.P.*, 1963-48 ITR 837 (All). The matter was considered from both points of view and it was held that in case it were a different kind of assessment, then no question of limitation arises and if it was a re-assessment under section 34, then the bar of 4 years imposed by section 34(3) is removed by the second proviso to sub-section (3) of section 34. The reasoning was based on the decision of the Supreme Court in *Bhopal Sugar Industries Ltd. v. Income-Tax Officer, Bhopal*, 1960-40 ITR 618=(AIR 1961 SC 182), wherein it has been laid

down that under system of hierarchy of courts in this Country including the proceedings under the Income-Tax Act a subordinate authority like the Income-Tax Officer is bound to carry out the directions of a superior authority and if the assessment made in consequence of an appellate order is altogether a different kind of assessment, than one made under section 23 or section 34, no question of limitation can at all arise and there would be no question of making any provision for the removal of a non-existent bar of limitation. In this view, the second proviso to section 34(3) would be superfluous and this court in Commissioner of Income-Tax v. Kishoresingh Kalyansingh, (1960) 39 ITR 522 (Bom), has taken the view that the second proviso to section 34(3) was in fact not necessary in a case where the Income-Tax Officer makes a fresh assessment on remand by the Appellate authority, but the second proviso has been added only *ex abundanti cautela*, that is, by way of abundant caution.

12. If the assessment cannot be said to be a different kind of assessment in the sense that it is neither an assessment under Section 23 nor reassessment under section 34, in a situation like this where the Income-Tax Officer has to make a fresh assessment in view of the order of remand, it can be still a proceeding for reassessment under Section 34. If a finding or a direction has been given by the appellate authority which directs the Income-Tax Officer to make the fresh assessment as per that finding or direction, that would constitute an information under section 34(1)(b) of the Act. The decision of the Supreme Court in Maharaj Kumar Kamal Singh v. Commissioner of Income Tax, B & O, AIR 1959 SC 257, shows that the information in section 34(1)(b) includes information as to facts as well as information as to state of law and the finding or direction given by an appellate authority either on the question of fact or law would be an information to the Income-Tax Officer under the provisions of section 34(1)(b). Section 34(1)(b), however, puts a bar of limitation and for proceedings under that provision a notice has to be issued within a period of 4 years at the end of that year and the assessment has to be made before the expiry of one year from the date of the service of the notice. Apparently, if the order of the appellate authority remanding the matter to the Income-Tax Officer is itself passed after a period of 4 years at the end of that year, no notice could ever be issued to the assessee under section 34(1)(b) of the Act and no effect could be given to the findings or directions given by the Appellate authority. In order to remove this anomalous position, it appears that the

second proviso below section 34(3) has been added which lifts the bar of limitation for making an assessment or reassessment in pursuance of the findings or directions given by the appellate or revisional authority under the different sections mentioned in the said proviso. This second proviso is a proviso to the whole of section 34 though put below sub-section (3) of section 4 and applies to all cases whether falling under section 34(1)(a) or (1)(b) or (1A) to (1D) of S. 34, provided that the assessment or reassessment is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under Sections 31, 33, 33A, 33B, 66 and 66A. In the present case, it is not necessary to consider whether the bar is lifted with respect to any person other than the assessee in respect of whom a finding or direction has been given by the appellate authority because here, we are dealing with the case of the assessee himself relating to whom the finding or direction has been given by the appellate authority. It may, however, be stated that in a case which went to the Supreme Court, the opinion was divided, some learned Judges holding that the second proviso so far as it relates to "any person" is *ultra vires* Article 14 of the Constitution and other learned Judges holding that it was *intra vires*. Subsequently, this view seems to have been modified by the later decision of the Supreme Court and it was held that "any person" would take in only persons intimately connected with the assessment and the proviso would be *ultra vires* with respect to other persons who are not intimately connected with the assessment. These cases are discussed later.

13. So far as the assessee is concerned, the second proviso makes it quite clear that if the assessment has to be made in consequence of or to give effect to any finding or direction contained in the appellate order then the bar of limitation provided in section 34(1)(b) or (3) stands removed and the fresh assessment would not be illegal if it is made after a period of 4 years from the end of that year. It was, however, contended that even notices under section 34 have not been issued in the present case and the notices that are issued are under section 23(2) of the Income-Tax Act, 1922 or under section 143(2) of the Income-Tax Act, 1961. Even if the notices that are issued are described as under section 23(2), they could be taken to be as notices under section 34 as they are issued in consequence of the order passed by the appellate authority and if the notices are so understood, then the second proviso to section 34 would apply with all force and the bar of limitation under S. 34(3) or

S. 34(1) (b) could not be pleaded. Such a situation arose in the Allahabad High Court in a case reported in *Lakshman Prakash v. Commissioner of Income-Tax, U.P.* 1963-48 ITR 705=(AIR 1963 All 172) (FB). Assessment was made for the assessment years 1940-41 to 1943-44 against a Hindu Undivided Family of which A was a member. For the assessment year 1944-45 A submitted a return in the status of an individual. The Income-Tax Officer assessed the income as that of a Hindu Undivided Family. The Hindu Undivided Family appealed and contended that the assessment was invalid as the income did not belong to it but belonged to A as an individual. The Appellate Assistant Commissioner directed an enquiry to be made as to whether the income belonged to the family or to A as an individual. The Income-Tax Officer made an enquiry and found that the income did not belong to the family and by order dated 24th January 1952 assessed the income as that of A as individual. A again appealed contending that the power to direct a fresh enquiry and fresh assessment conferred by clause (b) of section 31(3) of the Act was only in respect of the person who had appealed and did not extend to others. The second assessment made on A was said to be made beyond limitation. It was held that the direction with respect to individual A was not with respect to a different person as A was also the member of the Joint Hindu Family and secondly, it was held that the second proviso to Section 34 lifted the bar of limitation and the assessment though made 4 years after the end of the year was not beyond limitation in view of the fact that it was made in consequence of a finding or direction given by the appellate authority.

14. It was then contended that the second proviso below section 34(3) is itself invalid as being ultra vires of Article 14 of the Constitution. It is said that there is no difference between an assessee who has not filed return for a period of 4 years, and thus has escaped assessment or an assessee who has filed a return under section 22, but has not been assessed during the period of 4 years and has escaped assessment and between an assessee who has been assessed within a period of 4 years by the Income-Tax Officer, but by an order passed by the Appellate Assistant Commissioner or the Tribunal after a period of 4 years and remanding the case to the Income-Tax Officer with a finding or a direction in pursuance of which the Income-tax Officer has to make a fresh assessment. The latter also would be the case of an escaped assessment since 4 years have by that time elapsed after the end of the assessment. It is urged that whereas the assessee in the first two categories referred to

above can be reached only under section 34(1)(a) or (b) within the time limit prescribed therein, an assessee in respect of whom a finding or a direction has been given by the Tribunal even beyond the period prescribed under the proviso to sub-section (1) of section 34 could be reached much beyond that period for which there is no rational basis and there is no rational relation between the said provision and the object which is to be achieved. It is contended that both are cases of an escaped assessment and there is no reason why they should be differently treated. In fact, it is contended that the assessee in respect of whom a finding or direction has been given has submitted himself to the procedure under the Income-tax Act and has gone through the whole procedure, whereas in respect of the other assessee they have escaped assessment on account of the negligence or inadvertence or omission on the part of the Income-Tax Officer and are in a more favourable position.

15. The question regarding the vires of the second proviso below section 34(3) of the Income-Tax Act was raised before the Supreme Court in two decisions, viz., *S. C. Prashar v. Vasantsen Dwarkadas*, AIR 1963 SC 1356 and *Commissioner of Income-Tax, Bihar and Orissa v. Sardar Lakhmir Singh*, AIR 1963 SC 1394. Both these cases were decided by the same Bench of five Judges on the same day. In the first case the majority judgments were delivered by Mr. Justice S. K. Das, Mr. Justice J. L. Kapur and Mr. Justice A. K. Sarkar and the minority judgment was delivered by Mr. Justice Hidayatullah, as he then was, on behalf of himself and Mr. Justice Raghubar Dayal. Mr. Justice S. K. Das and Mr. Justice Kapur took the view that the second proviso to section 34(3) is unconstitutional whereas Mr. Justice Hidayatullah (now Chief Justice) and Mr. Justice Raghubar Dayal took the contrary view. Mr. Justice Sarkar did not deal with the question of vires in this judgment as he had dealt with it in the other judgment delivered on the same day, namely, AIR 1963 SC 1394. However, while holding that the said proviso is invalid on the reasons given by him, he observed at the end as follows:

"I think therefore, that the second proviso to sub-section (3) of section 34, as amended by the amending Act 1953, in so far as it affects persons other than assessee is void as violating Article 14 of the Constitution. It cannot validate the assessment orders in this case. As I have said before, it is not necessary in this case to say that the proviso is bad as making a hostile discrimination against the assessee mentioned in it and I do not do so. The respondent *Lakhmir Singh*

was not the assessee in the section 31 proceedings in consequence of which the assessment order against him was made. The assessee was his father as the Karta of a non-existent family. The proviso is invalid against the respondent Lakhmir Singh".

Thus, so far as the second proviso related to "any person", that is, a stranger who had nothing to do with the assessment proceedings in which the finding or direction was given, it was declared ultra vires. It appears that in these cases the question of the vires of the second proviso to section 34(3) was being considered in relation to "any person" and not with respect to an "assessee".

16. In Mahendra Bhawanji Thakar v. S. P. Pande, 65 Bom LR 674=(AIR 1964 Bom 170), this court had an occasion to deal with the constitutionality of the second proviso to section 34(3) and this Court interpreted the aforesaid decisions of the Supreme Court to mean that the whole of the second proviso to section 34(3) was ultra vires Article 14 of the Constitution. The question of the vires of the second proviso again came up for consideration before a Bench of Five Judges of the Supreme Court in Income-Tax Officer v. Murlidhar Bhagwandas, (1964) 52 ITR 335 =(AIR 1965 SC 342). The majority judgment delivered by Mr. Justice Subba Rao, as he then was, took the view that the words "any person" in the second proviso in the setting in which they appear must be confined to a person intimately connected with the assessments of the year under appeal. This was on the view that the modification or setting aside of assessment made on a firm, joint Hindu Family, association of persons for a particular year may affect the assessment for the said year on a partner or partners of the firm, member or members of the Hindu undivided family or the individual, as the case may be and in such cases though the latter are not eo nomine parties to the appeal, their assessments depend upon the assessments on the former. Thus, it would appear that the unconstitutionality of the second proviso to section 34(3) was confined only to the persons who are not intimately connected with the assessments and not with respect to the assessee or person intimately connected with the assessment under appeal. The minority judgment was given by Mr. Justice Mudholkar in which he considered the earlier Supreme Court decision cited above, as well as the decision in Suraj Mall Mohta & Co. v. A. V. Vishwanath Sastri, 1955-1 SCR 448=(AIR 1954 SC 545). The learned Judge while dealing with the question made the following observations which are relevant:

"No doubt, persons whose income have escaped assessment, and the fact that

they have escaped assessment has not been discovered till after the lapse of eight years from the year in which they could have been assessed to tax on such income can be placed in one class. But surely it does not follow that even in that class there can be no further classification. The legislature in enacting the particular provision has made a further or a sub-classification by putting under one head those whose assessments have come up for scrutiny before an appellate authority and with respect to whose escaped assessment a judicial finding or direction is made by the appellate authority and under another head other assesseees whose escaped income was not detected by the appellate authority and with respect to which no judicial finding or direction was, therefore, made by such authority. There is a real difference between the two categories of assesseees. Prima facie there is reasonable basis for the sub-classification and the grounds on which it is made, that is, discovery by a higher income-tax authority and a judicial finding or direction made with respect to the fact by it. These grounds have a rational relationship with the object which was intended to be achieved by the law, that is, to detect and bring to assessment the escaped income."

With reference to the earlier decisions of the Supreme Court in AIR 1963 SC 1356 and AIR 1963 SC 1394 it was observed:

"As regards the other decision relied upon, it is sufficient to point out that the majority of the learned Judges have only struck down that part of the proviso which enables a notice to issue "to any person" on the ground that it is violative of Article 14. The precise question which we have before us does not appear to have been the subject of decision in the case".

This decision though of minority will be the decision of the Court as the full aspects of the matter have been considered by these two Judges on the question of the vires of the second proviso in all its aspects and have declared the law that it is ultra vires only in so far as it relates to "any person". The majority judgment has not struck any different note and they must be taken to have concurred in the view expressed by Mr. Justice Mudholkar since they did not strike a contrary note. On the contrary, the majority judgment has explained the word "any person" and confined it to "a person" who is intimately connected with the assessment under appeal.

17. The Madhya Pradesh High Court in Shyam Sunder Govindram v. Income-Tax Officer, (1969) 71 ITR 333 (MP), while dealing with the question of the constitutionality of the second proviso to section 34(3) has observed as under:

"The learned counsel for the petitioner relies upon AIR 1963 SC 1356 to support his contention that the proviso to section 34(3) is unconstitutional as it is hit by article 14 of the Constitution. A perusal of that decision seems to us to indicate that the proviso has been held to be unconstitutional only so far as third parties are concerned but has been held valid with respect to persons who are parties to the proceedings before the income-tax authorities."

The Madras High Court in *M. C. T. Muthuraman v. Second Income-Tax Officer*, 1968 (69) ITR 432 (Mad), has explained the Supreme Court decisions in AIR 1963 SC 1356 and AIR 1963 SC 1394, referred to above, in these words:

".....the majority of the learned Judges of the Supreme Court were considering the question whether the proviso should be struck down as unconstitutional as it is not supported by the well-known theory of reasonable classification. It is, however, to be remembered that in AIR 1963 SC 1356, the majority were mainly concerned in applying the principle and text of the proviso to any person, meaning thereby an utter stranger to the earlier appeal or revisional proceedings. In that context, it was held that the provisions of the second proviso to section 34(3) in so far as they authorised the assessment or re-assessment of any person other than the assessee beyond the period of limitation specified in section 34 in consequence of or to give effect to a finding or direction given in an appeal, revision or reference arising out of proceedings in relation to the assessee violated the provisions of article 14 of the Constitution of India and were invalid to that extent".

18. This High Court while deciding the case of *Mahendra Bhawanji*, 65 Bom LR 674=(AIR 1964 Bom 170), cited supra, appears to have understood the decision of the Supreme Court in AIR 1963 SC 1356 to mean that the whole of the second proviso to section 34(3) was unconstitutional. This decision however, was given before the second decision of the Supreme Court in 1964-52 ITR 335=(AIR 1965 SC 342), cited above, and in view of the latest law declared by the Supreme Court, the decision in *Mahendra's* case 65 Bom LR 674=(AIR 1964 Bom 170) could not be read to mean that the whole of the second proviso is ultra vires, but must be confined only so far as it relates to an utter stranger. That is how the Madhya Pradesh and the Madras High Courts' decisions referred to above have limited the scope of the decision of this Court in *Mahendra's* case. However, this Court itself on a later occasion took a revised view of the matter in view of the Supreme Court deci-

sion in the case of 1964-52 ITR 335=(AIR 1965 SC 342). In *Onkarmal Meghraj v. Commissioner of Income-Tax Bombay*, (1969) 71 ITR 51 (Bom) this Court has now laid down:

"We may, however, point out that when this Court took the view that the case of *Vasantsen Dwarkadas*, AIR 1963 SC 1356 declared that the said proviso was wholly ultra vires, it had not the advantage of the Supreme Court decision in the case of *Commissioner of Income-Tax v. Sardar Lakhmir Singh* and the view expressed by Sarkar J. in the said decision. In *Vasantsen Dwarkadas's* case Sarkar J. when he expressed his view that he thought that the second proviso to section 34(3) of the Income-Tax Act is invalid, had preceded it by saying that he was taking that view for the reasons mentioned in the judgment in the case of AIR 1963 SC 1394. In the absence of that decision being before the Court, it took the view that Sarkar J.'s opinion was that the second proviso to section 34(3) was wholly invalid and it is on that basis that it was held that the case of *Vasantsen Dwarkadas* had declared that the second proviso was wholly ultra vires. Subsequent decision of the Supreme Court in 1964-52 ITR 335=(AIR 1965 SC 342) however, makes it clear that the law declared by the case of *Vasantsen Dwarkadas* is that the second proviso was ultra vires in so far as it affected persons other than those who were parties to the proceedings in which the order of finding was made. It appears to us, therefore, that the view expressed in 65 Bom LR 674=(AIR 1964 Bom 170), may be incorrect and may not be capable of being allowed to prevail in view of the subsequent decision of the Supreme Court in 1964-52 ITR 335=(AIR 1965 SC 342) which makes it clear that the extent of the ultra vires nature of the second proviso to section 34(3) is only so far as it affects persons other than parties to the proceedings."

The question, therefore, of the constitutionality of the second proviso to Section 34(3) has now been settled by the Supreme Court and the said proviso could not be held to be ultra vires as contended by the learned counsel for the petitioner except to the extent to which it has already been held to be ultra vires by the decision of the Supreme Court.

19. Since the second proviso to section 34(3) in so far as the assessee is concerned with whom we are now concerned in the present case, is valid and intra vires, must take effect and in view of the finding or direction that has been given by the appellate Tribunal in pursuance of which fresh assessment has to be made the bar of limitation put by sub-section (3) of section 34 will be removed and the proceedings could be taken by the In-

come-Tax Officer even though the original period of 4 years or a period of 8 years provided in section 34(1)(a) has elapsed. The notices which have been issued in the present case are in fact in intimation to the assessee that the further proceedings for assessment in pursuance of the finding or direction given by the Tribunal will be taken against the assessee and in any case they must be taken to be notices under Section 34 of the Income-Tax Act. The proceedings as proposed by the Income-Tax Officer, could therefore, be taken and a further assessment could be made against the petitioner-assessee and therefore, notices could be issued to the assessee for proceeding with the assessment in pursuance of the finding or direction given by the Appellate Tribunal. I do not, therefore, think that the notices issued to the petitioner are in any way invalid.

20. In the result, the petition fails and is dismissed with costs.

21. **VIMADALAL J.:**— The fact of the case have been set out in the judgment delivered by my brother Padhye and need not therefore, be set out by me in this judgment. I agree with the conclusion at which my brother Padhye has arrived, but would like to state my own reasons for the same. Mr. Bobde on behalf of the petitioners formulated, at the outset of his argument, the following three propositions as constituting the case of petitioners for whom he appeared:—

1. The second Proviso to section 34(3) of the Indian Income-Tax Act, 1922, (hereinafter referred to as "the second Proviso") is ultra vires Article 14 of the Constitution, because, if the appellate authority could not itself have made the assessment after the expiry of the period of four years from the end of the year in question as provided in the substantive portion of section 34(3) itself, there is no intelligible differentia for allowing the assessment to be done after the expiry of that statutory period by means of an order of remand, except by resorting to the provisions of section 34(1) in a proper case:

2. The orders of remand in the present case are not accompanied by any "finding or direction" within the terms of the second Proviso so as to attract the applicability of that Proviso; and

3. Once the statutory period of four years elapses in the course of proceedings by way of appeal etc., it is not possible to reach the assessee under the second Proviso, except through the machinery of section 34(1).

Though, Mr. Bobde formulated the three propositions stated above, it must be stated that, with his characteristic fairness, he did not press the second proposition in view of the decision of the Supreme

Court in the case of 1964-52 ITR 335 at pp. 344-345 = (AIR 1965 SC 342 at pp. 348-349) which makes it clear that an order of remand would itself fall within the term "direction" within the terms of the second Proviso. The said point must, therefore, be treated as abandoned by the petitioners. As far as the third proposition formulated by Mr. Bobde is concerned, Mr. Bobde has conceded that if the second Proviso is intra vires Article 14, no question of the applicability of the statutory period of four years' would arise, and the third proposition would not survive at all. The third proposition is, therefore, dependent upon the decision of the Court on the first point and must stand or fall according to the view which is taken on the first proposition. The result is that the entire case of the petitioners boils down to only one point and that is, the one which was formulated as the first proposition by Mr. Bobde, which embodies the question of the vires of the second Proviso. Even as far as the first proposition of Mr. Bobde is concerned, it may, at this stage, be clarified that though at the outset of his argument Mr. Bobde did contend that the second Proviso has, in its entirety, been already held to be invalid by the majority of the Supreme Court in the leading case of 1963-49 ITR (SC) 1 = (AIR 1963 SC 1356) as construed by a Division Bench of this Court in the case of (1965) 56 ITR 522 = (AIR 1964 Bom 170), he gave up that stand in view of the subsequent decision of the Supreme Court in the case of 1964-52 ITR 335 at p. 346 = (AIR 1965 SC 342 at p. 349) already referred to above in another context, and in view of the construction placed upon Prashar's case, 1963-49 ITR (SC) 1 = AIR 1963 SC 1356 by a Division Bench of this Court in the later case of 1969-71 I.T.R. 51 at pp. 81-82 (Bom) in which it has been held in the clearest possible terms that in Prashar's case, the second Proviso was held to be ultra vires only in so far as it affected persons other than those who were parties to the proceedings in which the order or finding was made. Once that position was made amply clear by Mr. Bobde in the course of his arguments before us, it was not necessary for Mr. Natu to address us on that point or to cite decision in order to show that the second Proviso has been held to be ultra vires by the Supreme Court in Prashar's case, 1963-49 ITR (SC) 1 = (AIR 1963 SC 1356) only in regard to third persons, as he did. I do not think it necessary to refer to the same as, in view of Mr. Bobde's clarification, the only point that arises for our decision is the one which has been formulated above as being the first proposition of Mr. Bobde.

22. The premise underlying that proposition of Mr. Bobde is that the appel-

late authority could not itself have made the assessment after the expiry of the period of four years laid down by the substantive portion of sub-section (3) of Section 34, because the term "assessment" takes in orders made in appeal or revision or on reference. This premise is seriously disputed by Mr. Natu on behalf of the Revenue. Mr. Natu has submitted that the statutory period of four years laid down in Section 34(3) is applicable only to the first order of assessment made by the Income-tax Officer under Section 23, and to a re-assessment under Section 34(1) in respect of escape-ment of income, but does not apply to any subsequent stage of the proceedings. According to Mr. Natu, as the substantive portion of sub-section (3) of Section 34 does not apply to proceedings by way of appeal, revision or reference, no question of lifting the ban under the second Proviso arises at all in respect of a fresh assessment made in consequence of a finding or direction given in appeal or revision or on a reference. The learned advocates on both sides have stated that the point is one which is not directly covered by authority.

23. In support of that contention, Mr. Natu has taken us in detail through the various sections of the Indian Income-tax Act, 1922, and the different expressions used therein viz., "assessment", "provisional assessment", "regular assessment", "fresh assessment", "new assessment", and "original assessment". He has pointed out that the word "assessment", simpliciter, has been used in Section 23, that the expression "provisional assessment" has been used in Section 23B, that the expression "regular assessment" has been used in sub-section (5) of the said Section 23B in a sense which equates it with the first assessment under Section 23, that the expression "fresh assessment" has been used in Sections 27, 30(1), 31(3)(b), and 33-B(1), that the expression "new assessment" is used in Section 31(4), and that the expression "original assessment" is used in Section 34(2). Mr. Natu has also relied strongly on the fact that Section 30(2) which lays down the period of limitation for the filing of an appeal by an assessee from the order of the Income-tax Officer to the Appellate Assistant Commissioner lays down various starting points of limitation, but none of those starting points has any relation to the time which the Income-tax Officer may have taken in completing the assessment. According to Mr. Natu, it is possible to conceive of a case in which the Income-tax Officer may have made the assessment from which the assessee desires to appeal, on the last day of the four years' period of limitation provided for by Section 34(3), in which case, it would be impossible for the assessee to

exercise the statutory right of appeal conferred upon him by Section 30 of the Act within that period, and it is for that reason that Section 30(2) provides for starting points of limitation which are quite independent of the time taken up by the Income-tax Officer for completing the assessment. Similarly, Mr. Natu has relied on the fact that sub-sections (1) and (2) of Section 33, which confer rights of appeal from the order passed by the Appellate Assistant Commissioner, upon the assessee and the Commissioner, respectively, also lay down the date of communication of the order under appeal as being the starting point of the period of limitation laid down therein, and do not take into account the time taken up by the Income-tax Officer for completing the assessment, or by the Appellate Assistant Commissioner for disposing of the appeal before him. Mr. Natu has contrasted these provisions with the provisions of Section 33A(1) which contain the words "subject to the provisions of this Act" which would make the revisional powers of the Commissioner under that section subject to the statutory period of four years laid down in Section 34(3). Mr. Natu has pointed out that those words are not to be found in Section 33B where the Commissioner seeks to exercise revisional powers to protect the interest of the Revenue.

24. In my opinion, the contention of Mr. Natu that the period of limitation laid down in the substantive portion of Section 34(3) applied only (a) to the first order of assessment by the Income-tax Officer under Section 23, and (b) to a re-assessment by the Income-tax Officer on account of escaped income under Section 34, is not correct. The scheme of the Act on which Mr. Natu has relied only shows that Section 34(3) does not apply to proceedings by way of appeal, revision or reference. It does not show that the terms of Section 34(3) would not cover an assessment or re-assessment by the Income-Tax Officer in consequence of a finding or direction given in appeal or revision, or on reference. In my opinion, the substantive portion of sub-section (3) of Section 34 would have applied to an assessment or re-assessment in consequence of a finding or direction given in appeal, or revision, or on reference, but for the second Proviso thereto. That is precisely why the legislature has enacted the second Proviso. Whilst, therefore, I agree with the conclusion of Mr. Natu that Section 34(3) does not apply to an assessment or re-assessment made in consequence of a finding or direction given in appeal or revision or on reference, in my opinion, that is not because of the terms of the substantive portion of sub-section (3) of Section 34, but because

the second Proviso lifts the bar of limitation in such cases. Though, as already stated above, no direct authority on the point has been cited before us in the course of the hearing of this petition, several authorities were cited by the learned advocates on either side which, it was contended, supported their respective cases, and I must now proceed to discuss.

25. Strong reliance was placed by Mr. Bobde on behalf of the petitioners on the decision of the Supreme Court in the case of AIR 1964 SC 1413. At the outset it must be stated that the said case related not to the Income-tax Act, but to the provisions of the Orissa Sales-tax Act, 1947, and the question which arose in that case was whether the said Act imposed a time limit for making an order under Section 23(3) thereof revising an order of assessment. The respondents before the Supreme Court having moved the High Court of Orissa under Article 226 of the Constitution to quash the orders of the Collector in revision, the High Court granted that relief, holding that the impugned orders were illegal as they were really re-assessments of turnover which had escaped assessment, and such assessment could not be made in respect of any quarter after thirty-six months from the date of its expiry as provided in Section 12(7) of that Act. The scheme of the Orissa Sales-tax Act was discussed in the judgment of the majority of the judges who decided the said case and the view taken (paragraph 24) was that when an appellate or revisional authority is effecting a fresh assessment by enhancing it, it is exercising the power which is conferred by S. 12 which lays down the different modes in which the assessment of tax may be made, and so to speak, doing the duty which the assessing authority would or ought to have performed. It was, therefore, held that any order of assessment made by the appellate authority or, as in that case, by the revising authority must, therefore, be held to be the order passed under Section 12, as well as under Section 23 which lays down the powers of such authority, and that, consequently, the period of limitation prescribed in the second Proviso in Section 12(6) would in terms become applicable. In accordance with the view of the majority of the judges, the decision of the High Court quashing the orders of assessment passed in the revision was, therefore, confirmed and the appeals before the Supreme Court dismissed. I am unable to read the decision in *Debika Debi's* case, AIR 1964 SC 1413, as being of any assistance for the purpose of construing the provisions of the Income-tax Act. The Supreme Court decided the question before it in that case expressly on a review of the provisions

of the Orissa Sales-tax Act. It would, in my opinion, be dangerous to apply that decision in regard to the construction of the provisions of the Income-tax Act, 1961, as urged by Mr. Bobde. Mr. Bobde also relied upon another decision of the Supreme Court, and that was the decision in the case of *A. N. Lakshman Shenoy v. Income-tax Officer*, 1958-34 ITR 275 = (AIR 1958 SC 795), in regard to what have been referred to in the Report of the said case as the Travancore Cochin appeals. The facts of that case were that by virtue of Article 277 of the Constitution, the taxes leviable under the Cochin Act or the Travancore Act continued to be so levied until provision to the contrary was made by Parliament by law. Such provision was made by the Finance Act, 1950, Section 13(1) of which provided, *inter alia*, that if immediately before the 1st day of April 1950, there was in force in any Part B State (The State of Travancore-Cochin being a Part B State) any law relating to income-tax or super-tax or tax on profits of business, that law was to cease to have effect except for the purposes of the levy, assessment and collection of income-tax and super-tax in respect of any period not included in the previous year for the purposes of assessment under the Indian Income-Tax Act, 1922, for the year ending on the 31st day of March, 1951, or for any subsequent year. One of the questions canvassed in the said case was whether Section 13 of the Finance Act, 1950, which kept alive the provisions of the Cochin Act and the Travancore Act, did so only "for the purpose of the levy, assessment and collection of Income-tax and super-tax" in respect of the period mentioned in the section, and did not have the effect of saving the provisions of those Acts for the purpose of "reassessment of income-tax and super-tax". The question that arose therefore, was, in what sense had the word "assessment" been used in Section 13(1) of the Finance Act, 1950. It was stated in the judgment (at pages 289-291) that the words "assessment" and "reassessment" occurred in several Sections of Chapter IV of the Indian Income-tax Act, 1922, and that Section 22 thereof laid down the whole procedure of assessment which applied not only to the first assessment, but which is also prescribed by Section 34 in respect of income which has escaped assessment. Various sections of the Act in which the word 'assessment' or 'reassessment' or any cognate expression has been used were then discussed, including Section 34 of that Act, and it was observed (at page 291) that that discussion clearly established that the word 'assessment' had to be understood in each section with reference to the context in which it had been used and

that in some sections, it had a comprehensive meaning, and in some a somewhat restricted meaning, to be distinguished from a "reassessment" or even a "fresh assessment". In my opinion, though the word 'assessment' had to be understood in each section with reference to the context in which it has been used as laid down by the Supreme Court in Shenoy's case, 1958-34 ITR 275=(AIR 1958 SC 795), it must carry the same meaning in the same section. It cannot mean one thing in Section 34(1) and another in Section 34(3) or in the second Proviso thereto. The ratio of the judgment of the Supreme Court in Shenoy's case is that as the words 'assessment' and 'reassessment' occurred in juxtaposition in Section 34, a somewhat restricted meaning had to be given to the otherwise comprehensive expression 'assessment' which would distinguish it from 'reassessment' or a 'fresh assessment'. It would, in my opinion, follow that the terms "assessment" and "reassessment" between them cover every kind of taxing order. That is the only conclusion to which the observations of the Supreme Court in Shenoy's case can lead us.

26. The next decision relied upon by Mr. Bobde was the decision of the Supreme Court in the case of Thomas v. Vasant Hiralal Shah, 1964-52 ITR 328=(AIR 1964 SC 1034), but all that the said decision lays down (at p. 334 of ITR)=(at p. 1037 of AIR), is that the second Proviso governs the whole of Section 34(1) and would consequently include even an escaped assessment with respect to which limitation is provided in clause (ii) of the first Proviso to Section 34(1). By virtue of the amendment effected in the Act in the year 1953 whereby the word 'section' was substituted for the word 'sub-section', I do not think that decision is of any use as far as the present case is concerned. In support of his contention that the term 'assessment' takes in all the appellate, revisional and reference stages of the proceedings also, Mr. Bobde has further relied upon the decision of the Privy Council in the case of the Income-tax Commissioner v. Khemchand Ramdas, AIR 1938 PC 175, the decision of a Division Bench of this Court in Income-tax Commissioner, Bombay v. Mangaldas Motilal & Co., AIR 1944 Bom 153, and the decision of the Patna High Court in the case of Province of Bihar v. Khetro Mohan, AIR 1949 Pat 418, in all of which the main question which arose was as to when the assessment could be said to have become final. What was held by the Privy Council in Khemchand Ramdas's case AIR 1938 PC 175, was that if the Commissioner desired to enhance the assessment he had to proceed within the

time limited by the Act. That was how the decision of the Privy Council in that case was construed by a Division Bench of this Court in Mangaldas Motilal's case (at page 154 Col. 2), in which the same view was expressed by the Court. The same view was expressed in Khetro Mohan's case, AIR 1949 Pat 418, by the Patna High Court in which it was observed that it is the assessment made on appeal that is the final assessment irrespective of the power of revision conferred by the Act (paras 22-23). I am, however, not concerned in the present case with finding out when 'assessment' becomes final, but I am concerned only with determining what is the content of words 'assessment' and 'reassessment'. Moreover, it may be pointed out that in all the three cases just discussed, the situation with which the court was concerned arose prior to the enactment of the second Proviso in its present form by Act No. 48 of 1948 in which the word 'assessment' appeared for the first time, and which proviso had an enlarged scope as pointed out by the Supreme Court in the case of 1964-52 ITR 335 at p. 341=(AIR 1965 SC 342 at pp. 346-347), which has been strongly relied upon by Mr. Natu and which I must now, proceed to discuss in some detail.

27. The facts of Murlidhar Bhagwan Das's case were that a certain item of interest amounting to Rs. 88,737/- was brought to tax for the assessment year 1949-50. The assessee appealed and the Appellate Assistant Commissioner held that the income was received in the previous accounting year and directed that the amount should be deleted from the assessment for the year 1949-50 and included in the assessment for the year 1948-49. Pursuant to that direction, the Income-tax Officer initiated reassessment proceedings under Section 34(1) in respect of the year 1948-49 and served a notice on the assessee on 5th December 1957. It was common ground that the said notice was beyond the time prescribed by Section 34(1), and the question which arose was whether the second Proviso to Section 34(3) applied and saved the notice from being time-barred. The judgment of the majority was delivered by Subba Rao J. and it was held that the second Proviso would not save the time-limit prescribed under sub-section (1) of Section 34 of the Act in respect of escaped assessment of a year other than that which was a subject matter of the appeal or the revision, as the case might be, and the notice in that case was clearly barred by limitation and had to be quashed, as held by the High Court, and the appeal was, therefore, dismissed. Tracing the history of Section 34 in some detail (at pp 339-341 of ITR)=(at pp 345-347 of

AIR), Subba Rao J. pointed out that while the scope of the proviso as it existed prior to the amending Act 48 of 1948, was confined only to the completion of reassessment proceedings, the scope of the amended proviso was much wider in that it exempted the subject matter of that proviso from the operation of the period of limitation prescribed by the section or, in other words, it gave full scope to the operation of the substantive part of the section unhampered by the periods of limitation prescribed by sub-sections (1), (2) and (3) of Section 34 of the Act. It was stated in that judgment that it followed that if a matter fell within the terms of proviso in question, there would be no period of limitation for initiating an action or making an assessment or reassessment in respect of that matter, as the said proviso was a proviso to the entire Section 34. In the historical background of Section 34, it was observed (at P. 341 of ITR)=(at P. 347 of AIR), that under that section as it existed in 1956, the assessment proceedings once commenced were to be completed within the period of limitation prescribed under Section 34(3) and that to a case to which the second proviso applied, there was no period of limitation either for initiating proceedings under Section 34 or for completing the assessment commenced either under Section 23 or under Section 34(1). It was, however, held (at page 343 of ITR)=(at p. 348 of AIR) by the Supreme Court that the said proviso did not confer any fresh power upon the Income-tax Officer to make assessments in respect of escaped income without any time limit, but only lifted the ban of limitation in respect of certain assessments made under certain provisions of the Act, and the lifting of the ban could not be so construed as to increase the jurisdiction of the Tribunals under the relevant section. The Supreme Court then proceeded to discuss (at pages 343-346 of ITR)=(at pp. 348, 349 of AIR) the significance of the expressions 'section', 'finding or direction,' "in consequence of or to give effect to," and "any person" which occur in the second Proviso and held that none of these expressions could enlarge the scope of that proviso which must be confined to a finding or direction necessary for giving relief in respect of the assessment of the year in question. Incidentally, it may be observed that the Supreme Court construed the expression "direction" in the second Proviso as referring only to the directions which the Appellate Assistant Commissioner or other Tribunals could issue under the powers conferred on him or them under the respective section. The ratio of the decision of the Supreme Court in Murlidhar Bhagwandas's case, 1964-52 ITR 335=(AIR 1965 SC 342) therefore, is that the second Proviso lifts

the ban of limitation only in respect of the assessment year in question in the appeal or revision. The said decision is, therefore, not directly applicable to the present case. The Supreme Court has, however, discussed the historical background of Section 34 and has analysed the provisions thereof in a manner which is of assistance in the task of construing the second Proviso in the present case. Mr. Natu has relied on the observation of the Supreme Court in the said case mentioned above that, to a case to which the second Proviso applies, there is no period of limitation either for initiating proceeding under Section 34 or for completing the assessment commenced either under Section 23 or under Section 34(1), as showing that the said proviso would lift the bar of limitation in the present case, and that it is not true to say that the appellate authority could not have made the assessment after the period of four years prescribed by Section 34(3) was over. In my opinion, however, the said case does not support the contention of Mr. Natu that the word 'assessment' in Section 34(3) means only the first order of assessment made by the Income-tax Officer under Section 23 and there is nothing in the judgment of the Supreme Court in Murlidhar Bhagwandas's case, 1964-52 ITR 335=(AIR 1965 SC 342), which would lead to that conclusion. The decision in Murlidhar Bhagwan Das's case, 1964-52 ITR 335=(AIR 1965 SC 342), was followed by the Supreme Court itself in the case of N. K. T. Sivalingam Chattiari v. Commissioner of Income Tax, 1967-66 ITR 586 (SC), but it is not necessary to deal with the same. In the case of Commissioner of Income-Tax v. Kishoresingh, 1960-39 ITR 522 (Bom) cited by Mr. Natu, the question which arose was whether the special period of limitation provided for in Section 33B (2)(b) is applicable to an order passed in revision by the Commissioner under Section 33B, whether suo motu or after the matter is remanded back to him in pursuance of an order of a higher authority. A Division Bench of this Court held that though the words of Section 33B (2)(b) are wide in the abstract if a literal meaning only was to be given to them, the cardinal rule of literal construction must not be pushed so far as to result in irrational or absurd conclusions, and that the phraseology of sub-section (2)(b) of Section 33B permitted of a construction which prevented a result which would be manifestly absurd. S. T. Desai J., delivering the judgment of the Court, stated (at page 533) that though a *casus omissus* is not to be readily inferred, "the preferable meaning of the clause under consideration seems to us to be to restrict it to the fitness of the matter". Though Mr. Natu has strongly contended to the

contrary, in my opinion, it is clear that what the Court then proceeded to do was to supply the *casus omissus* (which means, literally, "a case omitted"), and held that the rule of limitation prescribed in Section 33B(2) must be read as used with reference to an order made by the Commissioner in revision *suo motu*, and that the period of limitation prescribed by that provision did not apply to an order passed by the Commissioner in pursuance of an order or direction of a higher authority. In the course of the judgment in the said case, the Court rejected the argument that the legislature having in express terms provided for a period of limitation for making an assessment order under Section 23 and also provided a period of limitation for making an order of assessment or reassessment in cases of escaped income under Section 34, felt the necessity of engrafting an exception on the operation of that rule of limitation, because it must have been felt that but for the exception enacted under the proviso, the period of limitation of four years could have operated in every case, even when the order was made under Section 23 or under Section 34 after there had been an order or direction from a higher authority. The view taken was (at page 531) that the position properly analysed was that in a case of assessment under Section 23 or an order of assessment or reassessment under Section 34, a situation might arise when the Income-tax Officer might have to pass orders once again under those very sections and, by the time he sat down to do so, the period of limitation of four years laid down in Section 34(3) might well have already elapsed. It was pointed out in the said judgment that it being not the intention of the legislature in any such case to allow the possibility of such a contention being raised, the legislature engrafted the second proviso to sub-section (3) of Section 34 only *ex abundanti cautela*. That, in my opinion, is not a correct view of the matter, as what the Income-tax Officer does in consequence of a finding or direction given by way of appeal, revision or reference is 'assessment' or 'reassessment', and the second Proviso was necessary for the purpose of lifting the bar of limitation in regard to the same. The second Proviso refers to "assessment" or "reassessment" made "in consequence of or to give effect to any finding or direction" in proceedings by way of appeal, revision or reference. As already stated above, the word "direction" in the second Proviso refers to any order which the appellate authority or other tribunal can make under the powers conferred upon it by the relevant section or sections of the Act: 1964-52 ITR 335 at p. 345=(AIR 1965 SC 342 at pp. 348-349).

28. Mr. Natu has also relied upon a decision of the Supreme Court in the case of *K. S. Rashid and Son v. Income-tax Officer*, 1964-52 ITR 355=(AIR 1964 SC 1190), but the actual decision in the said case is of no assistance as far as the present case is concerned. What was sought to be impugned in that case was the validity of Clause (1A) of Section 34, and the same was held by the Supreme Court in that case to be valid on the ground that the classification made thereby was a rational one, in so far as it dealt with escaped assessment during the War years when business and industry made huge profits, and also in so far as it made a distinction in regard to escaped income of a high magnitude. It may, however, be mentioned that it was observed in the judgment in the said case (at page 361 of ITR)=(at p. 1193 of AIR) that the assessment or reassessment which has to follow the issue of the notice thereunder, must be assessment or reassessment in accordance with the relevant provision of the Act, and that was made very clear by the clause that followed which showed that it was when the process of assessment or reassessment commenced that clause came into operation and that clause required that the provisions of the Act, so far as might be, applied "accordingly".

29. The authorities do not lay down the precise connotation of the terms "assessment" and "reassessment" used in Sec. 34. A distinction was sought to be made between them in the course of the arguments in *Shenoy's case*, 1958-34 ITR 275=(AIR 1958 SC 795) cited above (at p. 290 of ITR)=(at p. 803 of AIR), but the Supreme Court did not pronounce upon it, beyond stating (at p. 291 of ITR)=(at p. 804 of AIR) that the former term had to be given "a somewhat restricted meaning, to be distinguished from "a reassessment". It is, however, not necessary for us for the purpose of this case to determine what is the distinction between the terms, "assessment" and "reassessment" *inter se*, as used in Section 34, in so far as it follows from the observation of the Supreme Court in *Shenoy's case*, 1958-34 ITR 275=(AIR 1958 SC 795) that those two terms, between them, cover all taxing orders. The question that falls for decision in the present case is, do the terms 'assessment' and 'reassessment' apply only to taxing orders passed by the original taxing authority viz., the Income-tax Officer, or do they also include the whole process of taxation by the higher appellate, revisional and reference authorities also? The authorities discussed above do not throw any light on that specific question with the result that we are relegated to a construction of Section 34 in the context of the other relevant section of the Act,

55 of 1965 D/- 2-7-1968, Debabrata Bandopadhyaya v. State of West Bengal 21
 (1963) AIR 1963 Madh Pra 61 (V 50) = 1963 (1) Cri LJ 187, Padmavati Devi v. R. K. Karanjia 22
 (1959) AIR 1959 SC 102 (V 46) = 1959 Cri LJ 251, State of Madhya Pradesh v. Revashankar 18
 (1957) AIR 1957 Madh Pra 152 (V 44) = 1957 Cri LJ 1137, Babulal Shukla v. Shivprasadsingh 22
 (1953) AIR 1953 SC 75 (V 40) = 1953 Cri LJ 519, Aswini Kumar v. Arabinda Bose 17
 (1940) AIR 1940 Nag 407 (V 27) = 1940 Nag LJ 425, Sub-Judge, First Class, Hoshangabad v. Jawaharlal Ramchand 19, 22
 (1936) AIR 1936 PC 141 (V 23) = 1936 All LJ 671, Andre Paul v. Attorney General of Trinidad 17
 N. Kamalakar and Nisarali, for Petitioner; V. R. Manohar and G. C. Banerjee, for Respondent; C. S. Dharmadhikari Asst. Govt. Pleader, for the State.

DESHMUKH J.— The petitioner is requesting this Court to take action against the respondent under section 3 of the Contempt of Courts Act. The present litigation is an off-shoot of a prior litigation. The facts of that case are not relevant for deciding the present petition, but the background against which the present petition comes to be filed may be noted in brief.

2. The subject-matter of the present petition is an article written by the respondent R. K. Karanjia in his Weekly named "Blitz" in the issue, dated April 20, 1968. The complainant had filed a complaint against the respondent in the Court of the Judicial Magistrate, First Class, Nagpur, under section 292 of the Indian Penal Code. On the last page or the cover page of the issue of Blitz, dated 5th of March 1966, a picture of one Pamela Tiffin appeared which was being styled as obscene by the complainant in his complaint. The respondent defended himself but the case ended in conviction on 28th September 1967. The respondent filed an appeal in the Court of Session and, by his judgment dated February 13, 1968, the learned Sessions Judge accepted the appeal and acquitted the respondent. It also appears that some move was made in the Parliament for amending the provisions of section 292 of the Indian Penal Code and to have that offence tried by a Tribunal higher than the Judicial Magistrate, First Class. Those discussions were held in the Parliament in February and March of 1968.

3. Against this background and after the acquittal by the Sessions Judge, the respondent wrote the present article which is now being impugned. After the article was published in the issue, dated

April 20, 1968, the complainant petitioner filed a criminal application on April 22, 1968 for permission to file an appeal under the provisions of section 417(3) of the Code of Criminal Procedure. He also moved this Court on April 25, 1968 by the present application. According to the petitioner, the article as a whole and more particularly some of the passages, which are quoted in the petition, are calculated to undermine the dignity and prestige of the judiciary. They are in the nature of an unjustified criticism against the trial Judge personally, as also against the entire lower judiciary. The petitioner, therefore, brings to the notice of this Court that a contempt has been committed by the respondent by publishing the said article and that appropriate action may be taken by this Court.

4. When this petition was admitted and a show cause notice was sent to the respondent, he appeared in the Court on July 30, 1968 and produced what is styled by the respondent as his unqualified apology "for any word, sentence or para which may be construed as contempt of Court". It may be mentioned that the petitioner in his petition had specifically quoted two paragraphs from the article which, in the opinion of the petitioner, clearly amounted to contempt. On July 30, 1968 the matter was called out before another Bench of this Court. It was then brought to the notice of the respondent and his Advocate, who was present, that there was another paragraph relating to the probe being made into the circumstances of the Nagpur case, which means the trial for obscenity. There were certain observations regarding the probe being made by the Chief Minister of the State and the Chief Justice of the Bombay High Court and it was particularly pointed out that if such probe was undertaken it would be as astounding as it would be rewarding. The respondent was told by the learned Judges of that Bench that here was a passage which prima facie demanded an enquiry into the Judge's conduct or the judgment of the Court, and if such course was permitted, that would be the end of the judiciary. What explanation the respondent had to offer in respect of that paragraph? When such an enquiry was made, an adjournment was sought by the learned Counsel for the respondent as he wanted to take instructions and file the reply. The matter was then adjourned to August 12, 1968 on which date the explanation to the query made, was filed in the form of an affidavit sworn by the respondent. On that date, further adjournment was sought. The learned Counsel Mr. Banerjee had some personal difficulty. Adjournment was granted and the matter was posted for hearing on August 19, 1968. Yesterday, when the matter was called

out, Mr. Manohar, another learned Counsel, appeared for the respondent along with Mr. Banerjee and he produced an apology again in the form of an affidavit. When the case was called out, we were not aware of this apology in the form of an additional affidavit as it was filed just when the matter was called out. We pointed out to Mr. Manohar that the apology so-called, which was filed on the previous day of hearing, does not appear to be either an apology or at any rate an unqualified apology. He, therefore, said that the respondent was producing another affidavit containing the apology which would indicate his mind in a proper manner. He now tenders unreserved, unqualified and unconditional apology. When we brought to his notice that the wording in this apology paragraph No. 1, was almost the same as in the earlier and would not, therefore, amount to an unconditional apology, Mr. Manohar pointed out that there was a typing mistake and the affidavit in terms did not represent what the respondent wanted to say or was dictated to the stenographer. In this manner, we have the last affidavit filed yesterday which, according to the respondent, now indicates what he precisely thinks in respect of the charges that are made against him.

5. When the matter was called out and the three apologies appeared on the record, one of the questions that we ourselves raised for consideration was whether in fact the article of the respondent amounts to a contempt. The petitioner alleged that it constitutes a contempt of Court. The respondent's learned Counsel also admitted that in his view this was a contempt. The last affidavit filed by the respondent also concedes that the article amounts to contempt. However, the respondent further places himself at the mercy of this Court for accepting the apology as sufficient amends and to treat the contempt as purged. Whether such an apology should be accepted and the contempt should be deemed to have been purged or some other punishment appropriate to the occasion is called for, was the only issue that was debated.

6. Though the only question that fell for decision was whether the apology tendered by the respondent should be accepted as sufficient amends we were generally addressed on the nature of the article, the type of contempt and the case law which deals with what constitutes a contempt and what punishment was meted out to the persons concerned. We must point out to the credit of the learned Counsel on both sides that they took a complete survey of all the important decisions on this point. We were taken through the judgments of the Privy

Council, the Supreme Court and the various High Courts including this Court. What constitutes a contempt of Court is now settled law. The contempt of Court is committed in two different ways. One way is to attack the Judge or the Courts generally and level against them criticism which far exceeds the bounds of legitimate criticism. When the judiciary as such, or the Judge in particular is so attacked and the attack may contain various kinds of imputations, such a contempt is styled as scandalizing the Court itself. The other type of contempt is committed when there is an attempt to interfere with the course of justice, an instance in point would be publishing material affecting the party defending itself, while a case is pending. This amounts to obstruction or interference in the course of justice. So far as the present article is concerned, it is in the nature of a direct attack on the particular trial Judge who delivered a judgment of conviction and it also includes sweeping remarks against the entire lower judiciary. There is, therefore, no doubt that the impugned article falls under the category of scandalizing the Court itself.

7. In order to find out whether the article in fact constitutes an offence and, if so, what is the gravity of that offence, we heard learned Counsel on both sides and got the article read in the Court as a whole. How this article should be read was one of the questions that was debated before us. The learned Counsel for the respondent Mr. Manohar submitted that this article cannot be analysed microscopically as a statute is analysed and that will have to be read in a broad manner and the normal sense that is conveyed by the words used must be accepted. We think that this is a correct approach. The article is published in a weekly newspaper and we agree that the effect of this article should be gauged from the point of view of a reader who reads the weekly in a certain manner. Newspapers of this type and magazines are not studied like text-books. They are hurriedly read and the broad impression that the article creates on the mind of a normal reader should be the test for the purpose of calculating the possible mischief that such an article would lead to. This argument was particularly emphasised before us, because the petitioner in his petition has singled out two passages for pointing out the grave nature of the contempt. In addition, on the first date of hearing, the learned Judges, who constituted another Bench, called up on the respondent to explain what precisely he meant by calling for a probe or enquiry into the Nagpur case. The paragraph requiring the Chief Justice and the Chief Minister to make an enquiry into this case, was particularly brought to his notice and he was asked

to explain the nature of enquiry that was contemplated. During the course of the argument before us, the last paragraph where the trial Judge's judgment has been criticised and is equated with an April-fool joke, was particularly emphasised on behalf of the petitioner. It is under these circumstances that Mr. Manohar argued that an analysis word by word and sentence by sentence is not the proper manner of reading such a newspaper article. When unjustified and excessive criticism of the judiciary is treated as a contempt of Court, the ground on which it is so treated, is that such unwarranted, unjustified and unoccasioned malicious criticism tends to undermine the prestige and dignity of the judiciary. This is only one effect. Such criticism, if it passed unnoticed, has also the tendency to shake the confidence of the common man in the impartiality of the judiciary. The respondent himself points out in the second paragraph of his apology that he considers Courts as the bulwark of liberty and the rights of the people. If this is the position of the judiciary which the Constitution has given it, it is the duty of every right-thinking citizen not to do anything consciously or unconsciously which will undermine that special position of the judiciary. Since this is the reason why the proceedings are taken against a mischief of this type, the effect that such article will create on the mind of a common reader must according to us, determine the gravity or otherwise of the offence.

8. Though Mr. Manohar, learned Counsel appearing for the respondent, said that the time chosen was most inopportune and the article was unnecessary, let us examine by looking to the contents of the article itself what justification the writer had for writing such an article. Mr. Manohar made a very able attempt to defend the respondent by pointing out why this article was written and what precisely was in the mind of the writer. That argument was addressed to us not in justification of what was done but only by way of pointing out the extenuating circumstances. Mr. Dharmadhikari, learned Assistant Government Pleader appearing for the State, had the same approach but with a different emphasis. He took us through the second paragraph of this article which opens with the words "from the Judicial Magistrate of Nagpur, whose strange judgment convicting me of the offence of obscenity shocked everybody...". He says that the next portion of that paragraph no doubt refers to the debates of Rajya Sabha and Lok Sabha. Though apparently the debates in the Parliament and Rajya Sabha are being pointed out as an occasion for writing this article, the main emphasis of the writer is that the judgment of conviction

by the trial Magistrate was a strange judgment. The trial Magistrate, his judgment and in the sweep of his pen the entire lower judiciary are the objects of criticism. He intended to give the lower judiciary in general and the trial Magistrate in particular, a bit of his mind and was just waiting for some opportunity. The present pretension in the affidavit as also the argument addressed on his behalf that this was a genuine criticism against the background of the Lok Sabha debate does not appear to be so true. We do think that there is considerable force in what Mr. Dharmadhikari argued. However, since it is the accepted proposition that the judges individually as well as the judiciary as an institution, are open to legitimate and reasonable criticism, we would not much emphasise the occasion for writing an article. If a legitimate criticism is made and we assume that it is amply justified, there will be no occasion to enquire about the reason at all. For a good educative criticism, any occasion is good enough. It is more the contents of an article and the effect thereof that must be emphasised apart from the occasion on which it is written.

9. Reading the article as a whole as a normal reader might read, it appears to us that besides the title of the article, there are three sub-titles which are made attractive to catch the eye of any reader. The title of the article is "whom will you fine for Konarak and Khajuraho". The sub-titles are "abuse of law", "Poor doomed" and "probe imperative". What the reader would think is that to publish pieces of art which are comparable to Konarak and Khajuraho is itself being held as an offence and that amounts to abuse of law. When a conviction takes place, poor man has no future and the only remedy, therefore, is a probe into the incident that happened at Nagpur. If, however, we would consider a reader who will read the article as a whole, even in that case, the effect that will be created on his mind is fraught with great mischief. The first portion dealing with "abuse of law" quotes out of context one observation of the learned Sessions Judge who allowed the appeal of the respondent. That observation points out that the judgment of the trial Court was "a typical case of how a very conservative application of the penal provisions can suffocate or stop a normal good expression of art and science." Against this quotation, a portion of the speech of one Mr. V. C. Shukla, Union Home Minister of State, is reproduced by styling it as an example of the triumph of commonsense. This passage may be a correct reproduction of the speech made by Mr. V. C. Shukla in the Parliament.

Mr. Shukla has recalled the Blitz case to point out where the lower Court Magistrate had punished the editor, but the Sessions Judge had acquitted him. Against the background of this portion is immediately the next part dealing with the inability of the poor to defend themselves in the Courts of law. What is then stated is that the poor are doomed. It may be alright that the Blitz had come out with triumphant colour, but a question is posed what about hundreds of those cases where those convicted and condemned by "such harsh and unwarranted judgments" in the lower Courts do not own the financial and "other resources" to get such convictions quashed and their honour and prestige vindicated by the higher Courts. Immediately follows a paragraph which says "If only people with money and power can afford the luxury of such costly appeals, the poor will be doomed to submit to the whimsicalities of the lower Courts". Now, this paragraph read against the background of criticism of the lower Courts made by a member of the Parliament on a privileged occasion undoubtedly makes an untrained common man to believe that there is no justice in the lower Courts and unless you have "financial ability, other resources and power", you have no hope of vindicating your rights. Such remarks are likely to make the common readers feel that the judgments delivered by the lower Courts are generally whimsical, that is, without any rational basis, but depending upon the personal sporadic impulse of the Judge.

10. The next portion starting with the title "probe imperative" first informs the reader how Blitz had to spend more than Rs. 20,000/- for defending itself. It is then pointed out that but for the magnificent manner in which leading citizens, trade unions, student organisations and other public bodies of Nagpur came to his rescue by organising a Blitz Defence Committee under the Chairmanship of Mr. A. D. Mani, M.P., Chief Editor of Hitavada, it would have been difficult for the respondent to engage the services of top legal luminaries of Nagpur whose names are printed therein.

11. Having thus pointed out the great difficulty in defending himself and the generous help that he received from the Defence Committee consisting of eminent people of Nagpur, the respondent proceeds to observe that something immediate and drastic has to be done to prevent "social workers" of the brand of the complainant from continuing to put responsible laws of the land to public ridicule. Then follows the observations for which an explanation was called for. The respondent says that he would urge both the enlightened and forward-looking Chief

Minister of Maharashtra and Chief Justice of the Bombay High Court to institute an enquiry into the circumstances of the Nagpur case. The revelations that would result from such a probe, he assures them, would be "as astounding as they would be rewarding". We would pause here and consider the effect of this article. The subsequent paragraph which is more in the nature of a personal attack on the judge and his judgment, may be kept aside for the time being. We have no doubt that the last portion which we have kept aside for the time being, has the result of heightening the effect of the earlier portion. If the present defamatory matter is against the Judge and amounts to contempt of Court, the use to which that portion is being put in the article as a whole is undoubtedly to create deeper and more heightened impression upon the mind of the common reader.

12. We have practically summarised all the relevant matters in the article. According to us, the article read as a whole has the tendency to undermine the prestige of the lower judiciary as a whole. We are aware that the respondent is trying to give compliments to the appellate Court, but even those compliments serve the purpose of contrasting the judgment of the lower Court as against the judgment of the appellate Court. The effect on the mind of the normal reader is to make him feel that judgments of the trial courts are harsh and unwarranted. They do not take proper view of the provisions of law. The judgments are based upon whimsicality, and one is to have not only financial but other resources including power for obtaining justice. The necessary implication of such a criticism, therefore, is that something other than an objective, and impartial examination of the record of the case is responsible for the judgments of the lower Courts. If such extraneous factors are influencing the judiciary, and if that is the impression that is conveyed to a common man who is likely to believe the printed words, we are sure that uncalculated harm is going to follow so far as the function of the judiciary is concerned. When we put a query to the learned Counsel for the respondent as to what is meant by "other resources" and what is again meant by "people with money and power alone getting justice", he made an effort to point out that this has reference to the formation of the Defence Committee and nothing else. He also assured us that this was all in the mind of the respondent. Assuming for the argument's sake that the reference to "other resources" may mean the assistance which the respondent got from the Defence Committee consisting of local luminaries, how is the reference to "power" explained? Had this Committee any "power" in it by which it

obtained the judgment of acquittal." The reference to factors like "other resources and power" is sinister and indicated that the judiciary is likely to be influenced by outside factors. It is the criticism of this type and the tone of this article in ridiculing the lower judiciary as a whole that, according to us, aggravated the situation. If against such a background, a common reader reads the passage relating to a probe or enquiry, and the assertion that the revelations that would result from such a probe would be "as astounding as they would be rewarding", undoubtedly it would lead to great distrust in the judiciary. To say in arguments now, or to put an affidavit that the probe merely related to the complainant's conduct and his enmity towards the respondent is to make an attempt to water down the effect of the paragraph in its setting in the argument. Mr. Manohar argued that in the petition filed by the petitioner, there is no reference to this paragraph relating to probe. It, therefore, means that it did not occur to the complainant that this was an objectionable portion of the article. Thus, he pointed out to us as a support for his argument that this portion has nothing to do with the judge or his judgment. It may be that the complainant knew the entire record of the case including the statement of the accused under section 342 of the Code of Criminal Procedure. He knew the defence of the accused and his reading of the article is likely to be slightly different from the reading of a common man who have no knowledge of the background of the case. It was argued before us that the judgment was printed as a whole in an issue of the Blitz, dated October 7, 1967. It is well known that the newspaper matter even if read exhaustively, is forgotten soon. The time lag between October 7, 1967 and April 20, 1968 was so great that no reader would remember the judgment as such. We are making the most liberal concession to the respondent that the judgment, though printed as a whole, is also read by the common reader on October 7, 1967. Even on that footing, we think that while reading this article in April 1968, beyond a vague memory, he would have no recollection of the details of that judgment. The moment this article was read in Court on July 30, 1968, the first reaction of the Bench was that here was an implied or sly reference to the judge himself and if an enquiry was called for, it would disclose something astounding. We are not, therefore, impressed by the explanation offered on behalf of the respondent by Mr. Manohar.

13. We also think that the reference to an enquiry is deliberately so worded as to make the reader wonder, what dramatic matter is hidden behind the screen. However, the respondent has now

given a full explanation regarding the background of the case. Stated shortly, he wants to say that the complainant is a pro-Pakistani whose loyalty to this country is doubtful. He is assisted by some others of the same type who entertain grudge against "Blitz" for publishing the pictures on cover pages or other writings. Hence the motive behind the complaint is anything but pure. If this is all that was to be discovered by the Chief Minister and the Chief Justice after the suggested probe, we wonder whether this could even be described as either "astounding or rewarding". On the contrary the deliberate choice of dramatic words and deliberate suppression of this background from the article, throws considerable light on the mentality of the writer and his desire to corrupt the mind of the reader.

14. This portion again falls in between the earlier criticism of the lower Courts as such and the ridicule of the judge's judgment in the last paragraph. So far as the last paragraph is concerned, the respondent says that the "PIN UP" case was not without its funny side even before the case went up in appeal to the higher Court. The respondent claims that after the full text of the judgment was printed, a friendly member of the judiciary made a query to him in writing whether it was a genuine reproduction of the judgment really delivered or it was some kind of April-fool joke that the respondent was making at the expense of the Magistrate. The respondent had to reassure the judicial friend that it was a verbatim reproduction of the authorised copy of the judgment duly signed by the Magistrate without any attempt by Blitz to hold it up to contempt or ridicule.

15. We made a query with the learned Counsel for the respondent whether his client was willing to disclose the name of the so-called "judicial friend". Mr. Manohar stated that his client would suffer the consequences himself and not disclose the name. We may, however, point out that in the initial affidavit filed by the respondent explaining the background of the article, it is not asserted on oath that there was in fact a "judicial friend" who wrote the alleged letter. In the absence of an assertion on oath we have our own doubts whether there is in fact such a letter writer, or whether reference is a fake one made to cut one more joke at the cost of the Magistrate.

16. The sum total of the effect, according to us, therefore, is that a common reader, when he keeps the issue aside after reading this article, will think that the particular judgment of conviction was funny judgment written whimsically and the judgment was a harsh and unwarranted one, that judgments of lower

Courts are generally of this type and normally justice though available in higher Courts requires, money and other resources including power; and that if the suggested enquiry was held, it would disclose something alarming about the trial of the case by the Magistrate and set right the wrong that has been done in administration of justice and thus improve the tone of the judiciary at large. The least that can be said is that the article is calculated to shatter the confidence of the common reader in the impartiality, integrity and efficiency of the lower judiciary.

17. If this is the effect of the article read as a whole, the only conclusion to which we can reach is that this is a contempt of a very grave type. Though a large number of judgments of various Courts were referred to us, considerable number of them were cited on either side only to point out that a particular punishment is meted out and rarely substantive sentence under the provisions of the Contempt of Courts Act has been resorted to. The point relating to the quantum of punishment will be dealt with by us at the end of the judgment. We might now refer usefully to two judgments which bring into relief the quality and nature of contempt when certain acts are committed. So far as the criticism against the judiciary is concerned, we may refer to *Aswini Kumar v. Arabinda Bose*, AIR 1953 SC 75. Those contempt proceedings were initiated by the Supreme Court against the respondent for writing an article in the *Times of India Daily* of October 30, 1952. In that article, extraneous motives and things of policies and politics were alleged against the Supreme Court Judges in the matter of their desire to abolish the dual system prevailing on the original side of some of the High Courts. The Supreme Court points out that if the article had confined itself merely to preach to the Courts of law the sermon of divine detachment, nothing was lost. But to impute motives and to allege that extraneous considerations go to the decision of the cases by the Supreme Court, is bound to undermine the administration of justice and is calculated to lead to greater mischief than can possibly be imagined. The observations of the Supreme Court in that behalf may be quoted:

"If an impression is created in the minds of the public that the Judges in the highest Court in the land act on extraneous considerations in deciding cases, the confidence of the whole community in the administration of justice is bound to be undermined and no greater mischief than that can possibly be imagined."

Their Lordships of the Supreme Court clearly point out that this is not to sup-

press all criticism against the judges and the judiciary. In fact, they quote with approval a passage from the judgment of the Privy Council in *Andre Paul v. Attorney-General*, AIR 1936 PC 141. The observations of Lord Atkin which are so often quoted in such cases are fully approved by the Supreme Court. They do believe that "the path of criticism is a public way and the wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune." It is pointed out that "justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men".

18. Against this background, it is pointed out that when criticism not only exceeds the legitimate bounds but is based upon a personal attack most unjustified and vilification of a class of judges without any justification whatsoever, the effect is bound to be that the prestige and position of the judiciary will be undermined. In another judgment in the case of *State of Madhya Pradesh v. Revashankar*, AIR 1959 SC 102, the Supreme Court classifies the innumerable ways by which attempts could be made to hinder or obstruct the due administration of justice in Courts. Having pointed out the two broad categories of contempt of Court, they observed that where the unjustified criticism is in substance an attack on individual judges or the Court as a whole with or without reference to particular cases, causing unwarranted and defamatory aspersions upon the character and ability of the judges, such conduct is punished as contempt for the reason that it tends to create distrust in the popular mind and impair the confidence of the people in the Courts which are of prime importance to the litigants in the protection of their rights and liberties.

19. Several other judgments were brought to our notice, but since they contain more or less similar observations relating to the nature of contempt and the manner in which it is to be held proved, it is not necessary to duplicate references. However, we think that a judgment of Mr. Justice Bose, as he then was, in the case of *Sub-Judge, First Class, Hoshangabad v. Jawahar Lal Ramchand*, AIR 1940 Nag 407, may be usefully referred to in the matter of approaching the offence of contempt of Court and the view the Court should take about the punishment that is to be inflicted. The learned Judge has particularly drawn

attention to the peculiar position of the lower judiciary. In that case, Sub-Judge, First Class, Hoshangabad had passed a certain order in the Judicial proceedings and a party litigant wrote a threatening letter to him. He challenged the legality of the act that was ordered to be done at the instance of the learned Judge and told him that he was doing so on his own responsibility and that the order was against law. That step is taken by the judge to cause loss to the defendant, and if he succeeded in the appeal, the judge will be responsible for making good the entire loss. When proceedings in contempt of Court were taken out against the writer of that letter, the learned Judge points out that it is necessary to take a particularly serious view of such contempts when they relate to the members of the lower judiciary. It would be better to point out the reasons thereof in the words of the learned Judge himself:

"But I feel that it is necessary to take a serious view of the matter in order to protect Judges in the lower Courts who are not as favourably situated as we are here and who have difficulties and obstacles to overcome from which we are happily free; also in order to leave no mistake or misunderstanding in the minds of the general public that this sort of attempt at intimidation will not be lightly passed over".

20. In view of the observations cited from the above judgments and bearing in mind the circumstances of the case, we think that the offence committed by the present respondent is not only of a grave nature but serious view requires to be taken thereof. Judgments of conviction by one Court and acquittal by the higher Court, or a judgment of acquittal by the lower Court and a conviction by the higher Court is a routine matter in judicial proceedings. No grievance can be made simply because the judgment has gone against a particular party. No Judge can ever decide a case in a manner which will please both sides. It is because of this that often it is said that a compromise is the best manner in which a litigation could be terminated. Then alone, the parties feel satisfied because each has agreed to the final decision. The duties of a judge are in the circumstances onerous and he must be in a position to discharge them without any fear or favour. Any attempt at intimidation or bullying or holding out a threat of unjustified criticism or an unwarranted attack undermining his prestige must therefore, be put down with a strong hand.

21. We might now consider usefully some references made before us to the circumstances in which punishment is to be meted out when the offence of con-

tempt of Court appears to be committed. Mr. Manohar referred us to 1968 SC (Notes) No. 383, in the case of Debabrata Bandopadhyaya v. State of West Bengal, Cri Appeal No. 55 of 1965, dt. 2-7-1968 =AIR 1969 SC 189. He particularly drew our attention to the observations of the learned Judges of the Supreme Court that punishment under the law of contempt is called for when the lapse is deliberate and is in disregard of one's duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged. Undoubtedly those are the only circumstances in which an act of contempt is not only looked with disfavour but is required to be put down with a strong hand. If the lapse is not deliberate but is by a slip or by an error of judgment and that explanation appeals to a Court of law, we have no doubt that in the circumstances the contempt should be styled as technical contempt and a sincere apology would be enough to purge such contempt. If the action to be taken is in the case of a deliberate lapse which is in disregard of duty and is also in defiance of authority, then undoubtedly, appropriate punishment is called for.

22. Examining now the respondent's article from that point of view, we find that the weekly newspaper Blitz has a circulation of two lac copies as was stated at the bar on behalf of the respondent. It was because of a query by us that the answer came to be given. In the context of calculating the harm that is done by such publication, the extent of publicity is a relevant factor. It is in that context we made the query as to what was the circulation of this paper. If the circulation is to the tune of about two lac copies per week, it must be said that the respondent, as the editor of such a widely circulated paper, has great responsibility. In common man's language, this paper will have to be described as a popular paper. The more popular the paper is, the greater is going to be the effect of writing in proportion to the stability, prestige and circulation of the paper, and the responsibility of the editor and those who manage it is proportionately heightened. Criticism from people placed in such position has got to be reasonable and must exhibit a high tone. When the respondent wrote this article, it could not be said that he was not familiar at all with the Courts, their position and the law relating to contempt of Court. On a query by us again, Mr. N. Kamlakar, learned counsel appearing for the petitioner, referred us to a judgment of the Madhya Pradesh High Court in Babulal Shukla v. Shivprasadsing, AIR 1957 Madh Pra 152. He particularly emphasised an observation of that Court that

while considering whether the apology alone is sufficient to purge the contempt, the past conduct of the person accused of having committed contempt and the nature of impugned publication must be taken into account. He, therefore, pointed out to us in that context that the respondent had previously to face such proceedings on some occasions. We, therefore, asked the learned Counsel for the respondent to make a statement after enquiry with the respondent whether he was in fact involved in such proceedings and what were the results thereof. It was stated at the bar on behalf of the respondent that on one occasion in 1952, a show cause notice was issued against the respondent by this Court in Bombay. He said that some reports of a pending case were published in the columns of this weekly. The contempt proceedings arose from the publication of those reports. The original litigation of which reports were published, was between Chester Bowles, the American Ambassador on the one hand and Mr. R. K. Karanjia the present respondent, and one Mr. Karaka on the other. The apology was then tendered and was accepted. The other occasion was when a similar proceeding was initiated against the respondent in the Madhya Pradesh High Court and which case is reported in *Padmawati Devi v. R. K. Karanjia*, AIR 1963 Madh Pra 61. That case arose out of publication of certain reports even when the police investigation was continuing. One of the points raised was whether publishing such reports before the filing of the charge sheet amounts to an interference with the course of justice. The Madhya Pradesh High Court then considered whether the apology sent by the respondent through post should be accepted. They held that it was no apology at all as no regrets were expressed for the wrong done. There was also an attempt to justify the publication of the material. Under the circumstances, the respondent was fined. The learned Counsel for the petitioner Mr. N. Kamlakar, therefore, urged before us that here is a respondent who is not only the editor of a widely circulated paper but is fully conversant with the law of contempt. He said that it is often said that experience is the best teacher, but the respondent in this case does not seem to have profited by his past experience. These circumstances are stated before us only to point out that the lapse committed by the respondent could not be said to be an accidental slip but it appears to be a deliberate and calculated assault on the dignity of the lower Court. It is particularly necessary for us to examine this position because Mr. Manohar in his persuasive manner made a very strenuous effort to point out to us that the respondent is really feeling re-

morse and this contempt should be deemed to have been purged by accepting this apology. We may at once point out as has been observed in several judgments of the Supreme Court as well as in the judgment of Mr. Justice Bose as he then was in the case of AIR 1940 Nag 407, that an apology is not a weapon of defence forged to purge the guilty of their offences. It is not an additional insult to be hurled at the heads of those who have been wronged. It is intended to be evidence of real contriteness, the manly consciousness of a wrong done, of an injury inflicted, and the earnest desire to make such reparation as lies in the wrong-doer's power. Mr. Dharmadhikari particularly emphasised this approach and says that the circumstances under which the so-called apology has been tendered by the respondent may be examined. An apology, which is unreserved, clean and immediately offered at the earliest opportunity, is an apology which undoubtedly must be given greater weight than a belated apology. If an unreserved, unconditional and unqualified apology is not tendered immediately on the realisation of the mistake committed but if after some discussion in the Courts and after getting a possible feeling that the matter may lead to grave consequence, an apology comes to be offered, it loses much of its grace. An apology, which as Mr. Justice Bose as he then was says, should be evidence of real contriteness and manly consciousness of the wrong done; it ceases to be so if it is belated, and it becomes instead, to borrow the language of Mr. Justice Bose, again the cringing of a coward shivering at the prospect of the stern hand of justice about to descend upon his head. When we examined the circumstances under which the apology comes to be tendered in this case, we find that the so-called apology tendered on the first day of hearing, namely, July 30, 1968 is not an unreserved and unconditional apology at all. In the first paragraph of the affidavit filed on that day there is an attempt to explain the circumstances under which the article came to be written. That portion may smack of an attempt to justify, but it is at once explained that the respondent, without entering into any lengthy discussion of the article or attempting to justify the same, was tendering an apology. When we say that the apology tendered does not appear to be an unreserved and unconditional apology, it would be better to quote the wording of the respondent himself so that what it contains may be notified by the words used by the respondent himself:

"Without entering into any lengthy discussion of the article or attempting to justify the same I hereby tender my unqualified apology to your Lordships for

any word, sentence or para which may be construed as contempt of Court and pray that your Lordships may be pleased to accept the same and discharge the rule nisi."

23. When this Bench was seized of this matter and the case opened on August 19, 1968, we told Mr. Manohar that the apology which we have quoted above does not appear to us to be the kind of unreserved and unconditional apology that is expected from a wrongdoer who really feels remorse. He does not exhibit anywhere the consciousness that he has done a wrong. He does not plainly admit his responsibility for the wrong and show the preparedness to minimise that wrong or to wash away the effect of his conduct by an unqualified, unreserved and sincere apology. What he says at best is that "he is tendering an unqualified apology for any word, sentence or para which may be construed as contempt of Court." By necessary implication and after reading this affidavit as a whole, the impression that is created, is that the respondent does not think that there was anything objectionable in the article. He does not admit that he has done a wrong which is to be retrieved by repentance. What he says is that for any word, sentence or para which may be construed as contempt of Court, he has an apology to tender. When we told Mr. Manohar of what we think of such an apology, Mr. Manohar said that he had tendered another apology at the beginning of the day which, in the circumstances, could not be circulated in the papers earlier. He, therefore, brought to our notice another apology. As luck would have it, even this affidavit of the apology had the same wording which we may reproduce:

"I further tender and convey my unqualified, unreserved and unconditional apology to their Lordships and the members of the judiciary for any word, sentence, passage or paragraph in the said articles, which may construe as contempt of Court".

Here the improvement only consists of referring to the members of the judiciary at large and the addition of one more adjective namely "unreserved". In the operative part, it had again reference to the same position, namely, that "the apology is tendered for any word, sentence, passage or paragraph in the said article, which may be construed as contempt of Court". Since this was not materially different, we asked Mr. Manohar how is this apology different from the first. Mr. Manohar said that there appeared to be a typing mistake which was immediately corrected. The present apology is as follows:

"I further tender and convey my unqualified, unreserved and unconditional apology to their Lordships and the Members of the Judiciary for every word, sentence, passage or paragraph appearing in the said article and plead guilty to the charge".

We will not make any fetish at all of the typing error that crept in the second apology which was first filed in Court in the beginning of the day on August 19, 1968, and we accept the word of Mr. Manohar as representing the truth. We will assume that the last apology which we have quoted above was the second apology tendered by the respondent on the 19th of August, 1968 when the hearing of this case began before in this Bench. The only question that remains to be considered is whether this apology which is tendered on the 19th of August, 1968 should be accepted and should be deemed enough to purge the contempt that is committed.

24. It may now be appropriate to refer to the approach of Mr. Manohar in the matter of punishment in contempt proceedings. Both sides refer to several decided judgments which are reported. By a statistical survey of these judgments, Mr. Manohar said that, in most of the cases, the apology was accepted as sufficient amends. In gross cases, the punishment was that only a fine was imposed. We are aware that the contempt proceedings are a special type of proceedings where summary justice is meted out. This proceeding is to be sparingly used only when the gravity of the occasion demands it. However, a statistical approach to punishment could not be considered to be either proper or judicial approach. The punishment in any case for the matter of that is primarily a matter of discretion. When the Legislature lays down that a particular offence is punishable upto a certain punishment in the form of substantive sentence as well as fine, a wide margin is available to the Courts to exercise their discretion. This discretion is judicially exercised and the punishment meted out has got to be commensurate with the occasion that demands the exercise of jurisdiction. Undoubtedly, the punishment should not be unduly harsh or severe, but it also need not be so light as to create an impression that whatever the gravity of the offence, one could always escape lightly. A norm is, therefore, to be struck by examining the facts and circumstances of a particular case. It is only against this background that we think that we have before us a contemner who has indulged himself into a most unwarranted and most unhealthy criticism of an entire class of Judges, namely, the lower judiciary. He has given to this unwarranted criticism of very wide publicity, because

his paper is widely circulated paper. When it was brought to his notice by a show cause notice that he has committed a contempt and why action should not be taken against him, he has not come before the Court with the kind of genuine remorse accompanied by unreserved apology which alone is the kind of apology that is given due consideration by Courts. When he realised the possible grave consequences on the second occasion, he comes forward with an apology which for the first time suggests that he (the respondent) is admitting that he has done a wrong. When a belated apology comes from a person, who is an experienced journalist and who claims to be the head of a popular weekly and who had on two previous occasions known what contempt proceedings are, we do not think that even the belated apology should be considered as indication of real contriteness. It had its origin more in the fear of consequences that might be meted out to him rather than in any genuine feeling of remorse for having unnecessarily bestowed harm and injury upon the members of the lower judiciary. In the circumstances, we think that the apology tendered by the respondent should not be accepted. Accordingly we do not accept that apology. In the circumstances which we have described above, we are of the opinion that this case calls for a sentence which will be commensurate with the nature of the harm done by the article.

25. We accordingly convict the respondent under section 3 of the Contempt of Courts Act and sentence him to suffer simple imprisonment for 15 days and to pay a fine of Rs. 2000/-. In default of payment of fine, he will suffer further simple imprisonment for 15 days. The respondent is given three weeks' time to pay the fine as well as to surrender himself.

26. At this stage Mr. Manohar, learned Counsel for the respondent, prays for leave to appeal to the Supreme Court which is refused.

Order accordingly.

AIR 1970 BOMBAY 59 (V 57 C 8)
(NAGPUR BENCH)

ABHYANKAR AND PADHYE JJ.

N. J. Nayadu and Co. and others, Petitioners v. Administrator of the City of Nagpur and another, Respondents.

Spl. Civil Appln. No. 414 of 1966, D/-11-6-1968.

Municipalities—City of Nagpur Corporation Act 1948 (2 of 1950), Ss. 114 (2) (g) and (3) and 144—Nagpur Municipal Corporation Theatre Tax Rules, R. 3—

S. 114 (2)(g) which authorises corporation to impose any other tax which the State Legislature has power to impose in the State under the Constitution is not invalid on the ground of excessive delegation of legislative power—Provisions in Act are adequate to indicate legislative policy and limits within which tax can be imposed—Imposition of theatre tax under R. 3 framed in pursuance of such power is also not invalid—(Constitution of India, Art. 245 — Delegated legislation).

S. 114 (2)(g) of the City of Nagpur Corporation Act which authorises the Nagpur Corporation to impose any other tax which the State Legislature has power to impose in the State under the Constitution is not invalid on the ground of excessive delegation of Legislative power by the State Legislature and the imposition of theatre tax in pursuance of R. 3 framed under S. 114(3) of the Act is also not invalid.

The provisions in the Nagpur Corporation Act are adequate to indicate the legislative policy and the reasonable limits within which the power to tax can be exercised. AIR 1965 SC 1107 & AIR 1968 SC 1232, Applied. (Para 21)

The power to impose taxes, whether compulsory or optional, has been granted to the Corporation for the purposes of the Act which itself is a sufficient guideline according to the decision of the Supreme Court. The Corporation is charged with multifarious duties. It has to find funds, finances and revenues for discharging its functions effectively and efficiently. It knows as a representative body what are the needs of its people, residents and citizens and how they should be met. The proposals for imposing the tax in the first instance are subject to objections which are required to be considered. They are further subject to scrutiny by the State Government at a responsible level. The rules to be made are again the responsibility of the State Government. All these safeguards therefore, are sufficiently defensive to protect the provision from challenge as a piece of excessive delegation of legislative power. There is a provision for budget. The budget is to be scrutinised by the Government. There is overriding power in the State Government under Section 144 of the Corporation Act to order exemption from payment of any tax in whole or in part in proper cases and in case of particular class of persons, and Government is also empowered to require the Corporation to reconsider its proposal of impost if it results in an unfair incidence or is injurious to the interests of the general public as provided under sub-section (2) of Section 144. The guidelines that are to be sought in the legislation are to be found in such and similar

provisions of the Corporation Act. AIR 1966 Bom 15 & AIR 1955 Bom 185 Rel. on. Case law reviewed. (Para 17)

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V. R. Manohar and M. B. Mor, for
Petitioners; C. S. Dharmadhikari, for

Respondent No. 1; S. M. Hajarnavis
Addl. Govt. Pleader, for Respondent
No. 2.

ABHYANKAR, J.:— The petitioners, 18 in number, are either Managers or proprietors of cinema houses exhibiting cinema films in the City of Nagpur. There is a Corporation constituted for the City of Nagpur under the provisions of the City of Nagpur Corporation Act, 1948 (hereinafter referred to as the Corporation Act). Under Chapter XI in Part IV of this Act, provision is made for taxation. Under Section 114, the Legislature has provided for taxes which could be imposed under the Act by the Corporation. The procedure for imposing taxes enumerated in this section is prescribed under Section 115. Sub-section (1) of Section 114 makes provision for compulsory taxes which the Corporation must impose. Under sub-section (2), the Corporation is empowered by the enabling provision, with the previous approval of the State Government and for the purposes of the Act, to impose some additional taxes. The additional taxes which could be so imposed are enumerated in clauses (a) to (f), and there is a residuary clause (g) under which the Corporation can also impose "any other tax which the State Legislature has power to impose in the State under the Constitution."

2. In exercise of this power, the Corporation of the City of Nagpur has imposed a tax called "the theatre tax" after following the necessary procedure. Rules have been framed by the State Government under sub-section (3) of Section 114 regulating the imposition, assessment and collection of the theatre tax. The petitioners have filed at annexure A to the petition a copy of the rules made by the State Government called the Nagpur Municipal Corporation Theatre Tax Rules. Under Rule 3 of these rules, different kinds of entertainments such as cinemas, dramas, circus, carnival or fete, tamashas, music concerts, wrestling performances and any other performances of amusement or entertainment are brought under the tax at the rate of Rs. 10/- or Rs. 7/- as the case may be. So far as the cinema houses are concerned, they are divided into two classes, Class I and Class II, and for cinema shows exhibited in Cinema Class I, a theatre tax at the rate of Rs. 10/- per show, and for cinema shows exhibited in Cinema Class II, a theatre tax at the rate of Rs. 7/- per show were required to be paid by virtue of the notification issued sometime in December 1958. These rates were enhanced in 1966 to Rs. 15/- and Rs. 10/- respectively by a notification dated 11-2-1966.

3. Though the petition raised a number of contentions challenging the valid-

ity and imposition of this theatre tax, the learned counsel appearing for the petitioners has confined his challenge only to one ground and one ground alone. According to the learned counsel for the petitioners, the provision of Section 114 (2)(g) of the Corporation Act amounts to excessive delegation of legislative power by the State Legislature and any action taken in pursuance of the exercise of the powers under that section is void and invalid as the section itself suffers from the vice of excessive delegation of legislative power by the State Legislature. It is contended that the residuary clause (g) permits the Corporation to impose any other tax which the State Legislature has power to impose in the State under the Constitution, namely, under any of the entries in the State List in the Seventh Schedule and the Legislature in investing the Corporation with this extensive power of imposing taxes has not taken care to indicate which of these taxes may be levied or what is the extent to which the impost may be levied, or the persons on whom it may be levied and what would be incidence of taxation in respect of any particular tax. It is contended that there is no guidance in any provision of the statute or in Section 114 itself as to what should be the maximum and minimum burden which can be imposed, the class of persons who will be liable to pay such tax, or the articles, events or properties in respect of which the tax may be levied, nor is there any guidance about the machinery of administration or exemptions, for which provision will have to be made in all tax legislations. On all these grounds therefore the provision of Section 114 (2) (g) is challenged as ultra vires of the powers of the Legislature and therefore invalid and void.

4. The learned counsel for the petitioners has relied heavily upon a recent decision of the Supreme Court in *M/s Devi Das v. State of Punjab*, AIR 1967 SC 1895 in which the provision of Section 5 of the Punjab General Sales Tax Act, 1948, as it stood in its original form, was struck down on the ground that the provision was in excess of the power of the Legislature to commit to the subordinate agency to legislate in respect of any law relating to taxes. That section as it stood was as follows:—

"Subject to the provisions of this Act, there shall be levied on the taxable turnover every year of a dealer a tax at such rates as the Provincial Government may by notification direct."

The reasons for this conclusion of the Court are to be found in paragraph 16 of the judgment where it is stated:

"Under Section 5 of the Punjab General Sales Tax Act, 1948, as it originally

stood, an uncontrolled power was conferred on the Provincial Government to levy every year on the taxable turnover of a dealer a tax at such rates as the said Government might direct. Under that section the Legislature practically effaced itself in the matter of fixation of rates and it did not give any guidance either under that section or under any other provisions of the Act....no other provision was brought to our notice. The argument of the learned counsel that such a policy could be gathered from the constitutional provisions cannot be accepted, for, if accepted, it would destroy the doctrine of excessive delegation. It would also sanction conferment of power by Legislature on the executive Government without laying down any guidelines in the Act. The minimum we expect of the Legislature is to lay down in the Act conferring such a power of fixation of rates clear legislative policy or guidelines in that regard. As the Act did not prescribe any such policy it must be held that Section 5 of the said Act, as it stood before the amendment, was void."

5. The contention of the learned counsel for the petitioner in support of this petition is that similarly in the case of the Corporation Act, there are no guidelines either in Section 114 or in any other provisions, which could be reasonably said to lay down guidance for the subordinate authority, namely, the Corporation or the State Government, in making rules as to what should be the incidence of this taxation or the maximum or minimum rates of tax, or the persons who may be exempted and the manner in which the tax may be collected. It is not disputed that if no guidelines can be found in any provision of the Act under which the Legislature entrusts a subordinate or a delegate with the further function of carrying out the provisions of the Act by subordinate legislation such as making rules or by-laws, then such a provision in the statute itself is liable to be struck down as amounting to delegation in excess of legitimate bounds. The question is whether the provisions of the Corporation Act, in the light of other pronouncements of the highest Court in this country, will justify such a construction and conclusion.

6. The learned counsel for the petitioners has brought to our attention some decisions of the other High Courts which have taken a similar view in respect of provisions relating to taxation under different heads. *Liberty Cinema v. Commissioner, Calcutta Corporation*, AIR 1959 Cal 45, is a case directly in point, because it concerned the power of the Municipal Corporation to fix what was called a licence fee for running a cinema house under Section 548(2) of the Cal-

cutta Municipal Act, 1951. That section was worded as follows:—

“Except when it is in this Act or in any rule or bye-law made thereunder otherwise expressly provided, for every such licence or written permission a fee may be charged at such rate as may from time to time be fixed by the Corporation and such fee shall be payable by the person to whom the licence or written permission is granted.”

In exercise of this power, the Corporation of Calcutta had fixed a fee at the rate of Rs. 400/- per show for small cinemas and Rs. 800/- per show for bigger cinemas. By a subsequent resolution, the Corporation increased this fee to Rs. 6000/- for smaller cinemas, to Rs. 12000/- for medium cinemas, and to Rs. 18,000/- for largest ones. One of such cinema houses called the Liberty Cinema, through its proprietor, challenged this enhancement and even the original imposition on several grounds. It was contended on behalf of the cinema exhibitor that if the impost was in the nature of a fee, it was disproportionate to the services rendered and was excessive; and if on the other hand, the impost was in the nature of a tax, the power to impose a tax was exercised under a provision of the Act, namely, Section 548(2) of the Calcutta Municipal Act, which was void and invalid as it amounted to excessive delegation of legislative power. This contention was accepted by the learned single Judge before whom the matter was taken in his writ jurisdiction. There was an appeal against this order, but the appellate Bench affirmed the decision of the learned single Judge. The Corporation thereafter preferred an appeal to the Supreme Court and the decision of the Supreme Court is reported in *Corporation of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107. The Supreme Court reversed the decision of the Calcutta High Court and affirmed the validity of the section and the action taken thereunder. We will have occasion to refer to the observations made in this decision on which the learned counsel for the respondent naturally relies.

7. The petitioners also invited our attention to another decision of the Calcutta High Court (again a single Bench decision) reported in *Sarat Chandra v. Calcutta Corporation*, AIR 1959 Cal 36. The challenge in that case was to the imposition of what is called an advertisement tax under Section 229 of the Calcutta Municipal Act, 1951. In paragraph 26 of the judgment, the learned Judge observed that the section left it to the Corporation to levy the licence fee, that is to say, to levy a tax in such manner and at such rate as it liked, or to exempt any person or body of persons that it

thinks fit. As a necessary corollary, it follows that it could levy a tax on any person or body of persons that it thinks fit and leave out others similarly situated. As there was no guidance in the section itself in respect of all these matters, it was held that the impost was unsupportable in view of the statutory provision itself being invalid as amounting to excessive delegation.

8. Apparently along with this case, several other petitions raising a similar challenge were disposed of and the decision was a subject-matter of appeal before a Division Bench consisting of the learned Chief Justice and Mr. Justice Bachawat (as he then was). That decision is reported in *Calcutta Corporation v. Sarat Chandra*, AIR 1959 Cal 704. So far as the validity of Section 229 is concerned, in so far as that section empowered the Corporation to prescribe the rates of tax not having laid down any standard by which the power can be guided or controlled, there was a difference of opinion between the two members of the Bench. In paragraph 49 of the report, Bachawat J. observed that the Legislature may formulate its policy with regard to fixation of the rate of tax in very broad and general terms and leave the implementation of the policy to subordinate agencies. Then reference is made to the decision of the American Supreme Court in (1928) 276 US 394=72 Law Ed 624, *J. W. Hampton Jr. and Co. v. United States* where a legislation of this type was held as constitutional. It is then observed:

“Instances of legislation in this country providing for flexible rates of tax are furnished by the Indian Tariff Act of 1934 (Act XXXII of 1934) Ss. 4, 8 and 9 empowering the government to alter protective duties, to impose additional import duty on bounty-fed articles, and to levy special import duty on sugar; The Sugar Industry (Protection) Act (Act XIII of 1932), Sec. 4 empowering the government to increase the duty on imported sugar; The Salt (Additional Import Duty) Act (Act XIV of 1939) Sec. 4 empowering the government to impose additional duty on imported salt.”

It is then observed that the legislation will certainly be upheld if it lays down an intelligible principle for fixation of the rate which can be implemented by the administrative agency. In paragraph 52 the learned Judge has pointed out:

“The legislative practice has gone even further and has often left to the executive an unfettered power to fix the rate of tax. The Bengal Excise Act, 1909 (Bengal Act V of 1909), Section 27 empowers the Government to impose an excise duty or a countervailing duty, as the case may be, at such rate or rates as the Government may direct on certain excisable articles. Similar unfettered

power seems to have been given to the executive by the Ajmer Excise Regulation (I of 1915) noticed in *Cooverji B. Bharucha v. Excise Commissioner*, AIR 1954 SC 220 at pp. 222, 224. Unfettered power to fix the rate of tax was also conferred upon the Government by the Matches (Excise Duty) Act, 1934 (Act XVI of 1934) Section 4 (b) by which duty was levied 'on all other matters at such rate as the Central Government may prescribe' and the Sugar (Excise Duty) Act, 1934 (Act XXIV), Section 3 (2) (iii) by which duty was made payable on palmyra sugar at such rate, if any, as may be fixed in this behalf by the Central Government after such enquiry as it may think fit'. While a legislature cannot by prescription acquire the power which it does not otherwise possess, consistent practice of making laws of a certain type is a sufficiently important matter to be taken into consideration in deciding whether legislation of that type is unconstitutional." After noticing the judicial decisions on the subject, the learned Judge observed that the delegation made under Section 229 of the Calcutta Municipal Act to the Corporation of Calcutta of the power to fix the rates of tax is valid.

9. The next case relied upon is *Shanmugha Oil Mill v. Market Committee*, AIR 1960 Mad 160. In this case, the constitutional validity of Section 11 (1) of the Madras Commercial Crops Markets Act, 1933, was under examination. In its re-enacted form Section 11(1) provided that the Market Committee shall, subject to such rules as may be made in this behalf, levy a cess by way of sales-tax on any commercial crop bought and sold in the notified area at such rates as the State Government may, by notification, determine. It was held by the learned single Judge:

"But the rate of tax which is an essential part of the declaration and assessment has been completely delegated to the executive Government with no principles or basis laid down. Uncontrolled power is vested in the Executive to fix such rate as it pleases. In the absence of a legislative provision regarding any policy or limits of assessment for the guidance of the assessing authority, it must be held that the provisions of the section amount to excessive delegation of legislative power, and, therefore, invalid."

10. The next case relied upon is *Standard Motor Union (P.) Ltd. v. State of Kerala*, AIR 1962 Ker 298. Section 12 of the T. C. Motor Vehicles Act provided that where Government are satisfied that special circumstances exist for the levy of toll on any road or bridge they may subject to such conditions as they may deem fit to impose direct by notification

in the gazette the levy of tolls on vehicles using such road or bridge and thereupon the provisions of the law relating to tolls for the time being in force shall apply thereto. The contention was that there was absolutely no indication anywhere in the Act as to what circumstances can be considered to be "special circumstances" under Section 12 justifying the levy of a toll. This contention was upheld and the section was struck down.

11. Reference was also made in the course of arguments to a decision of the Madhya Pradesh High Court in *State v. Haidarali*, AIR 1957 Madh Pra 179 (FB). In the case, the provisions of clause 11-B of the Iron and Steel (Control of Production and Distribution) Order 1941, were under examination. But the decision of the Full Bench could no longer be relied upon in view of the decision of the Supreme Court in *Union of India v. Bhanamal Gulzarimal Ltd.*, AIR 1960 SC 475, upholding the validity of that clause. Precisely the same provision of the Iron and Steel (Control of Production and Distribution) Order, 1941, was under examination in that case and has been upheld by the Supreme Court as not being unconstitutional on the ground of excessive delegation of power.

12. In our opinion, the petitioner's case would have been on a much stronger ground but for the decision of the Supreme Court in AIR 1965 SC 1107. It is useful to note a little more closely what the contention in that case was and how that contention was met. We have already referred to the facts giving rise to that case. By a resolution dated 14-3-1958 the Corporation of Calcutta changed the basis of assessment of the licence fee with effect from 1-4-1958. Under the new method the fee was to be assessed at rates prescribed per show according to the sanctioned seating capacity of the Cinema houses. The respondent's cinema house had 551 seats and under the changed method it became liable to a fee of Rs. 5/- per show. In the result, it became liable to pay a fee of Rs. 6000/- per year, whereas previously it was liable to pay only Rs. 400/- per year. The impost was challenged on different grounds in the Supreme Court. The contention that the levy amounted to expropriation and was an invasion on the right of the petitioner under Article 19 (1)(f) and (g) of the Constitution was rejected. The second contention was that the levy was in the nature of a fee in return for services to be rendered, and if it was a fee, the impost was not commensurate with the cost incurred by the Corporation in providing the services. It was not accepted that it was a fee and it was treated more properly as a tax. It is the last contention which is germane to the issue before us, and that was that Section 548 of the Calcutta Municipal Act

which authorised the levy as a tax as distinct from a fee was invalid as it amounted to an illegal delegation of legislative function to the Corporation, because it left it entirely to the latter to fix the amount of the tax and provided no guidance for that purpose. On the basis that Section 548 is a piece of delegated legislation, it was contended that the delegation was excessive. On the other hand, the Corporation's defence was that assuming that Section 548 is a piece of delegated legislation, the rate of tax is not an essential feature of the legislation and power was properly delegated to the Corporation and sufficient guidance for the purpose was given in the Act. It cannot be disputed that the power of the Legislature to delegate some of the subordinate functions is not disputed provided the guidelines within which the power is to be exercised are indicated. The first question that was considered and decided was regarding the contention of the Corporation that fixation of rates is not an essential part of legislation and is therefore not an essential legislative function.

13. The decision refers to the case of Pandit Banarsi Das's case, AIR 1958 SC 909, and observes as follows:

"The Act was a statute imposing taxes for revenue purposes. This case would appear to express authority for the proposition that fixation of rates of taxes may be legitimately left by a statute to a non-legislative authority, for we see no distinction in principle between delegation of power to fix rates of taxes to be charged on different classes of goods and power to fix rates simpliciter, if power to fix rates in some cases can be delegated then equally the power to fix rates generally can be delegated. No doubt Pandit Banarsi Das's case, AIR 1958 SC 909, was not concerned with fixation of rates of taxes; it was a case where the question was on what subject matter, and therefore on what persons, the tax could be imposed. Between the two we are unable to distinguish in principle, as to which is of the essence of legislation; if the power to decide who is to pay the tax is not an essential part of legislation, neither would the power to decide the rate of tax be so. Therefore, we think that apart from the express observation made, this case on principle supports the contention that fixing of the rate of a tax is not of the essence of legislative power".

14. Reference is then made to the decision of the English case of Powell v. Apollo Candle Co. Ltd., (1885) 10 AC 282; Syed Mohamed & Co. v. State of Madras, AIR 1953 Mad 105; and (1928) 276 US 394 = 72 Law Ed 624. And then the Court observed:

"No doubt when the power to fix rates of taxes is left to another body, the legislature must provide guidance for such

fixation. The question then is, was such guidance provided in the Act? We first wish to observe that the validity of the guidance cannot be tested by a rigid uniform rule; that must depend on the object of the Act giving power to fix the rate. It is said that the delegation of power to fix rates of taxes authorised for meeting the needs of the delegate to be valid, must provide the maximum rate that can be fixed or lay down rules indicating that maximum. We are unable to see how the specification of the maximum rate supplies any guidance as to how the amount of the tax which no doubt has to be below the maximum is to be fixed. Provision for such maximum only sets out a limit of the rate to be imposed and a limit is only a limit and not a guidance.

It seems to us that there are various decisions of this Court which support the proposition that for a statutory provision for raising revenue for the purposes of the delegates as the section now under consideration is, the needs of the taxing body for carrying out its functions under the statute for which alone the taxing power was conferred on it, may afford sufficient guidance to make the power to fix the rate of tax valid."

15. Reference is then made to the previous decision of the Supreme Court in the Western India Theatres Ltd. v. Municipal Corporation of the City of Poona, AIR 1959 SC 586. With reference to this case, it is pointed out that it was concerned with a statute under which the respondent Corporation had been set up and which gave that Corporation power to levy "any other tax". It was contended that such a power amounted to abdication of the legislative function as there was no guidance provided, and this contention was rejected by the Supreme Court, and one of the grounds on which the contention was rejected was that the State authorised the municipality to impose taxes therein mentioned 'for the purposes of the Act' and that this furnished sufficient guidance for the imposition of the tax (the underlining (here in ' ') is ours).

16. Reference is also made to other decisions of the Supreme Court. The first case was Vasanlal Maganbhai v. State of Bombay, (1961) 1 SCR 841 = (AIR 1961 SC 4) where the provisions of the Bombay Tenancy and Agricultural Lands Act giving power to the Government to fix a lower rate of maximum rent payable by the tenants were under challenge. The other case was AIR 1960 SC 475 to which we have already made a reference and in which the power given to the Steel Controller to fix rates was challenged. In our opinion, the following observations in this decision should hardly leave any scope for taking a different view about the validity of the impost challenged in this case.

beyond reasonable doubt would be as much a grave public mischief as to dissolve the tie of marriage, say, on the ground of adultery without that matrimonial offence being proved beyond reasonable doubt. Not that divorce has anything penal about it and, therefore, draws from the criminal law the standard it goes by. As Lord Pearce says in his speech in *Williams v. Williams*, (1963) 2 All ER 994, a case on insanity, the second limb of the *MacNaghten* rules affording the husband no defence to the wife's petition for dissolution of marriage on the ground of cruelty:

"I cannot accept the argument that divorce is partly punitive and should, therefore, look to the criminal law for guidance. The dissolution or permanent interruption of a union which is in theory life-long and indissoluble cannot be justified by any logic. But the frailties of humanity produce various situations which demand practical relief, and the Divorce Acts owe their origin to a merciful appreciation of that demand." : p. 1022 of the report.

Again, at page 1023:

"I do not find anything in the Divorce Acts to justify a theory that the law is intended to punish. They appear to intend a practical alleviation of intolerable situations with as little hardship as may be upon the party against whom relief is sought."

When that is the outlook in divorce jurisdiction: "practical alleviation of intolerable situation", or, as Lord Denning says in 1950 P. 125 = (1950) 1 All ER 40 (paragraph 28), the giving of a statutory relief from a marriage that has irretrievably broken down, or, as Lord Hatherly puts in (1874) 2 Sc & D. 374 (paragraph 22), relieving the spouse from his unhappy position, that of indissoluble union with one who had herself broken the marriage tie, why go in for such a high standard of proof beyond reasonable doubt, by which the guilt of one arraigned in criminal jurisdiction has got to be proved, no matter whether the divorce jurisdiction has borrowed it from the criminal jurisdiction or has suffered it to have an automatic growth because of the gravity and public importance of the issue? Will not such a high standard of proof unjustly deprive an injured spouse of a remedy which he ought to have?

37. The House of Lords answered the questions, just posed, on February 15, 1966, in (1966) AC 643, by "three voices to two", three voices being the voices of Lord Denning, Lord Pearce and Lord Pearson, and two voices being the voices of Lord Morris of Borth-y-Gest and Lord Morton of Henryton. Such majority however was only about condonation, conni-

vance and the like, where satisfaction beyond reasonable doubt was not necessary, not about the grounds for dissolution: adultery and the like, where satisfaction beyond reasonable doubt was necessary. Such was the lone view of Lord Pearson. The majority view, so limited, may be put thus:

A. "Satisfied", a neutral word, does not mean "satisfied beyond reasonable doubt". The legislature is quite capable of putting in the words "beyond reasonable doubt" if it meant it. It did not do so. It simply said on whom the burden of proof rested, leaving to the court itself the duty of assessing its own satisfaction.

B. Even in criminal cases, an accused is never bound to prove his innocence beyond reasonable doubt when the burden of proof is on him. It is sufficient if the balance of probability is in his favour: *Sodeman v. The King*, (1936) 2 All ER 1138, *Rex v. Carr-Briant*, (1943) KB 607. So also with connivance and condonation, 1966 AC 643 being a case on condonation, rested only on a casual act of intercourse prompted by the wife's allurements, namely, her naked invitation on the rug, which made the husband carried away by his passion, with not a single thought about forgiveness or reinstatement.

C. Analogies and precedents of criminal law have no authority in the divorce court, a civil tribunal: (1874) 2 Sc & D. 374. It is, therefore, wrong to apply the analogy of criminal law. Do not say that adultery must be proved with the same strictness as is required in a criminal case. Say simply it must be proved to the satisfaction of the court, by a preponderance of probability, just as any other civil case is.

D. Yet the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear.

38. Of 1948 P. 179 (paragraph 25) insisting on a matrimonial offence (later brought down to adultery only: paragraph 27) being proved, just as a crime is proved, Lord Denning observes in 1966 AC 643.

"Sitting in this House, I feel at liberty to say that I prefer (1948) 77 CLR 191 to 1948 P. 179."

But this is not the majority view. It is the view of Lord Denning and Lord Pearce. Lord Pearson shares the view, only about condonation, connivance and the like, which are bars to relief, not about adultery and the like, which are grounds for relief. Lord Morris of Borth-y-Gest and Lord Morton of Henryton in-

sist on nothing short of proof beyond reasonable doubt, no matter whether it is ground for relief or bar to relief. In sum, for condonation, which is the subject-matter of 1966 AC 643, the majority view is: preponderance of probability is the standard of proof, not proof beyond reasonable doubt — an expression, which, according to the minority view, is implicit in the word 'satisfied.' Lord Morris of Borth-y-Gest observing:

"No one, whether he be a judge or juror, would in fact be satisfied if he was in a state of reasonable doubt."

39. This completes our review of all the English cases Mr. Gouri Mitter has been good enough to cite before us, and a few more too, we have examined on our own. In England, the standard of proof beyond reasonable doubt, in a divorce court, a civil tribunal, is no more a concept of criminal jurisdiction; it is consigned there, its proper place, and we come full-circle back to the general rule of Lord Stowell (then Sir William Scott) in (1810) 2 Hag Con 1: the standard furnished by "the guarded discretion of a reasonable and just man" (paragraph 21). This is however so, not about grounds of relief: adultery and the like, but about bars to relief, condonation and the like, just the periphery within which the majority decision in 1966 AC 643 lies.

40. It is interesting to note, however, as I point out to Mr. Gouri Mitter in the course of his argument, that while so much divergence of opinion is there about the standard of proof beyond reasonable doubt, a concept of criminal law, being applied in a divorce suit, a civil proceeding, criminal jurisdiction is being instructed, on high authority, to eschew the expression "beyond reasonable doubt" — an expression which is too refractory to be brought within the limits of a clear and precise definition — and, what is more, to go by simply "satisfied". Such indeed is the case of *R. v. Summers*, (1952) 1 All ER 1059, where the Chairman of quarter sessions had taken pains, in the summing-up, to explain to the jury the meaning of the words "reasonable doubt". The court of criminal appeal saw no ground for interfering with the conviction, on merits. But Lord Goddard C. J., speaking for the court, said this about the expression "reasonable doubt":

"I have never yet heard any court give a real definition of what is a 'reasonable doubt', and it would be very much better if that expression was not used. Whenever a court attempts to explain what is meant by it, the explanation tends to result in confusion rather than clarity. It is far better, instead of using the words 'reasonable doubt' and then trying to say

what is a reasonable doubt, to say to a jury: 'you must not convict unless you are satisfied by the evidence given by the prosecution that the offence has been committed.'"

In *R. v. Hepworth*, (1955) 2 All ER 918, Lord Goddard C. J., presiding over the court of criminal appeal again, adhered to what he had said in (1952) 2 All ER 1059, just noticed, confessed to having some difficulty in understanding how there could be two standards of proof — one in a civil case and another in a criminal case — and added:

"It is very difficult to tell a jury what is a reasonable doubt."

His Lordship continued:

"One would be on safe ground if one said in a criminal case to a jury: 'you must be satisfied beyond reasonable doubt'. One could also say — 'you, the jury, must be completely satisfied' — or, better still — 'you must feel sure of the prisoner's guilt.'"

In *R. v. Attfield*, (1961) 3 All ER 243 (247), Ashworth J., speaking for the court of criminal appeal, said:

"This court would wish to reiterate what has been laid down now in several cases that the proper form of direction is . . . that the standard of proof required before a verdict of guilty can be returned is that the jury should be satisfied, that they should feel sure."

41. If that is that, what is all this controversy about on the 'civil' and 'criminal' standard? The very edge of the controversy is then gone. And the standard of proof in all jurisdictions — Civil, criminal and matrimonial (part of civil) — appears to be the same: satisfaction of the court. Section 3 of our Evidence Act, defining "proved", lays down as much too, making no distinction between proof in a civil case and proof in a criminal case.

42. Yet upon a review that goes before of all matrimonial cases, it may be said, as has indeed been said by Mr. Gouri Mitter, that, in England, on the law as it now stands, after 1966 AC 643, the standard of proof in a matrimonial cause is not 'satisfaction of the court beyond reasonable doubt', but simply 'satisfaction,' without that adverbial qualification, but only on matters relating to condonation, connivance and the like, the majority of three voices going to that extent only, and no further: paragraph 37. From 1966 AC 643, the proposition, contended for, does not follow that adultery has not to be proved with the same strictness as is required in a criminal case, but may

be proved, like any other matrimonial offence, by preponderance of probability. But what is the law here in India on the standard of proof? By that law, the litigation on hand will have to be governed. By that law, we shall have to govern ourselves too.

43. The four Supreme Court's decisions, noticed below one after another, in order of date, lay down what the law is in India in matrimonial causes on the standard of proof.

44. I. Bipinchandra Jaisingbai Shah v. Prabhavati, decided on October 19, 1956, and come into the reports in 1957: AIR 1957 SC 176.

In this case, one of divorce, at the instance of the husband, on the ground of desertion by his wife for a continuous period of four years, under Section 3, sub-section (1), clause (d), of the Bombay Hindu Divorce Act 22 of 1947, come into force on May 12, 1947, Sinha C. J. (then Sinha J.), speaking for the court, laid down the law as under:

"It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like any matrimonial offence, beyond all reasonable doubt."

45. II. Earnist John White v. Kathleen Olive White, 1958 SCR 1410=AIR 1958 SC 441.

It was a case of divorce on the ground of adultery, and that too under the Indian Divorce Act 4 of 1869, the seventh section whereof provides: Courts in all suits and proceedings under the Act shall act and give relief on principles and rules which in the opinion of the Court are as nearly as may be conformable to the principles and rules on which the court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. Having quoted this, as also just the passage I have quoted from the speech of Lord MacDermot (paragraph 34) in 1951 AC 391, Kapur J., who was speaking for the court, enunciated the law thus:

"In our opinion, the rule laid down by the House of Lords would provide the principle and rule which Indian Courts should apply to cases governed by the Act and the standard of proof in divorce cases would therefore be such that if the judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence he would be satisfied within the meaning of Section 14 of the Act. The two jurisdictions, i. e., matrimonial and criminal are distinct jurisdictions, but terms of S. 14 (in case the Court is satis-

fied on the evidence that the case of the petitioner has been proved . . .) make it plain that when the Court is to be satisfied on the evidence in respect of matrimonial offences the guilt must be proved beyond reasonable doubt. . . ."

"Satisfied on the evidence", the language used in the Indian Divorce Act, as also in the English statute, (paragraph 17), and simply "satisfied", the language used in the Hindu Marriage Act, mean the same thing, as pointed out by Mudholkar J. in his minority judgment in Mahendra v. Sushila, AIR 1965 SC 364 at p. 402 (paragraph 209).

46. Gower v. Gower, decided on March 7, 1950, (paragraph 29), (1950) 1 All ER 804 a case on adultery, was pressed before their Lordships in the White case, AIR 1958 SC 441 "as to the approach the Court should have to a matrimonial offence", presumably with particular reference to the approach made by Lord Denning (paragraphs 30-32). But in view of the decision rendered by the House on December 14, 1950, in the Preston-Jones case, 1951 AC 391, (paragraph 33), their Lordships considered it unnecessary to discuss it—1950-1 All ER 804. It is futile to make a point of that before us; the more so, as the test of proof beyond reasonable doubt, though not as a concept of criminal law, was adopted in 1950-1 All ER 804 by Lord Bucknill. That is the test Lord MacDermot went by in the Preston-Jones case, 1951 AC 391 and Kapur J. adopted in AIR 1958 SC 441. True it is, as argued, that in the Preston-Jones case, 1951 AC 391 the grave issue of adultery was rendered graver still by the consideration that in effect a child was to be bastardized, nothing like which was present in AIR 1958 SC 441, a case of adultery simpliciter. Yet bow I must before the authority of the Supreme Court laying down the standard of proof as proof beyond reasonable doubt.

47. III. Lachman Utamchand v. Meena, decided on August 14, 1963, and come into the reports in 1964: AIR 1964 SC 40.

Here was a case of judicial separation for desertion by the wife under Section 10, sub-section (1), Cl. (a) of the Hindu Marriage Act, 1955. The trial Judge decreed the relief the husband had prayed him for. The High Court reversed him. In the Supreme Court, Ayyangar J., for Sinha C. J., Das A. C. J., Raghubar Dayal J. and for himself, reversed the High Court. Subba Rao C. J. (then Subba Rao J.) did not. Whatever might have been their difference of opinion on merits, both the majority view and the minority view were agreed on the standard of proof.

Majority view.

It is settled law that the burden of proving desertion — the factum as well as animus deserendi — is on the petitioner; and he or she has to establish beyond reasonable doubt, to the satisfaction of the court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause: P. 48, Paragraph 18, of the report.

48. It is said that the minority view reproduced above attributes to AIR 1957 SC 176 more than it had laid down, because nothing has been said there about the standard of proof in a criminal case. But what is said there is necessity of proof "beyond all reasonable doubt" (paragraph 44). That is the standard in a criminal case from time out of mind. As Rayden on Divorce, 10th edition, puts it at page 170:

"But proof beyond reasonable doubt is in fact the standard of proof in a criminal case".

That apart, what Lord MacDermot said in the Preston-Jones case 1951 AC 391 (paragraph 34) and what Hodson L. J. said in the Galler case, 1954 P. 252

Raghubar Dayal J. for himself and Ayyangar J.

... what the court has to see in these proceedings is whether the petitioner has proved beyond reasonable doubt that the respondent was pregnant by someone else at the time of marriage: p. 371, paragraph 21, of the report.

50. What one, therefore, finds is consensus, in the sense of unanimity, that the standard of proof in a matrimonial cause in India is proof beyond reasonable doubt. Agnes Cecillia Gome v. Lancelot Ashley Gome, AIR 1964 Cal 28, and Adelaide Mande Tobias v. William Albert Tobias, (1967) 71 Cal WN 605 = AIR 1968 Cal 133, we have referred to, lay down as much too. The criticism levelled against the decision in Gome v. Gome AIR 1964 Cal 28 is this: To demand proof beyond reasonable doubt in adultery, and yet to say that the proposition that the same strict proof is required as is required in a criminal case "has been widely expressed", amount to an inconsistency. To such criticism we have little to add to what we have stated in paragraph 48 ante. On the Tobias case, (1967) 71 Cal WN 605 = AIR 1968 Cal 133 a twofold comment is made. First: it is not right to relegate, as obiter

Minority view

(i) The offence of desertion must be proved beyond any reasonable doubt. In short, this court (in AIR 1957 SC 176) equated the proof in a matrimonial case to that in a criminal case: P. 56 of the report: paragraph 42.

(ii) The legal burden is upon the petitioning spouse to establish by convincing evidence beyond any reasonable doubt that the respondent abandoned him without reasonable cause: p. 59 paragraph 50 *ibid*.

(paragraph 35) appear to be a complete answer to a contention as this.

49. IV. Mahendra v. Sushila decided on March 18, 1964, and come into the reports in 1965; AIR 1965 SC 364.

It is the Preston-Jones case 1951 AC 391 of India the other way round: the normal delivery of a child too soon, 171 days after the date of the marriage, just the opposite of the delivery of a normal full-time baby too late, 360 days after the last coitus as in the other. Whatever may be difference in opinion between the majority view and the minority view, on merits, and other matters, the same standard of proof is adhered to as much in one as in the other:

Mudholkar J. for himself alone.

In my judgment, what the Court has said in White's case, AIR 1958 SC 441 (paragraph 45 ante), about the applicability of the rule in 1951 AC 391: the Preston-Jones case: must also apply to a case under the Hindu Marriage Act: p. 402, paragraph 209, of the report.

as has been done here, so many reasons of Lord Denning in (1950) 1 All ER 804 (Paragraph 30) in support of the standard of proof in a matrimonial cause, a civil proceeding, being the 'civil' and not the 'criminal' standard, only because his Lordship was simply satisfied on evidence — not that his Lordship was satisfied beyond reasonable doubt, as has been attributed to him — that adultery was proved. In reality, they are additional reasons why the 'criminal' standard of persuasiveness cannot be called in aid. Once that is so, obiter they cannot be. Perhaps this may be said, if we may say so, with the greatest respect. See Jacobs v. London County Council, (1950) 1 All ER 737 = 1950 AC 361. But what value has such criticism now? 1966 AC 643, a pronouncement of the House, has since settled the controversy in England in favour of the standard of persuasion being 'civil,' not 'criminal', but

only in matters relating to condonation, connivance and the like. Second: (1966) AC 643, decided on February 15, 1966, was not cited before the court in the Tobias case, (1967) 71 Cal WN 605 = AIR 1968 Cal 133 decided on March 8, 1967. It was not. But what difference would such citation have made? The court would have been bound by the law on the standard of proof being proof beyond reasonable doubt, as laid down by the Supreme Court in the four decisions referred to above. Surely, the court could not have preferred 1966 AC 643 to those decisions of the Supreme Court.

51. In *Lilabati v. Kashinath*, (1969) 73 Cal WN 19, the last case referred to us by Mr. Gouri Mitter on the question of standard of proof, a decision rendered by my learned brother and myself, we did no more than go by the standard laid down by the Supreme Court, quoting an excerpt from the minority judgment of Subba Rao C. J. (then Subba Rao J.) in AIR 1964 SC 40, as we have quoted here as well (paragraph 47). So long as the law laid down by the Supreme Court stands, we see nothing to unsay what we had said then. And as to equating the proof to that in a criminal case, we reiterate what we have stated in paragraph 48 ante.

52. To sum up, the law, in India, on the standard of proof, in a matrimonial cause, is proof beyond reasonable doubt, though, in England, the law, after 1966 AC 643, is otherwise: satisfaction of the court by a preponderance of probability in matters relating to condonation, connivance and the like. Whether their Lordships of the Supreme Court, when referred to 1966 AC 643 on an appropriate occasion, will approve the majority view there, that "satisfied", a neutral word, does not mean "satisfied beyond reasonable doubt," or the minority view there, that that adverbial qualification "beyond reasonable doubt" is implicit in the word "satisfied", quite in keeping with their Lordships' present view, we cannot say. All we can say is that we must go by the law as it now stands, on the foot of existing pronouncements by the Supreme Court, that law being: 'Prove you must a matrimonial offence beyond reasonable doubt'.

52A. How 1966 AC 643 has to be construed, the court of appeal in England points out in *Bastable v. Bastable*, (1968) 1 WLR 1684, which we have since come across, and, where, pending further guidance from the House, a high standard of proof was required to be satisfied about the commission of the offence of adultery. The standard furnished by a mere balance of probability was ruled out, 1966 AC 643 notwithstanding. So still less can we say what view will ultimately

commend itself to the Supreme Court. Therefore, the law, as it now stands, as pronounced by the Supreme Court must receive effect. The law is proof beyond reasonable doubt. And by that law we must govern ourselves.

53. This is how we get out of the way the difficulty on the standard of proof, (paragraph 16), pressed upon us by Mr. Gouri Mitter. Having done so, we now apply ourselves to facts, which, however, are such, as we find upon the whole of the evidence and the pleadings, that, to put it very mildly, not a single count of the fourfold charge, Sachindra brings against his life's partner Nilima, can be said to have been proved, no matter what standard of proof we call in aid: the strictest one of proof beyond reasonable doubt, ensuring, say, a 90 per cent certainty, or the lightest one of proof on a very slender balance of probability, say, even a 51 per cent, probability of Sachindra's case being true. Yet a chronological review of the development of the law on the standard of proof, as we have done, we could not very well go without, not only out of deference to Mr. Gouri Mitter's painstaking argument, but also with a view to satisfying ourselves what the law now is in England and also in India, and how it grew. The more so, as we have on the high authority of Mudholkar J. in AIR 1965 SC 364 (paragraph 49): "The law of divorce in India is, broadly speaking, modelled on the law of England."

54. To the first affair first, namely, the Gopal affair (paragraph 15), who this Gopal is has been noticed: a son of Jitendra, Sachindra's eldest brother. Such a one was forty-two or forty-three years of age on March 24, 1964, as Sachindra says in his evidence on that date. So, on June 28, 1937, when Sachindra and Nilima were married, Gopal was a lad of fifteen or sixteen years old. And Nilima, his aunt, let it be recalled, was then aged eighteen. A little more deserves to be noticed. Jitendra retired as a professor of the Cooch-Bihar College. And Gopal was a student living at Cooch-Bihar at the time of the marriage of his uncle Sachindra with Nilima. But during the summer vacation and the Pujah vacation as well, Gopal used to visit Bakal, the ancestral home of all, where, as noticed, Nilima used to live too until July 1948 when she was permanently shifted to "4D". Such is the evidence of Sachindra himself.

55. Now, what Sachindra alleges about the Gopal affair be noticed. In his petition bearing date January 19, 1962, for divorce or judicial separation, he would say no more than this:

In July 1941 Nilima was in Calcutta for a short stay. Gopal was also then staying

in Sachindra's "Calcutta residence" with a view to prosecuting his studies. It then came to his (Sachindra's) notice that Nilima's behaviour with Gopal "was not such as was consistent with the normal notions of decency expected of a married lady of Hindu Society." He took exception to such inelegance. Result: Gopal, his nephew, left. But he used to visit Nilima at Bakal.

56. Such is the averment in paragraph 5 of the petition — an averment which is true to Sachindra's knowledge. It is difficult to conceive of a pleading more 'liquid,' when it is borne in mind that the finding Sachindra invites from the Court is that in July 1941, Nilima, about twenty-two years of age, and the mother of a child (Khana), some three years old then, committed adultery with Gopal aged about twenty or twenty-one. Far be it from us to suggest that the direct fact of adultery has to be invariably pleaded, because spouses, who love to gad about outside the bonds of matrimony, are seldom surprised in such extra-marital gallivanting and worse, though a feature of this unpleasant litigation is, as will presently be seen, that, according to Sachindra, Nilima and her paramour are surprised in such direct or near-direct fact of adultery on each of the four occasions. That is not what we are on, in criticising the 'liquid' averment in the fifth paragraph of the petition. What we are on is that adultery can be proved in two ways. One way is to testify to the direct fact of adultery — a phenomenon so rare. Another way is to infer from circumstances "that lead to it by fair inference as a necessary conclusion". Now, read the averment in the fifth paragraph once more. What Sachindra seeks to convey, by such averment, true to his knowledge, is the existence of such circumstances, not the direct fact of adultery, which he does plead about the second Umakanta affair (paragraph 7 of the petition), nor the near-direct fact of adultery, which he does plead about the Narayan affair (paragraph 8 *ibid*). So, what sort of behaviour on the part of Nilima with Gopal Sachindra noticed — behaviour so inconsistent with decorum and decency expected of a married lady in Hindu society — has got to be pleaded; not the evidence by which the material fact of such behaviour has to be proved.

57. The law on this appears to be clear enough. Order 6, rule 2, of the Procedure Code prescribes just so. And Rule 4 of of the same Order makes it clearer still, prescribing as it does that, what to say of cases where misrepresentation, fraud, breach of trust, wilful default, or undue influence is relied upon and where particulars thereof must be set out in the pleading, even in all other cases, in which

particulars may be necessary beyond such as are exemplified in the statutory forms such particulars shall be stated in the pleading. When a husband charges his wife with a conduct so unbecoming of a married lady in society, a conduct to which he takes exception, causing Gopal to flee, it is very necessary that he do state the particulars: what exactly did the wife do? When? Where? Nothing of the kind is there in the fifth paragraph. This is why such averment is regarded as "liquid".

58. That the Code, by the provisions of which we are going, applies here, is provided for by Section 21 of the Hindu Marriage Act 1955. This section is no doubt subject, amongst other things, to such rules as the High Court may make in this behalf. This court has since made the rules: The Hindu Marriage Act (Calcutta High Court) Rules 1957. See Rule 340B, High Court Civil Rules and Orders, Volume I, which, incorporates these rules. But they provide for (i) application of the Original Side Rules to the institution and trial of suits etc. to proceedings on the Original Side under the Hindu Marriage Act and (ii) application of the City Civil Court Rules 1956 to proceedings thereunder in the City Civil Court. Where go then so many district courts throughout the State — the proper forum of such proceedings under Section 19 of the Hindu Marriage Act? The Hindu Marriage Act (Calcutta High Court) Rules 1957 do not provide for these district courts. They do not, because it is so unnecessary to make such provisions. It is so unnecessary, because the statute itself provides, by Section 21, the application of the Code of Civil Procedure.

59. That apart, the statute (the Hindu Marriage Act), by Section 20, sub-section (1) prescribes:

"Every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded."

In the case on hand, one of the facts on which Sachindra's claim to relief for divorce is founded is the adultery of Nilima with Gopal in July 1941. The nature of such case permits very much indeed a statement, distinctly enough, of what Sachindra had seen Nilima doing with Gopal, where and when. Yet all he states is that the behaviour of Nilima with Gopal at Calcutta in July 1941 was not such as is consistent "with the normal notions of decency expected of a married lady of Hindu Society." This is not stating a fact distinctly, as is the requirement of the statute. To say so little is to leave so much unsaid. The material facts touching the misbehaviour of Nilima with

Gopal are not pleaded. And that is what we emphasize, not the evidence by which such facts are to be proved.

60. In sum, a pleading as this, so indistinct and inadequate, appears to be beneath notice. It goes down still more, when we turn from such poor pleading, as we now do, to evidence. And the lone evidence in assertion of Nilima's inelegance on this count is that of Sachindra himself, the first of his ten witnesses, including himself, as is only to be expected. Only to be expected, because when a spouse stoops to libidinous performance with somebody, not her spouse, in the privacy of the matrimonial home, you cannot ordinarily expect witnesses to be about. So, that by itself is not to be reckoned against Sachindra. It is not reckoned either. What is reckoned against him instead is the manner of his evidence on material facts, which it was so easy for him to plead, but which he did not, with no explanation for this sort of amazing omission. What is reckoned against him instead is the existence of authentic circumstances, contemporaneous and subsequent, proclaiming the utter falsity of the Gopal affair.

61-77. (The judgment then deals with facts inclusive of letters written by Nilima to Sachindra, touching the Gopal affair and continues:)

78. Such then is the letter, to spell adultery from which is an impossible task. It is just the letter a loving and loyal wife writes to her husband, hiding nothing from him. The husband, no less loving, shows his concern for his wife's health, while in Calcutta, as the wife's reply reveals. No doubt, the husband's aversion for Gopal remains, as is quite natural. But for Gopal's misdeed, or rather attempt to do something improper to his aunt, as will presently be seen (paragraph 86), the aunt cannot be blameworthy. And if her only fault has been to talk the minimal to Gopal, she has given an explanation which is at once as cogent, as reasonable, backed by the assurance: 'Let nothing you worry. That sort of thing which you apprehend and which leads you to ask me not to talk? From my side, I hope, never.' And, in any event, only from that sort of little talking, "the guarded discretion of a reasonable and just man", "the careful and cautious consideration of a discreet man", can never come to a fair inference of adultery as a necessary conclusion. On the contrary, an opposite conclusion is clearly indicated: absence of adultery as alleged, and Nilima's chastity remaining unsullied.

79. A conclusion as this appears to be strengthened all the more by the important consideration that both the letters written by Nilima from Bakal to Sachin-

dra at Calcutta are contemporaneous or near-contemporaneous documents, recording so many detail soon after Gopal had misbehaved himself, and have, therefore, a force all their own. More, they are ante litem motam, an expression which means before the commencement of any controversy and not merely before the commencement of proceedings relating to the matter: Phipson on Evidence, 10th edition, paragraph 859, page 352. These two letters of Nilima, along with the letters of Sachindra to which the aforesaid two letters are the replies, in so far as they can be judged from the replies themselves, clearly show that no controversy had arisen then about the adultery, as alleged now, on the part of Nilima. The only controversy, if that, was about Nilima speaking to Gopal, notwithstanding his entirely one-sided impropriety dealt with in paragraph 86. So regarded, the value of these two letters appears also to be on the high side in countering the allegation of adultery with Gopal, in July 1941, bolstered up, as it appears upon evidence, for this matrimonial litigation, and that too when the trial begins.

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82. Interrupting the review of Nilima's pleading, it will be profitable to recall what Lord Atkin said on a point as this in *Ross v. Ross*, 1930 AC 1 at p. 23:

"That there were opportunities for committing adultery is nothing: there must be circumstances amounting to proof that opportunities could be used."

Here, upon the whole of the evidence, there is none: neither opportunity in a crowded joint-family home nor a single circumstance amounting to proof. Even Sachindra gives a clearance to Nilima.

83. To return to Nilima's written statement, it is averred in paragraph 5 that she had not come to Calcutta ever "for a stay" with Sachindra prior to 1948. An averment as this is true to her knowledge, as she says in her verification at the foot of the written statement bearing date, April 25, 1962. If this averment stands, the Gopal affair of July 1941, no matter whether at Calcutta or in a house near Barrackpore, falls all the more. But the evidence completely satisfies us that it cannot stand. After having made two contradictory statements: (i) that she had never been to Calcutta before 1948 and (ii) that she did come once to the house of her "Dadu" (at Calcutta) after her marriage, she breaks down and admits:

"Before 1948 I once came to Calcutta at 4D Mohanlal Street as one of the legs of Khana got fractured."

Such clear admission apart, the contents of Nilima's letters coupled with her oral evidence go to show that she was in all likelihood in Calcutta, not once, but probably more than once, before July 1948, as indeed is Sachindra's version: a true version, as it seems to be, in our judgment. See paragraph 7. Cross-examined, Nilima speaks of Moti Babu, Bankim Babu and Jnan Babu as co-tenants of "4D" before 1948 along with her husband who, however, became the sole tenant thereof (the whole "4D") in 1948. She does not stop there. She says further, she "was acquainted with Jnan Babu and his wife at 4D Mohanlal Street." It, therefore, looks so probable that she was at "4D" before 1948, when Jnan Babu was a co-tenant, and thereby got to know Jnan Babu and his wife. Similarly, it appears, she came to know Bankim Babu and his people. And in her letters from Bakal she goes on enquiring about them. In that letter reviewed already, exhibit 1, she wants to know whether or not Bankim Babu's wife has returned, and, if so, how those people are behaving then. More, earlier in the same letter, she reminds her husband how a letter from home had nettled him when she was in Calcutta for the first time. Again in another letter, exhibit 1(i) bearing date, Bhadra 17, written by Nilima from Bakal — a letter which Nilima admits to be in her handwriting — she enquires of "Sundar of my heart" how the members of Jnan Babu's are keeping.

84. The conclusion must, therefore, be that Nilima did come to Calcutta before 1948, her averment to the contrary in the written statement being not correct. This fosters the contention on behalf of Sachindra that Nilima took refuge under a lie as this only to negate the Gopal affair: a true occurrence. With respect, we cannot agree. We cannot, because this is tackling the problem from a wrong end. The problem is: 'You have raised an action for divorce on the ground of adultery, the Gopal affair of July 1941 being an instance of such adultery, as you say, so distinctly in your evidence, but pleading in your petition indecent behaviour and no more. It is for you to prove such case. Have you proved so?' That is the problem. And that one of the pleas taken by Nilima — a plea of alibi — is found to be false, if that, does not answer this problem. Sure enough, the falsity of a particular defence of hers can never be a substitute for proof of the charge of adultery brought against her. To the Preston-Jones, 1951 AC 391 case again. Faced with the stern fact of having given birth to a full-time baby 360 days after her husband had left her and England, having been con-

tinuously absent abroad, the wife led evidence to establish her husband having been home on leave some nine months before the birth of the child. Such evidence was disbelieved. Was it, therefore, inconsistent with her being a respectable woman with an easy conscience? No; that would be tackling the problem from a wrong end again, as pointed out by Lord Normand in his speech, (1951) AC 391 at p. 405:

"In divorce proceedings it is for the petitioner to prove his case whether the action is defended or not, and though the putting forward of a false defence may destroy the respondent's credibility that in itself does not establish the truth of the petitioner's case. Apart from that objection of principle, it would be in the circumstances of this case be unjust to the respondent to infer or assume that the false defence is tantamount to an admission of guilt. If it is possible that a child may be born 360 days after coitus and if that was what had indeed happened, the departure from the normal course of things is so extraordinary that the mother, conscious of innocence but believing herself the victim of a sport of nature, might, despairing of establishing the true defence, allow herself to palter with the truth, and might induce others closely connected with her to lend themselves to prevarication or worse."

We govern ourselves by the principle laid down here: an ancient and well-established principle at that, followed in all jurisdictions. The falsity of the defence does not in itself prove the truth of the plaintiff's case. And the circumstances here go in favour of Nilima much more. Called upon to answer the vaguest of a vague charge as laid in the fifth paragraph of Sachindra's petition of January 19, 1962: that in July 1941 the behaviour of Nilima and Gopal was not such as was consistent with the normal notions of decency etc., she had charged her memory on or about April 25, 1962, (some twenty-one years after such date), when she filed her written statement, emphatically denied the charge of such behaviour, adding that she was not in Calcutta ever before 1948. Lapse of twenty-one years, and three more children of the marriage after 1941, the last of them having been born in 1950: So, her having pleaded so in April 1962, cannot be regarded as anything but venial: the more so, when she has the candour to admit, on cross-examination, that she had been to Calcutta before 1948. After all, everybody is not endowed with superabundance of memory. A thing which you do not remember today does come back to your mind later, much later. It does happen always. And Nilima is Nilima, not Sachindra the learned. It will,

therefore, be so unjust to her, that objection of principle apart, to infer that her inaccurate pleading of not having come to Calcutta before 1948 is tantamount to admission on her part of the Gopal affair, either as pleaded or as testified to in evidence, the difference between the two being poles asunder. Even if it be assumed, though we are loth to do so, upon the whole of the evidence, that Nilima did "palter with the truth" in her pleading, and deliberately too, the proof of the Gopal affair in a house near Barrackpore in July 1941, spoken to for the first time by Sachindra from the witness-box on March 24, 1964, some twenty-three years after the so-called affair, the parties having co-habited meanwhile and got three more children, remains as far as ever. And the less said about Sachindra's 'liquid' averment in paragraph 5 of his petition, the better.

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86. But what did Gopal actually do? That he did something improper appears to be manifest. On this the direct evidence must be of Gopal and Nilima, and none else. Gopal does not figure as a witness. Nilima does. Hers is evidence not in one court, not in two, but in three: the court of the committing magistrate, the court of session, and the court of the judge who has tried this matrimonial cause now under appeal. The conjoint effect of such evidence, Nilima having been confronted at the trial, (a fact which has been clumsily recorded by the trial judge) with hers in the magistrate's court and the session court, comes to this:

(A) Gopal had once an evil eye on her. But he could do little. (B) Gopal once made an immoral proposal to her and attempted to outrage her modesty. But he failed. (C) Gopal had some weakness for her. He had desire too for an immoral approach. But he did not succeed in doing any harm to her. So, this is all that Gopal had done. For that, Gopal deserves condemnation, not Nilima. From that, no inference of adultery can follow.

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90. No more need be said about the Gopal affair of July 1941, which, in view of all that goes before, we, going a little more than the trial judge who is simply "not prepared to accept the uncorroborated testimony of the plaintiff on this point", find as a fact to be false. We can only deplore that one like Sachindra, otherwise so talented, could bring himself to level such a baseless accusation against Nilima, none else than his mar-

ried wife of mature years, who had borne him four children one after another from 1938 to 1950. What to say of us, even his counsel, Mr. Gouri Mitter, who has argued the case with great ability and thoroughness, "gives up", in the end, with his usual fairness, the Gopal affair, subject to the reservation that Nilima's pleading on having ever come to Calcutta before 1948 should be weighed against her. To such reservation we have said all we have to, in paragraph 84 et seqante, to which we have little to add. And if we have dealt with the Gopal affair in detail, in spite of Mr. Gouri Mitter having been good enough to give it up at the end, it is only because we feel that Nilima, a married woman for the last thirty-one years and a little more, and a mother of four children, the last of whom is some nineteen years of age now should have from this court, on such a charge, a finding on merits, and not merely on concession from counsel of her adversary. Sachindra's evidence, towards the close of his examination in chief, about his having condoned Nilima's adultery with Gopal, looks amusing in the context. No offence of such adultery being there, no question of condonation can arise.

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[The judgment then deals with, amongst other things, the first Umakant affair of July 1955 in the light of pleadings and evidence, finds it to be a sham, and proceeds:]

107. we have then before us the oath against oath of Sachindra and Nilima, who directly contradict each other on the triple allegation of adultery, exchange of glances and kulpi ice-cream candies. Each such allegation is one of fact, known, as it appears, only to Sachindra and Nilima, barring, of course, Umakanta and the icecream vendor who do not figure as witnesses and whom it will not be prudent either, to expect as witnesses. Whom are we to believe then — Sachindra or Nilima? Sachindra we cannot bring ourselves to believe. We cannot, because he is one who carries his oath very lightly by deposing to such material facts for the first time from the witness-box, saying not a word thereabout in his pleading, and offering for such a grave omission an explanation which has only to be stated in order to be rejected. We cannot, also because such evidence appears to be self-defeating and otherwise unsatisfactory. We have stated why. Nilima we believe. And certainly we prefer her testimony to that of Sachindra. It ill-behoves a judicial personage to be dogmatic about matters sexual. Because sex is a mighty demon capable of overturning so many,

barring, of course, those whose moorings are strong enough, as also those, so few, who have mastered their passions instead of being mastered by them. But, here, upon the whole of the evidence, we are satisfied that Nilima, a married woman of 36, having behind her then a conjugal life of eighteen years, with the rough and the smooth, and a mother too of four children, one of whom was just married, did not misbehave with Uma-kanta, as alleged, not in Sachindra's petition, but in his evidence, the allegation in the petition being beneath notice

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124. Now, we deal with the period: March 1956, when Sachindra left for England to qualify himself for D. M. R. T., to February 1958, when he returned home, with the qualification he had gone to England for. Nilima did not go to the Dum Dum aerodrome to see her husband off. She did not, because Sachindra did not allow her to. Even this fosters a suggestion that her husband did not allow her to see him off at the aerodrome, because he suspected her character. What one has got to do with the other completely beats us. Surely, going to the aerodrome will not give a characterless woman the sort of thing she is after and revels in. Nothing of the kind is put to Sachindra. Shantipada who had been to the aerodrome to see his father-in-law off speaks of his mother-in-law having not accompanied them. But he had seen a lady there and Sachindra talking to her in the lounge. That lady is Asha (as Shantipada came to know subsequently) — a woman who is put forward by Nilima as Sachindra's mistress with whom he openly lived and had even sexual intercourse in Nilima's presence. So it is said. If that is the reason why Nilima was not allowed by Sachindra to go to the aerodrome, that should have been, but has not been, put to him. He has, therefore, no opportunity to explain all this: why Nilima stays away from, and Asha goes to, the aerodrome. So, no inference adverse either to Sachindra or Nilima can be drawn on such evidence. A painful litigation has been rendered still more painful by the 'hit and run' method of conducting it without any forethought, the result of which has been the record being full of materials not needed and empty of some materials badly needed.

125. Fortunately, with all the imperfections in the conduct of a serious case, both on behalf of Sachindra and Nilima, the correspondence to and fro, during this period, appears to be a revelation. And this correspondence we go through, in order of date, as far as possible, touching

at the same time the material oral evidence on the matters concerned.

126. 1. A letter bearing date, June 27, 1956, exhibit A(2), written by Sachindra from Manchester to his son-in-law Shantipada at "4D".

By this letter of June 27 Sachindra answers Shantipada's of June 24 previous. The first paragraph deals with two important matters—Khana's success in the examination and her first pregnancy. The history of Khana's studies, as elicited from her on cross-examination, is that she could not appear at the matriculation examination from Victoria Institution, a well-known school in North Calcutta, on account of her illness. She took the examination instead from Haranath Girls' School; whether as a private candidate or a regular candidate, she does not remember. Khana denies that she played truant from her classes with a view to making herself merry in the company of her boy friends. But she admits she was absent from her school for several days month in month out. At the same time she denies, she was reported, against by the headmistress to her father with the threat of rustication for bad conduct. Indeed, to prove her "gross misconduct", Ajoy Kumar Shome, assistant librarian of Victoria Institution, is examined as Sachindra's ninth witness. He brings the only record available: the attendance register of class for the year 1954, when Khana was a student of that class, and speaks of the removal of her name from the roll for gross misconduct. But what is such misconduct about? This witness Shome, who started his service in the school in 1952, when he was "15 to 20 years of age", what a way of an assistant librarian stating his age—, and whose duty is to distribute books to the pupils and to take them back, does not know anything about that, as indeed he cannot. All he can say is: the Principal told him that Khana's name was struck off the rolls "because of her misconduct". And he did not enquire of the Principal about this. But the truth of what the Principal told Shome is very much in issue here. That being so, it is hearsay and inadmissible, in absence of the Principal's evidence. The outlook would have been otherwise if the object of such evidence was not to establish the truth of the Principal's statement, but only the fact that she did make a statement. Certainly that is not the outlook here. See *Subramaniam v. Public Prosecutor*, (1956) 1 WLR 965, a decision of the Judicial Committee of the Privy Council, which I governed myself by in *Kamal Krishna Deb v. Birju Kumvakar*, (1967) 72 Cal WN 279, and *Sm. Tusharkana Debi v. Bhawanji Prosad Roy Chowdhury*, (1969) 73

Cal WN 143, a matrimonial appeal, and which I govern myself by here too. So, Khana's misconduct, bolstered up obviously with a view to adding strength to the story of her elopement, remains unproved, nothing to say of the fact that misconduct on the part of a school-going girl does not necessarily mean sexual misconduct only. To disobey a teacher, for example, is misconduct too.

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148. The evidence we have covered so far, on the cause of Sachindra's sudden frustration, as is evidenced for the first time by his letter of February 27, 1957, exhibit 3(a), appears to be so poor. It is indeed difficult to conceive of poorer evidence. And still we shall have to hold, as is said, we should, that this sort of frustration, expressed for the first time on February 27, 1957, is the natural reaction of the first Umakanta affair of July 1955, upon which it rests: With respect, to hold so will be to negate reason, no less to invert it. Even Sachindra does not say, either in this letter or in his substantive evidence, that the feeling of misery and frustration he gave vent to was the aftermath of the first Umakanta affair of July 1955. Then the affair itself is conceived in falsity for the first time Sachindra steps into the witness-box. The time he does so is March 1964. No averment on anything like the racy affair, as stated from the witness-box, is there in Sachindra's petition bearing date January 19, 1962. Yet to attempt to turn the corner saying: 'no matter I did not plead the first Umakanta affair of July 1955 in my petition for divorce — and that indeed is my weakest point — the affair itself is proved by my fulmination contained in the letter of February 27, 1957, exhibit 3(a),' is really to advance an argument of despair. Here it is we see not only negation of reason but also inversion thereof. First things first. The Umakanta affair of July 1955 is the first thing. Upon a consideration of all relevant evidence, it is found to be false. Will this falsehood of July 1955 be converted into truth only because the author of such falsehood writes a letter some two years later expressing his frustration, the cause of which is capable of being stated, but he does not state ever? We confess, we cannot subvert common-sense and reason that way. To prove adultery then becomes the easiest thing in a court of law. No manner of evidence, direct or circumstantial, on adultery. Or worse still, as here, there is false evidence. It does not matter. All you have to do then is to write a letter months or years later bemoaning about your wife's adultery. (Sachindra does not

do that little even). And adultery is proved, the complainer corroborating himself in this wise. We have no hesitation in rejecting this contention on behalf of Sachindra, the appellant, rested on such extravagant consideration. So the cause for Sachindra's frustration expressed in his letter of February 27, 1957, exhibit 3(a), must be sought elsewhere.

149. The clue to what is thus sought, if not what is sought itself, is probably found in the letter we review now:

IV A letter bearing in ink the date. May 13, 1957, exhibit 1(b), and written in pencil, on a leaf of a ruled exercise-book, by Nilima from here to Sachindra in England.

Nilima opens the letter in the usual way in which she addresses Sachindra; that is, as "Sundar" (the beautiful). But what she writes in the inside is anything but beautiful. Truth to tell, it is horrible. So, her addressing Sachindra as "Sundar" still looks mechanical, empty of that love and warmth such address shows in her earlier letters reviewed above. Or is it manifestation of deeper love still, Nilima running amok by the wrong sought to be done to her and Khana's home, as she takes for granted? To run on with this letter. The very first sentence bears:

"I have answered all your letters."

Thus, there appears to have been correspondence to and fro between these two unfortunate spouses, one in India and another in England, even before this letter of May 13, 1957. But we do not get any, whether from Sachindra or from Nilima. In chief, all Sachindra says in this letter is:

"I received this letter from my wife at Calcutta in England, marked Ex. 1/B" — the mark on the letter itself reading: Exbt. 1(b). About Nilima having answered all the letters of Sachindra, what these letters are like, where they are, why they are not produced, etc., etc. we have no evidence. So, all we can find is that there were letters of Sachindra to Nilima and hers to him earlier than May 13, 1957. But how much earlier? Could they be a little earlier than February 27, 1957 — some seventy-five days ahead of May 13, 1957? Yes, they could be. Indeed, they were; as early as in January 1957. More of which hereafter in paragraphs 166 and 167.

150. But let the further contents of the letter Nilima admittedly wrote to Sachindra in England, on May 13, 1957, exhibit 1(b), be noticed:

"Here is news for you. The bad women you are addicted to bring into being that matter over Khana's going to Agra. Those vile women tell Khana's mother-in-law and (her) grandmother all sorts of

things. A passage of arms follows. And in the end an occurrence like this takes place. How nice indeed! For these wenches, father and daughter part with one another. And that perhaps fills you with a great joy. Your daughter, however, will not forget to venge it. And Shriman Shantipada says: 'Should they enter our house, in my presence, I shall lambast them, breaking their legs.' Khana is in peace nowadays. What is the sorrow of a woman who has such a husband? What is her want as well?"

Then, begins a passage which was not read before us in court during the hearing of the appeal, but which we were invited by counsel for both the spouses to read for ourselves. So it was done out of regard for public decency. But we feel that our public duty calls upon us to reproduce the whole of it, so that none of the parties, and Sachindra in particular, who has preserved it with care all these years and tendered it as his evidence, treating it as his trump-card, may not leave our court with the impression that we have blinked over it. Such consideration apart, when it is our misfortune to adjudicate a case of this nature, some of the arguments in a big way resting on this letter itself, to pass an important passage by is not to do our duty. More, called upon to decide a divorce litigation on the ground of naked adultery, it is, in our judgment, puerile to be swayed by a too-strict morality. Sure enough, the theme of this unfortunate litigation is not Sachindra and Nilima saying their paternoster. And here is the passage:

"Do you get letters from these sluts regularly? Does the inside of these letters smell their genital passage? Lick those letters: they smell so. Blinded by the infatuation for the moisture of the genital passage of these whores, you have in a manner given up the modest claim to your paternal property. Because of such infatuation for those sluts, how much deeper will you sink, and how much more will you get the minor children stranded on the street? Oh those women who lament, now that they cannot suck you this way and that way. I am in peace."

Venom written in vitriol. Yet Nilima concludes:

"Accept my obeisance (pranam).
Shantu."

That name again by which Sachindra used to pet Nilima in the heyday of their married life, sounding so cacophonous in the context of the letter; obeisance no less. Because obeisance connotes reverence. What goes before shows irreverence in the extreme.

151. A despicable letter by any standard. And we cannot but too strongly con-

demn this: that Nilima some thirty-eight years of age then, and the mother of four children, the oldest of whom (Khana) was nineteen, married about two years ago, and the youngest of whom was seven years of age, at the time, could bring herself to write such filthy letter, no matter what the provocation was. But let us not run away from the point that awaits our decision. And the point that awaits our decision is whether or no Nilima did commit adultery as alleged. Does this nasty letter prove that: adultery as Sachindra alleges? That is the question. A consummate hypocrite may write the nicest letters in the world and yet revel in adultery. On the other hand, one, frank to a fault, may write the most vulgar letter, throwing discretion and decency to the winds, and yet keep her unsullied. So, to find adultery only on the basis of such letter, is, in our judgment, not the right way to look at the matter. Give us some dependable material to sustain the charge of adultery, and we can say, to put it very high, that a coarse letter as this lends assurance to the charge. But when there is no dependable material (as here), there is necessarily nothing to be lent assurance to. And such coarse letter can hardly do any duty except showing the coarseness of the writer. To say, therefore, as has indeed been said, that the letter shows Nilima to be "a sexual pervert", having committed adultery with Umakanta in July 1955 even though what is there in support thereof is false evidence, is to say the unsayable.

152. Then, let a clean look be taken of this unclean letter, without being prejudiced by its language, which undoubtedly stinks and tempts one to be prejudiced. It consists of two parts. The first part deals with all that falsehood and malice could invent, over the going of Khana to Agra, dinned into the ears of Khana's mother-in-law and her grandmother, by those women, referred to in the original letter as "magira", to whom Sachindra was addicted, and the failure of such attempt to do harm to Khana in her matrimonial home, thanks to Shantipada, to have a husband like whom is to be free from sorrow and want. The second part deals with the reaction in the writer's mind of such nefarious game played by those women to wreck her own and her beloved daughter's home — women who, the writer takes it for granted, are in correspondence with Sachindra, much to the satisfaction of his libido, and who miss so much their Eros in Sachindra so far away.

153. Now who are these women referred to as "magira" (plural of "magi") in so disparaging a manner, apart from the fact that that expression means prosti-

tutes in that part of undivided Bengal, Sachindra and Nilima hail from? Surprisingly enough, Sachindra says, on cross-examination:

"I do not know exactly what is meant by the word 'magira' in Ex. 1(b)."

Surprisingly enough, because even if he did not know then (May 1957) who Nilima was referring to by such word, surely, he knew it very much in March 1964 when he was giving evidence. Surely, because even in or about August 1957, Sachindra had written to Nilima for the requisite information on the point, as is evidenced by Nilima's letter written after Shantipada's, bearing date August 13, 1957, exhibit A(1), gone into evidence, on admission by Sachindra: just what the endorsement over the signature of the trial judge is, in the list of documents admitted in evidence, in High Court form no. (J)23. And Nilima told Sachindra what he had wanted to know, Nilima's letter, part of exhibit A(1), an admitted document, reading:

"Om.

Sundar,

The letter of yours I have received in due time. In reply I inform you what you want to know.

(1) After Khana's marriage, your 'Mej-da' (second brother Surendra: in calling Surendra 'mej-da' instead of 'chhor-da', Nilima deviates from the family norm) and "Boudi" (Jibanbala) one day went to 'Kalibarhi' (the temple of Goddess Kali at Kalighat where Khana's matrimonial home is) and brought, through one of the locality, Khana's mother-in-law to them. Both — husband and wife — told her all sorts of nasty things, attacking our character. More, they said too: 'Khana and I are unchaste, and for that and that only you oppress us and do not get peace of mind.'

(2) Kamala, Gita, (two daughters of Surendra and Jibanbala), Bhawani, Gour and others even go to the residence (of Khana's father-in-law), and also to 'Cenemahalla' and 'Kalibarhi' by a secret appointment, only to whisper into the ears of Khana's mother-in-law all sorts of nasty things.

I have heard such thing happening, from Shantipada's sister Gouri. Also, only a few days ago, she casually dropped in at our place. I have then managed to get it all the better. And Gouri could get to know all this, because she would lie by her father and mother at night and hear the discussions between them day after day.

Even to Pagla Banerjee of our country home, they have said all sorts of nasty things concerning my character.

You will have to cut off connexion — this is a 'must' for you — with those rogues and dirty fellows, for whom the

sweet relationship between husband and wife is torn asunder, for whom father and daughter are separated, for whom a home is broken.

We are all well here. Khana is not keeping good health at all. How are you? Inform me how to keep on the social formality concerning our daughter (at her father-in-law's place) for the (coming) Pujah season.

Accept my 'pranam'.

'Shantu'."

154. Such is the illuminating letter Sachindra received in August 1957 at 8, Elms Road, Stonegate, Leicester, U. K., just the address it bears, telling him all he had wanted to know about the campaign of calumny waged against Nilima and Khana by Jibanbala, Kamala and Gita, amongst others. Yet Sachindra's evidence in March 1964 is that he does not know exactly what is meant by the word "magira" in Nilima's indecorous letter of May 13, 1957. Lapse of memory on the part of Sachindra, the nimble-witted? He does not say so. He says instead, he does not know. And these are things which a husband and a father cannot forget; and certainly not a gifted one like Sachindra, with mind alert and acute, so unlike Nilima, an ordinary matriculate, who first says, on cross-examination, that she does not know Pagla Banerjee, only to admit later that she did refer to Pagla Banerjee in her letter of August 13, 1957, exhibit A(1), just reviewed. Even if it be regarded as fencing, which it is not—, it looks like a venial slip, when one like her is speaking of a seven-year-old event —, falsity of her evidence does not prove the truth of her husband's case, to prove which the onus is upon him and him alone: the same principle we have governed ourselves by.

156. It is time to make it clear that we do not use these letters of Nilima, one of May 13, 1957, exhibit 1(b), and another of August 13, 1957, exhibit A(1), in assertion of the truth of various statements attributed to Gouri, Jibanbala, Kamala, Gita and others. To do so will be to infract the rule of hearsay pointed out in paragraph 126 on the authority of a decision of the Judicial Committee of the Privy Council. We use these letters instead to probe into the mind of Nilima prevailing then. Her mind — the mind of the mother of a married daughter and the mind of a wife too — was greatly exercised over the wrong (as was her belief) attempted to be done to her and Khana in so mean and cruel a manner by Jibanbala, Kamala and Gita—women who, she considered, were in liaison and correspondence with her husband. Having

been exercised so, she became a picture of imbalance, so far as her husband was concerned, and hit him so hard, oblivious of all sense of decorum and decency, but not without expressing gratification, so far her daughter Khana was concerned, at the failure of such base attempt, because of Shantipada the good, who had seen through the dirty game, and in whose care Khana was safe. This is how we read and treat the letters. And that cannot offend against the rule of hearsay. Because, the letters are very much there as primary evidence, mirroring so faithfully the mind of Nilima then: a matter of the utmost relevance in judging her at the time. It will be noticed that the letter of August 13, 1957 exhibit A(1), is so matter-of-fact, placing the data she has come by, even enquiring of her husband's health, as also of the Pujah present for Khana and her husband, and certainly devoid of that obscene outburst which marks and mars her letter of May 13, 1957, exhibit 1 (b). It looks, on having come to know of the campaign of vilification against her and Khana, she completely lost her head, which only could have led her to write the shameful and shameless letter she did on May 13, 1957, attacking her husband in that vile way. But by August 13, 1957, when she wrote the other letter, exhibit (A)1, she had calmed down a lot in three months' time and, therefore, became so matter-of-fact, posting her husband with the detail and demanding of him to sever all connexion with those "pisachas" (literally demons) and "Shaitans" (satans), — words we have translated, going by the sense and context, as rogues and dirty fellows—, for their attempted villainy in wrecking her and Khana's home. Once the obscene letter of May 13, 1957, is looked at so, — and this, in our judgment, is the only way to look at it, upon the whole of the evidence—, the capital Sachindra seeks to make out of it, a precious document preserved with care all these years, though any other decent husband would have thrown such impromptu handiwork of a semi-literate and imbalanced woman, none else than his wife for the last twenty years, to the flames, no sooner was it received and read, really degenerates into fust and fume, with a view to prejudicing the mind of a judge, who is a "human" too in spite of being a judge. We condemn the vulgarity Nilima evinces by her letter of May 13, 1957, but infer no bestiality on her part, itching for, and having in fact, sexual intercourse with a servant Umakanta in July 1955, because of such a letter some two years later. And this is what we have been asked to infer.

157. If we condemn Sachindra for seeking to make a perverted use of a perverse letter written by his wife in a fit of high

temper, we condemn Nilima no less, not only for the obscenity such letter shows, but also for a diatribe launched upon by her, against her life's partner ever since 1937, as if he was an acrobat, without a rival and beyond compare, in the realm of sex, performing the sexual act with her and also with every woman he came across, irrespective of age and relationship, such as (i) his second brother Surendra's wife Jibanbala, sixty-eight years in March 1964, according to Sachindra, and fifty-eight years of age, according to Nilima, one who is the mother of eleven children, nine living and two dead and the grandmother too of her children's children, (ii) Kamala, (iii) Gita, daughters both of Jibanbala, (iv) Ramgopal's mother, (said to be sixty-five years of age in 1959), the wife of Nilima's cousin, a mother too of four children, two of whom are married, and a grandmother again of her children's children numbering four or five, according to Nilima, and a dozen, according to Sachindra, (v) Keso's mother, a cook, whose husband was an A. S. I. (Assistant Sub-Inspector?) and a next-door neighbour of the Chatterjees at Bakal, (vi) Nurse Asha, (vi) Monorama (viii) Putul, (ix) some other village girls and (x) maid-servants too. The learned trial Judge rejects such a wild charge upon the whole of the evidence, confining himself to the first six of the women listed just now. So do we. What to speak of us, the judges, even Nilima's advocate concedes before the trial judge absence of evidence to prove that Sachindra "is guilty of any illicit intercourse or any other matrimonial offence with any woman", to quote the very words in which the judge records, in his judgment, the concession so made. Mr. Amarendra Mitra sees in such concession a concession on a mixed question of fact and law, so that it may not be binding on his client. With respect, we do not. What we see in such concession is a concession on fact, fact and fact. No question of legal cruelty is involved here. So, what does or does not constitute cruelty may well be a mixed question of fact and law. What is involved here is illicit intercourse with named women: 100% a question of fact.

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166. The big matter is: what is the reason of Sachindra having ceased writing to his wife? The reason is, as he writes in this letter to "Chhor-da":

"The reply I get is so uncivil. Her condition looks like that of one who all on a sudden looks down upon the world as a trifle. Far from replying to such letter, I hate even to read the whole of it. No matter I do not write back, she goes on pouring venom at an interval of

one month or one month and a half. What is the end of all this? Where will it end? And how far will it go? As I brood over this, I get frightened from time to time. She was seized with a passion to live all to herself. For my part I am also praying to God that she may live alone."

But it is really a curse in the garb of a prayer, because in the very next sentence, he adds:

"There may not be any one by her to give her even a glass of water."

So, he wants Nilima to die of thirst.

167. Here then is the cause of Sachindra's frustration, passionately given vent to, in his letter of February 27, 1957, exhibit 3(a) — a cause we have been searching for so long. From early in January 1957, Nilima has been torturing Sachindra, as he himself writes, by inflicting upon him one uncivil letter after another, a grand specimen of which is that preposterous one of May 13, 1957, exhibit 1(b). The cause is not the first Umakanta affair of July 1955, as we are asked to hold, on behalf of Sachindra. The cause cannot be that, invented for the first time from the witness-box for the purpose of this painful litigation.

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211. Such being our conclusion, (on Jadav's letter), rested on the wealth of material that goes before, it is hardly necessary to notice in detail some other points referred to on behalf of the respondent Nilima. They may, however, just be touched. Here are they:

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(ii) In the concluding portion of the penultimate paragraph on the third page of the letter, exhibit 2, the writing:

"In particular, it is Kashinath Dey who Khana is terribly afraid of."

appears to be in different ink and is, therefore, an interpolation. So is said to be another portion in the third paragraph of the second page, beginning with "Basar Khabar": the news of the residence (at "4D"). Indeed, the manner in which these two words have been written goes ill with the paragraph-wise arrangement of the letter. But nothing like this was put to Jadav who has, therefore, no opportunity to explain these features now complained of. In absence of such opportunity and explanation, it will be so unfair to Jadav to draw any inference adverse to him; just the principle we have gone by on cognate matters, a principle for which the leading authority is Browne v. Dunn, (1893) 6 R 67.

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215. It must, therefore, be held, accepting Nilima's evidence and rejecting

Sachindra's, that, on return from England in February 1958, Sachindra and Nilima resumed normal marital life at "4D", notwithstanding the letter in so bad taste of Nilima on May 13, 1957, exhibit 1(b): paragraph 149: which, we can well realize, had tormented Sachindra a lot in England, of which however Sachindra does not say: 'Because of this dirty letter, on my return from England, I stopped cohabiting with Nilima and taking food cooked or even touched by her', but of which Nilima makes the following significant statement in chief:

"When my husband was in England, I wrote him a letter accusing him of bad character. My husband never protested by any letter that he is innocent."

For all we see, there is no cross-examination on this point. The suggestion, on the contrary, is that Sachindra "had written several letters" to Nilima with a view to correcting her. Sure enough, that is not suggesting: "Why do you refer to my association with those whom you call sluts ('magis')? They are not sluts and I do not associate with them either, in the manner you say.' Towards the close of Nilima's cross-examination, she answers:

"It is not a fact that I have made false imputation against the character of my husband to save myself."

But obviously this relates to Nilima's charge at the trial of Sachindra having carnal connexion with so many women she names, including, of course, Jibanbala and her two daughters, Kamala and Gouri, the "magira" (sluts) of Nilima's vulgar letter of May 13, 1957, exhibit 1(b). But to suggest so is not to suggest that Sachindra did write to Nilima in answer to her abominable letter of May 13, 1957, exhibit 1(b), protesting against the charge brought against him therein and proclaiming his innocence. In sum, there is no cross-examination on the point: the point of Nilima's evidence that Sachindra never protested against her charge of his having been in liaison with the "magis" that is, Jibanbala and her two daughters, Kamala and Gouri, or that he never asserted his innocence. Yet such failure to cross-examine will not amount to acceptance of Nilima's testimony here, it will not, because such testimony about Sachindra's bad character is inherently incredible, as has indeed been conceded even by Nilima's advocate at the trial, paragraph 157. See Phipson on Evidence, 10th edition, paragraph 1542, at page 595 relying on (1893) 6 R 67.

[The judgment then notices common aerogrammes written by Sachindra and Nilima to their son-in-law in England, and proceeds:]

227. Now, what does such sharing, in March 1959, of a common aerogramme by Sachindra and Nilima, who share too the

sentiments expressed for Khana, Shantipada, "Dadubhai" and all, go to show? A glum Sachindra, living at arm's length from his wife Nilima "in a separate room altogether" and not partaking of food cooked or even touched by her, ever since his return home in February 1958 and right up to March 1959, or a contented Sachindra, living his normal marital life over again, after his return from England, filled with the joy of sending his son-in-law to England with high expenses and higher hopes, feeling gratified along with his wife at such a one's success, and sharing with her not only the same aerogramme but also other sentiments just noticed? To a prudent man, the second alternative is the very probable answer; a contented Sachindra, living his normal marital life over again, on his return from England, is the very probable answer. To hold otherwise is to assume so many extravagant steps, one after another:

One, Sachindra finishes writing his portion of the letter dated March 3, 1959:

Two, somehow he passes it on to Nilima.

Three, Nilima finishes writing her portion of the letter.

Four, somehow she passes it on back to Sachindra.

Five, Sachindra then gets it put into post.

Nothing is impossible in this world. So, the aerogramme moving about, as if in a game of battledore and shuttlecock, is possible, but not in the least probable, in the context of the two writers: husband and wife: living at arm's length from one another, in separate rooms "altogether", animated too by the worst of hostility, for which the husband does not partake of food cooked or even touched by the wife. Upon the whole, therefore, accord and amity look far more probable than discord and hostility. In having proceeded so, we have done no more than governed ourselves, as indeed is obvious, by both the standards of proof, —, 'civil' and 'criminal' —, the degree of difference between the two having been made crystal clear, if we may say so with utmost respect, by Lord Denning in (1947) 63 TLR 474. By whichever standard we go, the conclusion reached is the same: Sachindra's version of living in complete isolation from Nilima, on his return from England, appears to be improbable to a degree and cannot, therefore, be accepted

234. Acknowledging all letters written by Shantipada, in the first part, Nilima writes:

"Do your studies in sound mind. Whatever money you need your father-in-law will give. Do return so soon as you

qualify yourself as D.M.R.D. Then and then only peace and welfare will prevail all in all."

Consider this along with what Sachindra writes in the same aerogramme (of May 26, 1959): 'No job over there? Let that not disturb you and your studies. I shall stand your expenses until your next examination in October'. Do we not see the heart of Sachindra and Nilima beating in unison? Does such unison exist only in letters written in one and the same aerogramme? Possible, but not in the least probable. Far more probable — a very great probability indeed — is that Sachindra and Nilima both, living quite a normal marital life, talk things over, work as a team and cheer up their son-in-law in a distant land in that way. Just think of the reverse, as Sachindra wants us to do. Sachindra lives "in a separate room altogether" and takes no food cooked by Nilima or even touched by her, ever since February 1958, the time he returned home after an absence of some two years in England, and right up to May 26, 1959, the date this conjoint letter bears. To think so is to be convinced that they are at daggers drawn, all these fifteen months or thereabouts. And still such a conjoint letter in identity of pitch? And Nilima has not a single paisa of her own. She has then no authority either, of her husband to write what she does about his standing for all expenses. So, the opposite of what we think and hold looks very, very improbable, almost impossible.

236. The third part of her letter has as its burden "Dadubhai" referred to by Sachindra as well in his. Nilima, because she is Nilima, the grandmother, cannot help writing:

'Dadubhai' has learnt to speak a lot. There is not a word he cannot utter. His tongue goes nineteen to the dozen. He speaks of you much and always."

Nilima then concludes:

"Here go for you my blessings, full of heart. 'Ma'."

Regular and frequent correspondence between Sachindra and Nilima, on one hand, and Shantipada, on the other. And the same approach again. What is seen in the sharing, by Sachindra and Nilima, of a common aerogramme as this is the sharing of the common problem over their son-in-law Shantipada's studies in England, no less of the common joy over their grandchild "Dadubhai's" stay with them, the grandmother very naturally speaking more than the grand-father, though not nineteen to the dozen, as "Dadubhai" does. Necessarily, what is seen is a normal marital relationship between the two, with all it means, right up to May 26, 1959, —

and not that sort of life Sachindra speaks of in his evidence, making a pariah of his wife, though living in the same house, all these fifteen months or so, from February 1958, because of her unchastity — a reason which appears to be doubly false. First: the first Umakanta affair of July 1955, upon which such charge of unchastity rests, is itself false. Second: after the so-called first Umakanta affair of July 1955, Sachindra had had sexual intercourse with Nilima up to March 1956 when he left for England, as we have found. So, there was no earthly reason for Sachindra to withdraw himself completely from the matrimonial consortium from March 1958, on his return home and to his family, after an absence of nearly two years, as he says he did, on the ground of Nilima's unchastity; but unchastity there is not, and there cannot be, either on account of the first Umakanta affair of July 1955 (which is a sham) or on account of any fresh unchastity, of which there is not even a soupcon of evidence. So, the fact that the charge of unchastity is doubly false becomes patent.

[The judgment then proceeds to deal with, amongst other things, the second Umakanta affair, in the light of pleadings and evidence, and proceeds:]

250. Thus, even on the basis of Sachindra's evidence, we find it impossible to say that the second Umakanta affair of July 1959, as he alleges, is true. If to this be added Nilima's denial on oath, which we regard as true, upon the whole of the evidence, it does lend assurance all the more to the conclusion we have come to. In sum, the ground we have covered so far, completely satisfies us, unless there is anything to the contrary, that the second Umakanta affair of July 1959 clearly appears to be a sham just like the first one of 1955.

251. It is however, said, and very strenuously too, that there is a great thing to the contrary. If there is, we shall be in duty bound to discharge the conclusion we have just come to, on the second Umakanta affair of July 1959. This brings us to the third part of Sachindra's averment in paragraph 7 of his pleading:

"Your petitioner being adamant (in not forgiving Nilima who prayed for his forgiveness and promised to be faithful), she left the house and ultimately went to Benaras (Varanasi) and stayed there for about three months."

Sachindra supplements this by his oral evidence, — as indeed he is entitled to do, for evidence has not to be pleaded —, in the manner following:

"My wife also left after assault to the house of her maternal grandfather, Sashi Kanta Chakrabarti, at Entally. From the house of Shashi, my wife went to Benaras, in the house of my brother Jitendra."

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The recording is inaccurate, in that Sashi Kanta Chakrabarti (S. K. Chakrabarti) is the brother of Nilima's maternal grandfather Chandra Kanta Chakrabarti. Sashi Kanta is, therefore, her grand-uncle (not grandfather) on the mother's side. Be that as it may, this is what Sachindra says in chief: Second Umakanta affair of July 1959: Nilima's flight thereafter to Varanasi in the house of Sachindra's brother Jitendra via the residence of her grand-uncle S. K. Chakrabarti at Entally in Calcutta.

252. What did Sachindra do then? For his part, he decided, after the second Umakanta affair of July 1959, "to start a divorce case" against Nilima. More, he posted his brothers with this sort of misfortune, as also with his decision to go to law for divorce. So he did, not in writing, but orally; because all his brothers "were present at Calcutta at that time." Such is Sachindra's evidence on cross-examination, and admissible evidence at that. But when he says further, on cross-examination:

"My elder brother protested against my action (proposed action?) through my nephew Ramesh Chatterjee and other brothers. They told me not to take any action till my daughter was married."

He oversteps the limit of admissibility. None of his brothers he examines; not even his nephew Ramesh Chatterjee. The truth of what they say is very much at issue here; not merely the factum of statements they make to him. Clearly, therefore, this part of Sachindra's evidence degenerates into hearsay: paragraph 126. Leave it alone. Still what remains as evidence within bounds is that Sachindra did tell all his brothers, including Jitendra, at Calcutta then, all about the second Umakanta affair or "the July 1959 incident", as he puts it, and also about his decision "to start a divorce case against his wife."

253. This is then the stance taken by Sachindra — second Umakanta affair of July 1959 at "4D": Sachindra's assault on Nilima: Nilima's flight therefrom to Varanasi via Entally (in Calcutta): Sachindra's determination to start divorce proceedings: his brothers (including Jitendra), told so and the reason thereof, 'vetoing' it.

254. The stance taken by Nilima is — No second Umakanta affair of July 1959: But Sachindra's misbehaviour with Ramgopal's mother at "4D": Protest by her against such misbehaviour: Assault by Sachindra: Report by her to Grand-uncle S. K. Chakrabarti at Entally: Then, on to Varanasi and putting up with her "Bhasur" Jitendra for sometime: Back to "4D" on S. K. Chakrabarti having driven away Ramgopal's mother from "4D".

255. In two such conflicting versions, two common factors, agreed to by the two spouses, are plain to be seen. One, Sachindra's assault upon Nilima, two, Nilima's absence from "4D" and stay at Varanasi. Sachindra's version be called S. Nilima's version be called N. Now, the great thing contrary to the conclusion of there having been no second Umakanta affair of July 1959 (paragraph 251) is put in the manner following:

Two causes, one being the alternative of the other, are there for Nilima's leaving "4D" for Varanasi in July 1959. One cause is the cause set out in S: the second Umakanta affair of July 1959 followed by assault upon Nilima by Sachindra. Another cause is the cause set out in N: Nilima's protest against Sachindra's misbehaviour with Ramgopal's mother followed by assault upon her by Sachindra. There is no scope for a third cause, far less for a conjecture. So if the cause in N be rejected and it deserves to be rejected for various infirmities the cause in S must be accepted.

256. Such is said to be the great thing, contrary to the conclusion of the second Umakanta affair being a sham. And it is put in so attractive a form. Broadly speaking, it comes to saying:

I. Truth is S or N.

II. Truth is not N.

III. Ergo, truth is S.

The attractiveness of such a great thing, however, cannot hide its two great fallacies. One, the very first premise may break down on its own falsity. (as indeed it does), if the materials we have had put before us by the whole of evidence lead to the conclusion (as indeed they do) that truth is neither S nor N. And that will be enough for the failure of Sachindra whose case it is and who is to prove his case, irrespective of failure on the part of Nilima to establish N. Two, — it is a corollary to what just goes before—, the falsity of N in itself does not prove the truth of S, which it is for Sachindra to prove by evidence worthy of being accepted. See the extract from the speech of Lord Normand in the Preston-Jones case, 1951 AC 391 paragraph 84.

257. The question therefore is that: Has Sachindra, whose case it is, been able to prove by evidence that the cause of Nilima going away to Varanasi is the second Umakanta affair of July 1959 followed by thrashing at the hand of her husband? The evidence, on the foot of which we have held the second Umakanta affair to be a sham, we put out of our mind for the time being. We now confine ourselves only to the question just posed: is the cause of Nilima's flight to Varanasi the second Umakanta affair followed by the beating given her by Sachindra?

269. Thus, the more we probe into the second Umakanta affair, the more it goes down and down into the bottom of a bottomless pit, not seen nor capable of being seen by anybody except Sachindra, whom we regard, much to our regret, as a witness of untruth and disbelief. There is yet another matter which, it is contended, on one hand, lends assurance to the falsity of the second Umakanta affair, and which, it is contended, on the other, is not deserving of serious consideration. That matter is Sachindra's averment in paragraph 4 of his petition, supported by his affidavit dated May 18, 1962, in answer to Nilima's verified petition dated April 25, 1962, in the court below, for maintenance pendente lite and expenses of the proceedings, under Section 24 of the Hindu Marriage Act 25 of 1955. Such averment reads:

"That the Respondent committed adultery with Umakanta in Calcutta and was discovered in (the) first week of July 1959 in a compromising position in the same bed with him." The affidavit by Sachindra in support of this averment bears:

"That the statements made in paras (a vile abbreviation for paragraphs) 1 to 5 of the above petition marked with the letter 'A' are true to my information and the rest are true to my knowledge."

We have looked into the original petition. It is marked "A", almost at the top on the left-hand side. The paper-book (page 26, part I) does not bring that out. So, here is Sachindra solemnly affirming by an affidavit that the second Umakanta affair in the first week of July 1959 is true to his information only.

270. He is. So what? In his pleading, paragraph 7, he is definite that the second Umakanta affair is true to his knowledge. And his pleading is dated January 19, 1962. What happened in the course of four months from January 19, 1962, to May 18, 1962, the date of his petition, opposing Nilima's, for relief under Section 24 of the Hindu Marriage Act 25 of 1955, by which his 'knowledge' was converted into 'information', save of course, gross negligence on the part of his lawyer who drew up the affidavit on May 18, 1962, fed by his own negligence in having subscribed to such an affidavit? Nothing or little. That apart, Sachindra's petition of May 18, 1962, must be read as a whole. Once that is done, "repeated acts of adultery of the respondent" (Nilima), as stated in paragraph 7, "as a result of adulteries", as stated in paragraph 9, "adultery of the respondent", as pleaded in paragraph 10, "as a result of repeated adulteries of the respondent," as

pleaded in paragraph 11, "she (Nilima) persisted in living a life of adultery", as pleaded in paragraph 12, etc., etc., are all true to his knowledge, as he affirms in the same affidavit. Now, the second Umakanta affair is one of the "repeated acts of adultery." So, it is true to his knowledge. How can it be then true to his information again? Palpably a mistake: palpably a case of negligence, first on the part of the drafter and then on the part of the deponent. We do not, therefore, allow a capital to be made of such infirmity. That apart, the utter falsity of the second Umakanta affair is proved, to our complete satisfaction, by so many facts and circumstances reviewed. We are, therefore, in no need of any other matter, nothing to say of a poor one like this, to lend assurance to the falsity of the second Umakanta affair — falsity which is so satisfactorily proved, infirmity or no infirmity of this type in an interlocutory petition. In the view we take of such infirmity, it is not necessary for us to deal with the further contention on behalf of Sachindra, that the statements in his interlocutory petition of May 18, 1962, may not be, and, at any rate, should not be, referred to as evidence under the provisions of Section 20, sub-section (2) of the Hindu Marriage Act 25 of 1955.

271. We revert to Jitendra's letter of July 28, 1959, exhibit A, which, we have found, militates against the second Umakanta affair. In other words, the cause of Nilima having fled "4D" in July 1959 for Varanasi via, Entally is not the second Umakanta affair coupling with assault upon her by Sachindra for that. Sachindra's version, which we have called, S, therefore, fails. Thus, in the first proposition: Truth is S or N: (N being the symbol we have resorted to for Nilima's version of her going to Varanasi), S fails. Truth is not S. [See paragraphs 255 and 256].

272. Now, if truth is not S, which means that the second Umakanta affair is not true, — indeed, it appears to be false —, that is enough for Sachindra's failure on this part of the case, resting on the second Umakanta affair itself. In that view, whether truth is N or not may not be gone into even. But when the point is there, it is well we deal with it.

273. And what is the point? The point is that Nilima fled "4D" in July 1959 for Varanasi, because her husband had misbehaved with Ramgopal's mother—which she protested against, but only to be assaulted by Sachindra. That led her to go to Varanasi after having reported the matter to her Dadu S. K. Chakrabarti at his Entally residence: paragraph 254. This is Nilima's version: we have represented by the symbol N: paragraph 255.

274. How does Jitendra's letter of July 28, 1959, fit this version N? It appears to fit well enough. On no other hypothesis, can be explained such expressions as we find in this letter:

(i) "This sort of sudden mental lapse on the part of Shriman Kanu (Sachin) has been taking place only as the result of planetary influence."

(ii) "But Rahu and Mars lead him astray from time to time."

(iii) "For mental lapse fostered by the planets, if he indulges in incoherent talks before people, pray, treat this as delirious outburst of a patient and forgive him."

(iv) "... calmly but slowly he will realise his own wrongs and faults; he will be ashamed, and nothing but ashamed, of himself; ..."

(v) "... he very much owes himself a duty to remain calm and to maintain his wife in honour, ..."

275. Leave aside the planets and their influence. Such esoteric approach is alien to a court of law. But, "sudden mental lapse," Sachindra going "astray," realization of his wrongs asking him "ashamed of himself," owing himself a duty "to maintain his wife in honour", — expressions as these fit so nicely with N. Jitendra's sorrow over his affectionate brother Sachindra doing that which even the boys do not, with all his learning, does not go ill with N, in so far as its assault part is concerned. It may go so with the charge of sexual misbehaviour Nilima alleges. Boys, if they are really boys, do not generally go as low as that. But, read as a whole, such letter does lean very much in favour of N.

276. To say so however is not to say that truth is N. It must be borne in mind, Nilima at Varanasi has, and Sachindra in Calcutta has not, the ears of Jitendra. Likewise, Nilima at Entally has, and Sachindra at "4D" has not, the ears of S. K. Chakrabarti. Once that is borne in mind, it is plain to be seen that the source of what Jitendra, a gentleman of undisputed and indisputable integrity, writes in this letter is twofold — (i) Nilima's report and (ii) S. K. Chakrabarti's letter based on just that: Nilima's report. Nothing that we see upon evidence enables us to find that Sachindra did anything to disabuse Jitendra's mind of the impression created by the ex parte report of Nilima.

[The judgment enters into evidence and continues]:

282. All this has produced disbelief in our mind about Sachindra's affair with Ramgopal's mother, as Nilima alleges and reports first to Dadu S. K. Chakrabarti at Entally and thereafter to Jitendra at Varanasi, Jitendra's letter of July 28,

1959, exhibit A, having been rested on such report. Thus, it is seen that truth is neither S nor N: paragraph 256. Therefore, the very premise, upon which we are invited to find the cause of Nilima's escape to Varanasi being the second Umakanta affair and the assault that followed, appears to be false. And falsity of this premise cannot lead to the inference of the second Umakanta affair being true, by any conceivable process of reasoning. What then, it may be asked, is the reason why Nilima fled "4D" for Varanasi in July 1959, as indeed she did? We do not know, going by evidence, — and we have to go by evidence only. Nor need we know. All we know, upon evidence again, is that neither the second Umakanta affair nor any affair of Sachindra with Ramgopal's mother is the cause of her such flight. That is enough for us. That is enough too to reject, as we do, the second Umakanta affair as a sham. As rightly contended, there is no scope for a third cause, far less for a conjecture: paragraph 255. A conclusion as this is neither to be regretted nor to be surprised at. It is indeed inevitable when one spouse, otherwise respectable, educated and high in his profession, stoops so low as to charge another spouse, a respectable married woman of mature years, having four children of the marriage and a grandchild too, with one false charge of adultery after another, so far three in number, the other spouse in turn retaliating with all that imagination can exaggerate or invent. Result: the real truth which lies at the root of Nilima's departure for Varanasi is made a casualty of. In the midst of such falsehood, however, the truth that emerges in a negative form is that neither the second Umakanta affair, an out-and-out false charge, nor the affair of Sachindra with Ramgopal's mother, patently exaggerated a lot, and very possibly untrue, is the cause of Nilima's leaving her matrimonial home for Varanasi in July 1959. The solitary vulgar letter of Nilima (paragraph 149) written to none less than her husband, and meant for his consumption only, — not that Nilima was giving vent to such vulgarity in a stentorian voice from the housetop—, and that too when she was completely off her head under the apprehension that her home and her beloved daughter Khana's were about to be broken by certain evil-minded persons, does not show her to be a disrespectable married woman.

283. There remains for consideration the Narayan affair — the last act of adultery Sachindra charges Nilima with: paragraph 15. The eighth paragraph of Sachindra's pleading dated January 19, 1962, contains his case on the topic. It opens with the averment:

"That the respondent could not give up her habit of leading a life of shame."

Such averment Sachindra opens his case with does not stand. It does not, because the life of shame is rested on the Gopal affair and the two Umakanta affairs, each of which we have found to be false.

284. The eighth paragraph of Sachindra's pleading continues:

"She (Nilima) again contracted illicit intimacy with one Narain (Narayan) Chakrabarti, a refugee night-guard for the clinic located on the ground-floor of the present house of your petitioner." i. e. "4D".

There is not even a soupcon of evidence in support of any intimacy, in the sense of an antecedent conduct, with a view to showing, as Lord Buckmaster put it in 1930 AC 1, at p. 7, "that the association of the parties (here Nilima and Narayan) was so intimate and their mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence." So, an averment (as here), attributing to Nilima and Narayan a prior intimacy, looks singularly barren. And in so far as it attributes an illicit intimacy between the two, it looks still more barren. In sum, there is not a shred of evidence even, to warrant such averment, on prior intimacy, licit or illicit, between Narayan and Nilima. It is simply a jejune manner of preparing the ground for what follows:

"... in the first week of January 1961, the owner of the clinic Sri Benoy Banerjee discovered both of them, in a room bolted from inside resulting in Narain's (Narayan's) dismissal forthwith."

Such discovery of Nilima and Narayan "in a room bolted from inside" was made by Benoy, not by Sachindra, who discovered three other affairs found by us to be false. Naturally, therefore an averment as this is true to Sachindra's information derived from Benoy, as is his verification of the pleading dated January 19, 1962.

285. Very rarely are the prurient parties surprised in the direct act of adultery. If one has to go by the pleading (just reproduced), Benoy does not surprise them either, in the direct act of adultery. All he discovers is that they are "in a room bolted from outside". That may be enough, if true. Because, from such a discovery may well follow the fair inference of adultery as a necessary conclusion, other things being there.

288. Such is Benoy's evidence in chief. Leaving aside all other points, we are

Pleading

1. Date of the occurrence: the Narayan affair first week of January 1961.

2. Discovery of Nilima and Narayan in a room bolted from inside.

[Dealing with the variance between pleading and oral evidence and between oral evidence and oral evidence, the judgment proceeds]:

295. Realization of this sort of absurdity leads to an embellishment in the manner following:

"There is a door inside the patients' sitting-room in the clinic. There is a door of that room leading to the road. It is not possible to bolt the door of the room leading to the road from inside the room. The door of the patients' waiting-room leading to the verandah can be bolted from inside as well as from the outside." vide Benoy's evidence on cross-examination.

If this is true: that the door leading to the road cannot be bolted from within and has necessarily to be locked from outside, facilitating Benoy's sudden entry into the room, by which Nilima and Narayan were taken by surprise, and that only the inner door can be bolted from inside and outside, why such averment in the pleading:

"Benoy Banerjee discovered both of them in a room bolted from inside."

It is then a room incapable of being bolted from inside, so far as the roadside door is concerned. To say that what is meant is the bolting from inside the door on the verandah-side only is to bring the matter to the verge of ridicule and absurdity. None speaks of a room bolted on one side (the inner side) from within and locked on another side (the roadside and the outer side at that) from outside as a room bolted from inside. If what Benoy says is true — and he reported all this to Sachindra who had personal knowledge too of how the doors were locked and opened — the averment would have been:

"Benoy Banerjee opened the room's door on the roadside, locked from outside, and discovered both of them in that room."

But the averment is not so. It is futile to say, as has been said on behalf of Sachindra: "Shall I 'cook' a story like this and make Benoy enter the room through a door on the roadside even

now concentrating on one and only one: the enormous disparity between pleading and evidence just paraphrased, on the affair proper:

Benoy's evidence in chief.

1. Date of the occurrence: the Narayan affair January 1, 1961, a Sunday.

2. Discovery of Nilima and Narayan in embrace with one another (as first stated) and then on the same bed completely naked committing sexual intercourse (as subsequently stated).

though there is no arrangement for padlocking it from outside?" This is but a poor way of running away from the pleading where discovery by Benoy of Nilima and Narayan inside of a room bolted from within is categorically stated and where such discovery after unlocking the door by Benoy is not stated at all. The difference between the two modes of discovery is very great and fundamental. So, in order to make it look that Benoy could see all he says he had seen, this story of padlocking from outside is introduced for the first time at the trial, without realizing how out of joint it is with the averment in the pleading. Thus, the "cooking" of the story appears to be manifest. And when people "cook" so, they do not always realize the full effect of such "cooking". That has been the case here. Such a story is tested in the light of the party's own pleading and found to be absurd. And because it is absurd, it will be said that author could not have spun out such a trash: Then, no story, found on scrutiny to be absurd, can ever fail. Again, the time and labour taken to plead discovery by Benoy of Nilima and Narayan inside of a room bolted from within will be just the time and labour taken to plead discovery by Benoy of Narayan and Nilima after having opened the door locked from outside. So, why plead the one, and not the other? No question of evidence being pleaded arises here. The question here is of stating as distinctly as the nature of the case permits the facts on which the claim to relief is founded: Section 20, sub-section (1), of the Hindu Marriage Act 25 of 1955. The claim to relief here is divorce. Binoy unlocks the door padlocked from outside, sees Narayan and Nilima locked in embrace, and finds them having sexual intercourse too. The nature of the case does permit such facts being stated very distinctly. Yet you do not plead anything of the kind and pass such first-rate material by. It is said, all I have to plead is adultery, not how my witness got into the room. Be it so. But have you pleaded Nilima and Narayan locked in embrace and committing sexual

intercourse? You have not. All you plead instead is discovery by Benoy of Nilima and Narayan in a room bolted from within. The conclusion, therefore, appears to be ineluctable that Sachindra did not himself know on January 19, 1962, what case he would try to make out at the trial, for which he deliberately kept his averment at large, so that things found convenient might be made to fit it later.

296. So, falsity of the whole thing appears to be patent. No amount of subsequent evidence can turn this falsity into truth. To sum up, how falsity is piled upon falsity appears to be an interesting study:

I. Discovery by Benoy of Nilima and Narayan in a room bolted from inside: paragraph 8 of Sachindra's pleading. A self-defeating averment. Certainly the walls, doors and windows are not pellucid, enabling Benoy to see Nilima and Narayan inside of such a closed room.

II. Discovery by Benoy of Nilima and Narayan in the same room, on the same bed, and in a compromising position: Sachindra's evidence in chief on the foot of what Benoy had reported to him on the very day of the occurrence. Improvement upon the pleading: (i) sharing of the same bed and (ii) both being in a compromising position. Same comment: lack of transparency of the walls, doors and windows standing between Benoy and what he claims to have seen. And the door, bolted from inside, having been opened either by Nilima or Narayan, each having been inside, they would not revert to the same bed and to their compromising position, so as to oblige Benoy by furnishing direct evidence of their misdeed.

III. Discovery by Benoy of Nilima and Narayan lying in embrace in the visitors' room which is the same as the patients' waiting-room, the locus delicti: Benoy's evidence in chief. New — neither in pleading nor in Sachindra's evidence.

IV. Discovery by Benoy of Nilima and Narayan committing sexual intercourse, completely naked: Benoy's evidence in chief a little later. Newer still: neither in pleading nor in Sachindra's evidence. Told so — and Benoy told Sachindra what he had seen — Sachindra could have never omitted to plead and depose to such an excellent material.

V. The visitors' room was bolted from inside in the sense that the inner door thereof could be bolted from inside. Not that the outer door leading to the road was bolted from within: Benoy's cross-examination. A belated exercise in futility in order to explain away the averment in the pleading of discovery by Benoy of Nilima and Narayan inside of a room bolted from within.

305. Where is the ticket for a show by the International Circus at Tallah on January 1, 1961, about which we have heard so much and but for which the Narayan affair could not have been detected? It is said, very wrongly in our judgment, that to comment on the absence of the circus ticket at the trial is "to do violence to common sense." To counter a contention as this, we can do no better than quote the following from the judgment of Sir William Scott (afterwards Lord Stowell) in (1810) 2 Hag Con 1, a judgment from which we have quoted already in paragraph 21:

"It is a fundamental rule that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which the proof would be attainable: it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion: and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally. Because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case."

What Sir William Scott calls very rare is quite a regular feature here. In each of the four affairs from 1941 to 1961 Nilima is surprised in the direct fact of adultery. So it is said, with what effect, it has been seen. Be that as it may, this circus matter, this story of the purchase of a ticket for the show on January 1, 1961, may be slight in itself. But it has an important bearing in the decision as to the truth or falsity of the very reason which brought Benoy to the clinic closed on a Sunday evening. Say, there was nothing like any circus show that day; or if there was any, Benoy had not purchased the solitary ticket he says he did. Then, the very basis of the story fails: the story which brought back Benoy to a closed clinic, with a view to collecting the ticket left there inadvertently, and thereby getting the opportunity to see what he says he had seen. And still it will be said, it does "violence to common sense": Let it not be forgotten that the charge is the charge of adultery against a respectable married woman of mature years, the mother of four children, the

oldest of whom is then some twenty-three and the youngest some eleven years of age, and a grandmother too. And adultery with whom? With a night-watch thriving on pocket-money. So, the basic fact which leads to the detection of such adultery must be proved to our complete satisfaction, the basic fact being the most unexpected arrival of Benoy to the closed clinic, with a view to collecting the circus ticket, left behind inadvertently. That has not been proved, Benoy being a witness of the type whose uncorroborated evidence on the point — and so poor an evidence at that — we reject as totally unworthy of credence.

[The judgment then deals with facts about the benami purchase of the clinic by Benoy from Sachindra and proceeds:]
326.

C. Account Book.

Coming to the account book, exhibit 11, which, Benoy says, he maintains in his own way, the first thing that forces itself on the attention of a prudent man is that its very look is repellent. A bound exercise book, it purports to contain only receipts of Rs. 200 a month by Dr. Bhattacharjee and Rs. 75 a month by Niranjana Ganguly, the technician, both of whom Benoy appointed for the clinic, after his purchase. The stamped receipts over their signatures are from May 5, 1950, to April 7, 1964. Looking so fresh the entries may very well have been made in one sitting, and certainly not contemporaneously. In a hurry, a few, a very few, of the revenue stamps have been cancelled; the most of them have not been. Some of the receipts show that Dr. Bhattacharjee received his remuneration later than Technician Ganguli. Yet Dr. Bhattacharjee's receipts are entered first, and Ganguly's thereafter. Smudging is there too. No other expenses are entered, though it is boasted, "all expenses of the clinic would be found" here. In sum, this sort of an accounting book appears to be self-defeating and deserves to be rejected on its own inherent vice, opportunity or no opportunity to the witness to explain such vice. It appears. Benoy spoke at least one truth when he had stated before the Income-Tax Officer that he did not maintain "any books of account."

327. Such then are the facts and circumstances we have reviewed from paragraph 307. Do they or do they not lead to the irresistible inference of the sale of the clinic by Sachindra to Benoy, as evidenced by the indenture of sale dated March 2, 1960, exhibit 5, having been benami, in the sense that it is a sham? We are, however, reminded, and very rightly too, on behalf of Sachindra, that the burden of proving benami is on the

person who alleges it: here Nilima. That no doubt is settled law. But law is no less settled in two other ways. First: as observed by Sir Lawrence Jenkins in *Seturatham Aiyar v. Venkatachala Goudan*, 47 Ind App 76 = (AIR 1920 PC 67):

"The controversy had passed the stage at which discussion as to the burden of proof was pertinent; the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them."

Just so here. Almost all the relevant facts are before us — facts we have started chronicling from paragraph 307. And all that remains for decision is what inference should be drawn from them. Mr. Ameer Ali re-echoes the same thing in different language:

"When the entire evidence on both sides is before the court, the debate as to onus is purely academical." : *Chidambara Sivaprakasa Pandara Sannadhigal v. Veerama Reddi*, 49 Ind App 286 = 27 Cal WN 245 = (AIR 1922 PC 292).

Why go then into matters "purely academical"? The almost entire evidence is before the Court. What is more, here the evidence led by and on behalf of Sachindra, in chief and on cross-examination, appears to be sufficient to sustain a firm conclusion. Such then is the first aspect of law equally well settled. The second is: as observed by Lord Hobhouse in *Uman Parshad v. Gandharp Singh*, (1887), 14 Ind App 127 (PC), the system of putting property benami having been extremely common, even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose.

328. Judged in the light of the law quoted above, what do the facts and circumstances catalogued from paragraph 307 go to show? Taboo upon Sachindra, for the post he holds, to keep a clinic; the clinic, yielding quite a good income, sold for a paltry sum of Rs. 2,000, to one who lacks the rudimentary knowledge of elementary principles of running such a business; the reason given for such sale being false; the conduct of the so-called vendor and vendee, before, during and after the sale, so simulate, from every point of view; — all discussed in detail, in the foregoing lines, furnish evidence, not slight, but considerable, and can, in our judgment, lead to one and only one inference, that the transaction, evidenced by the sale-deed of March 2, 1960, is a sham, Sachindra purporting to sell the clinic to Benoy without intending that his title should cease or pass to Benoy: just the second class of benami, not quite an accurate description though, as pointed out by Venkatarama Ayyar J., speaking for the court, in *Sree Meenakshi Mills Ltd. v. Commr. of Income-tax*, AIR 1957 SC 49 at p. 66, the other class of benami

being a real sale by A to B, but in the name of X, benamidar of B who remains hidden, which does not bulk large here.

329. So, the conclusion come to by the trial judge on the question of benami, in the sense of the transaction having been a sham, appears to be plainly right, even though, some of the reasons he goes by, we will not.

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330. ** ** ** **

We have found the identity of the two: the old clinic purchased and the new one started, Sachindra being the proprietor of both, and Benoy having lent his name only to a sham deal, Sachindra "paying the rent of the entire house even now including the clinic," as he admits on cross-examination, and Benoy having its use free. The contention that such payment of rent for the whole house by Sachindra, in absence of any cross-examination on the internal arrangement between Sachindra and Benoy, is "absolutely correct," appears to us to be absolutely incorrect. We are concerned with what evidence is, not with what evidence might have been. And on evidence as it is, the conclusion that it is a sham variety of benami appears to be irresistible. That apart, it is common experience, when a transaction is benami of either variety, a sham or a genuine one under the false name of another, (paragraph 328), "all the proceedings which would attend a real transfer are carefully gone through in order to throw a veil over the reality", to quote from Lord Hobhouse again in the Uman Parshad case, (1887) 14 Ind App 127 (PC). Once this is borne in mind, these documents, which the judge passes by in a wrong manner, in our judgment, or the trade licences, exhibits 6 series, and the like, even if free from infirmities (which they are not) appear to be nothing like so important as has been imagined, in the face of other overwhelming indicia in favour of the transaction benami, in the sense of its having been a sham.

331. Once it is found as a fact — as, indeed, it is — that the sale of the clinic on the ground-floor of "4D" by Sachindra to Benoy on or about March 2, 1960, is a sham, the Narayan affair of the first week of January 1961, according to Sachindra's pleading, or of January 1, 1961, as stated at the last moment, in the course of the trial, — an affair which we have found to be false, independently of benami, — becomes false still. Sachindra continued to be the proprietor of the clinic as before. And Benoy had no reason whatever to swoop down upon the clinic in the circumstances he says he did. The very contemplation that a husband of Sachindra's standing and attainments can stoop

so low, as to press into service Benoy, an abominable type, only with a view to blackening his consort for some twenty-four years, whatever her other faults, in so mean a manner, fills us with horror; and we find it difficult to speak with becoming restraint about such a one, Sachindra.

332. Thus, the Narayan affair does not survive. It cannot. The utter falsity here, there and everywhere proclaims its doom. But the pertinacity of Sachindra remains. To prove that, which is incapable of being proved, so false it is, Sachindra leads evidence on what may be called facts subsequent to the Narayan affair: post-Narayan-affair facts.

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[The judgment deals with post-Narayan-affair facts and continues].

356. Nilima's pregnancy, abortion and, therefore, adultery during the carriage of the present matrimonial proceedings and after her departure from the matrimonial home on April 5, 1961.

The genesis of so serious an allegation, against Nilima is her routine application dated May 3, 1963, exhibit 14, for postponement in the court below of the present suit set down for hearing on May 4, 1963, on the ground of her illness, in support of which was attached a certificate dated May 2, 1963, exhibit D, over the signature of a registered medical practitioner, Dr. N. P. Mukherjee, "Specialist in Women, Children and Venereal Diseases". Such a specialist certified that Nilima "has been suffering from Acute uterine Haemorrhage since last night". The contention grounded on this is: 'Nilima, some forty-four years of age then, down with acute uterine haemorrhage in May 1963? She must have then been pregnant by one other than her husband whom she had left on April 5, 1961.' Nothing, in our judgment, can be more fallacious, even though we have been referred to certain standard books, and even though to Dr. N. P. Mukherjee, Nilima's fifth witness, the suggestion thrown out is that he was pressed into service to cause abortion — which he denies.

357. But the matter on the legal plane needs clearing up first. The ratio of Knight v. Knight, AIR 1955 NUC (Cal) 857, we have been referred to, and the full text of which judgment we have seen, is: Evidence on post-suit adultery is admissible, not as the basis for a decree of divorce, not as the ground on which divorce can be granted, but to prove and explain other evidence given in the case, to tend to show the character and quality

of the previous acts. Apply this ratio here and to the facts we have found? Impossible. The evidence given in the case, the evidence we have discussed above, proves the utter falsity of the four specific acts of adultery Sachindra charges Nilima with. So, this sort of post-suit adultery has nothing to explain, far less to prove, such evidence. The character and quality of the previous acts? The evidence completely satisfies us that no previous acts of adultery can be attributed to Nilima. By parity of reasoning, therefore, this sort of post-adultery cannot tend to show the character and quality of something which does not exist. And of course this cannot serve as the basis for a decree of divorce Sachindra prays the court for.

358. On merits, a mountain has been made of a molehill. Grant Nilima, some forty-four years of age in May 1963, had acute uterine haemorrhage with no exaggeration for the sake of getting a postponement. And at once the inference will be that she was then pregnant with abortion trailing behind: Nothing can be more absurd. The text-books cited do not go to that length. In Gynaecology by MacLeod and Read, 1955, fifth edition, at page 689, it is said:

"In the period of reproductive activity (fifteenth to forty-fifth year) the commonest cause of haemorrhage is some disturbance of pregnancy."

"The 'commonest cause' means what it says: the commonest cause. It does not mean the only cause. So, why so much noise over so little?

359. That some disturbance of pregnancy is not the only cause of haemorrhage is borne out by what the same text-book contains, two lines later:

"Next to pregnancy the commonest causes encountered are fibroid tumours, malignant growth of the uterus, and pelvic inflammatory lesions," things which are beyond Dr. N. P. Mukherjee that specialist "in women" etc., and a very superficial examination made by him, for which he advises removal of the patient to Eden Hospital for women, in case haemorrhage does not yield to his treatment by hormone.

360. Again, reliance is placed upon the following from the Text book of Gynaecology by Brewer, 1964, third edition, at page 186, under the caption: Abortion — "...abnormal uterine bleeding in women of the childbearing age is indicative of pregnancy, until it is proved otherwise."

But the same author continues:

"Biologic tests are helpful if positive. Examination of clots or other materials which escape from the uterus may disclose fetal tissue and thereby establish the

diagnosis (of pregnancy and abortion). If this is not accomplished, the cause of the bleeding may remain obscure."

That is the case here. The cause of Nilima's bleeding remains obscure. Dr. N. P. Mukherjee does examine the blood clots. He does not say, they disclosed "fetal tissue."

365. To negate the Narayan. affair, three specific pleas have been resorted to, on behalf of Nilima. One is all about a feast at "4D" on the New Year's Day of 1961: January 1: when Benoy, one with culinary ability, it is said, cooked some delicacies. The other is about a photograph said to have been taken in 1957 (exhibit B) with Benoy in it, in commemoration of a picnic at the Botanical Gardens, only to show how intimate Benoy (called uncle by the children) was with the family long before 1960, the year of the benami deal. The third is about Narayan continuing his service as a night-watchman even after 1-1-1961, there being divergence, even in evidence led or suggested on behalf of Nilima as to how long he continued to serve so, after January 1, 1961. Dismiss the pleas. And certainly the evidence on the pleas so taken is not apt to inspire belief. Say, they are false, as they look like, the feast business and the photograph business in particular having been introduced almost at the last moment. So what? The same approach again, as in paragraphs 84 and 256: a false defence is not tantamount to an admission of guilt, and the falsity of the defence does not prove the case of the party suing. It is, therefore, hardly necessary to enter into these pleas in detail. Suffice it to say we reject them.

366. Shantipada's evidence that his father-in-law Sachindra used to press the breasts of women patients has been severely commented upon. It is said that "even cold wind is gentler than human touch" when one like Shantipada lets down "the architect of his career" in this manner. It will be noticed however that in having come to our conclusions on the four specific facts of adultery, as alleged, or on any other side-issue, we have not taken this or anything like this into our reckoning.

367. All that goes before appears to be good enough for decision of the appeal we have been called upon to adjudicate. But it will not be right on our part to conclude the judgment here and now, though, we realize, much to our regret, that it has already run into a tome, so to say. Because we owe it to ourselves and to the two spouses to give an indication as to where, according to our judgment, lies the seed of this most un-

fortunate matrimonial litigation, wrecking a home, so full of promise and possibilities, unless, of course, both Sachindra and Nilima can rise to the occasion even now and start their connubial life over again, forgetting all that has happened and trying their best to retrieve the ground they have lost over the years. A very, very difficult thing to do, without doubt. That is, therefore, hoping against hope. Be that as it may, the whole of the evidence completely satisfies us that the four direct facts of adultery Sachindra charges Nilima with are false, and false to the knowledge of Sachindra. Therefore, the seed of this most unfortunate litigation does not lie here, as indeed it cannot.

368. Where then does it lie? Our answer, upon the whole of this evidence, is: it lies in the very foolish step taken in initiating the rape case against Sachindra — a case, of which, Sachindra rightly says.

"Reba (his daughter) was the complainant." — of which Sachindra also says, and rightly too:

"Khana (another daughter of his) took Reba with her and it is at the instance of Khana the complaint was filed."

That case failed. And what a case! Visualise the agony of the man, in particular that of one like Sachindra so highly placed in life: "Reader. Radiotherapy Medical College, Calcutta" a post to which he was appointed on his return from England in February 1958, a post he holds too on the date of his evidence who has to go through the ordeal of a prosecution as this, with all it means. Acquitted, he appears to have been seized with a spirit of reprisal. Reprisal against whom? Neither Khana nor Reba is within his reach. Nilima is. And reprisal against Nilima is reprisal against Khana and Reba who are deeply attached to their mother, so naturally too. On top of that, Nilima has given evidence against him as a witness for the State in that criminal case: *The State v. Sachindra*. Burning with indignation at the indignity he tastes ever since his arrest, no less with the agony he goes through for about a year, he too completely loses his mental balance, as Nilima did years ago, leading to that vulgar letter, and can bring himself to raise this false matrimonial action, only twenty-seven days after his acquittal in the criminal case. Herein lies the seed of this painful litigation, as it seems to us, upon the whole of the evidence. On no other hypothesis can we reconcile ourselves to the role we see Sachindra having played in this case right from the beginning. The least that was apprehended of an acute-minded person like him was that, when out (as indeed he was) to unleash concoction and

falsehood in order to spite his wife, he would do so in such a manner as to defy detection or to make detection very difficult. Here however falsehood and concoction appear to be patent. Sachindra was burning with rage which perhaps made him blind even to the obvious. More, Sachindra was taking the help of people — Priest Ramani, uncle Abani, Poet Jadav, so-called Businessman Benoy, etc., specimens indeed of untruthful witnesses — who, inspired or uninspired, were bound to land him in disaster. And that is just what has happened here.

369. The failure of the prosecution of Sachindra on a most heinous charge of having raped his own daughter, on which we have heard so much, has been in our mind always. But this is a matter from which nothing can be drawn to the prejudice, or in favour, of the evidence adduced here. What led to the failure of that prosecution is not within our province to inquire. It is upon the evidence adduced here, in support of the four direct facts of adultery, that the appeal, we are seized of, must have to be determined. We have done no more. That being so, the Missir letters, exhibits 1(c), 1(d) and possibly 1(f) too, — letters to the investigating officer, Missir, by Nilima, — requesting him to see that the criminal case may have a tortuous progress for two years, etc., or to caution Reba so that none can make her admit in writing about the criminal case being a false one — and the like, e. g., consulting a woman police officer, pale into insignificance and irrelevance too, so far as the case on hand is concerned. Such matters had their significance and relevance at the criminal trial where the letters were made good use of as defence exhibits, the marks of which these papers bear to this day. Exhibit 1(e), a letter by Nilima to Khana, conveying her wish and Sachindra's too, that Khana must not come to "4D" again, merits like treatment. It had importance and relevance at the criminal trial, in that Khana, the prime-mover in the criminal case, as Sachindra admits, was painted so. And it was made good use of too as a defence exhibit. This is how Nilima befriended her husband standing his trial on a charge of rape upon his own daughter, in addition to her having remained neutral and not opposed his bail, as Sachindra admits.

370. By parity of reasoning, it will be barren to inquire how Sachindra could get hold of these letters, though appearances are very much in favour of Sachindra having succeeded in getting them from Nilima who thought, and very rightly too, as she says, that they would be beneficial to him. So the charge that Sachindra had forced her to write so does not appear to stand. But it appears to be

clear; upon evidence, that Nilima wrote these letters, inclusive of the one to Khana, exhibit 1(e), as Sachindra desired her to write. We accept Nilima's evidence pro tanto, eliminating the allegation of force.

371. If in such an obliging mood, why, it is asked, did she flee "4D" on April 5, 1961? To answer such question, the mere "dead body" of recorded evidence is not enough; one has to place himself or herself in Nilima's position then. Torn between her daughters, the unmarried daughter Reba in particular, on one hand, and her husband, on the other, what else could she have done; the more so, when Sachindra was demanding more and more a writing from her that Reba had falsely started a rape case against him. The assault Nilima charges Sachindra with does not appear to be true. On the contrary, he had then enough reasons to woo her more and more for a few more of the type of the Missir letters. It therefore, looks very natural that Sachindra and she lived as husband and wife, on good terms, up to April 4, 1961, as Nilima says. We see nothing in it to be pooh-poohed. In any event, all this has nothing whatever to do with the main theme of the present case: the four direct facts of adultery. If we deal with them, it is only because we have been addressed thereon.

372. The charge of adultery against Nilima, on each of the four counts, therefore, fails.

373. Upon the whole of the evidence, we find no manner of cruelty either, on the part of Nilima, who did all she could to help Sachindra by not having opposed his bail and by having written letters to Missir and Khana, as just noticed, with a view to doing him good.

374. The rule remains. Why Sachindra should be restrained from disposing of his land in Linton Street in any manner he thinks fit, in a case of this type, is more than what we can understand. Nilima's maintenance? Let her claim that in a subsequent suit or proceeding, as she says, in her petition, she will. Then, the matter will be considered in accordance with law, not now. That apart, Sachindra, as we size him to be, upon evidence, is quite a solvent man with ample resources, which Nilima may fall back upon, if that stage comes. There is no merit in the rule.

375. In the result, the appeal fails and be dismissed with costs, which we assess in a lump at Rs. 1,000, in addition to what has been paid already to the respondent Nilima.

The connected rule do stand discharged. No costs.

376. We express our indebtedness to the bar for the assistance rendered.

377. SALIL KUMAR DATTA, J.:— I agree.

Appeal dismissed.

AIR 1970 CALCUTTA 75 (V 57 C 8)

P. B. MUKHARJI, J.

Associated Power Co. Ltd., Plaintiff
v. Ram Taran Roy, Defendant.

Suit No. 1316 of 1964. D/- 13-1-1969.

Calcutta City Civil Court Act (21 of 1953) Sch. 1 Cl. 4(iv) and Section 5(ii) — 'Goods' — Meaning of — Word is used in its broad, plain and ordinary connotation — It includes 'electricity' — When jurisdiction of courts relates to general expressions no artificially technical and narrow interpretation should be adopted.

When jurisdiction of a Court relates to such general expressions "transactions of merchants and traders", "buying and selling of goods", as in Cl. 4(iv) of the first Schedule of the City Civil Court Act, it is essential that no artificially technical and narrow interpretation should be adopted to cut down the broad connotation of such general expressions.

(Para 22)

The City Civil Court Act does not define "goods". The Constitution and the Sale of Goods Act do. Both of them are wide enough to include "electricity" within the meaning of the expression "goods". The separate mention in items 53 and 54 of List 2 of Sch. 7 of Constitution cannot by itself justify a conclusion that the Constitution of India intended to draw any distinction between electricity and goods. Even if it did, that was for allocating taxes and not for drawing a distinction between "electricity" and goods.

(Paras 12, 9)

The Transfer of Property Act does not define goods or the movable property. But S. 3(36) of the General Clauses Act defines movable property to mean "property of every description except immovable property." That again is a kind of residuary definition within which "electricity" can certainly come as "movable" property.

(Para 12)

The question is the principle of construction when a statute creates new jurisdiction and affects the old and existing ones. The point for construction is the meaning of the word "goods" in Cl. 4 (iv) of the First Schedule of the City Civil Court Act. The plain question is, was it intended that the goods in that context was meant to be understood in a technical sense? Reading the scheme of jurisdiction as distributed between the City Civil Court and the High Court, and keeping in

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view the object of the City Civil Court Act as stated in the preamble to relieve pressure on the Original Side of the High Court, it appears that although there is an overall outside financial limit of Rs. 10,000 for the City Civil Court, that limit is reduced to Rs. 5,000/- in cases dealing with import or export of merchandise, stock of exchange transactions or future markets, documents of title to the goods under the Sale of Goods Act, transactions of merchants and traders relating to the buying or the selling of goods or relating to the construction of mercantile documents or relating or arising out of transactions of mercantile agents under the Sale of Goods Act. The principle appears to be reduced value for City Civil Court Jurisdiction where the transaction concerned is of commercial nature because all these items mentioned in clause 4 of the First Schedule of the City Civil Court Act show that they are more or less of commercial nature. Therefore it was provided that the Original Side of the High Court shall continue to have jurisdiction and the limit was that it must be over Rs. 5,000 and not below and if below then it would go to City Civil Court. This interpretation is more consistent with the language of the Act and the intention expressed there. For any other view would lead to this absurd result that a commercial suit for sale of batteries claiming, say, a sum of Rs. 6,000 could be filed in the High Court, but the same suit for the same amount of money for supply of electrical current which would be produced by joining the terminals of these batteries, would not lie in the Original Side of the High Court.

(Para 21)

For the purposes of construing the jurisdiction of the High Court under clause 4(iv) of the First Schedule of the City Civil Court Act the word "goods" is used there in its broad, plain and ordinary connotation without the subtlety or artificiality that electricity is energy and not matter. The language, "consumer" or "supply" is the usual language for supply of electricity. That does not make it inconsistent with the sale of electricity. Even in economics the word "consumed" or "consumer" is used in respect of many goods irrespective of the fact whether they represent energy or not.

It must, therefore, be held that electricity is goods within the meaning of clause 4(iv) of the First Schedule of the City Civil Court Act. AIR 1936 Cal 753 Not Foll. AIR 1938 PC 130 & AIR 1958 SC 560 & AIR 1965 SC 1082 (1089) & (1938) 4 All ER 631 (647) Ref.; AIR 1955 Pat 375 & (1909) 1 KB 737 (741) & (1909) 2 KB 604 Disting. AIR 1946 All 502 (505) & AIR 1938 Lah 338 (339) & AIR 1964 Madh Pra 101 (106-7), Rel. on.

(Paras 23, 25)

Cases Referred:	Chronological Paras
(1965) AIR 1965 SC 1082 (V 52)=	
(1965) 2 SCR 112, K. L. Johar & Co. v. Deputy Commercial Tax Officer	14
(1964) AIR 1964 Madh Pra 101 (V 51) = 1964 Jab LJ 57, Municipal Committee, Harda v. Harda Electric Supply Co. (Pvt) Ltd., Harda	20
(1958) AIR 1958 SC 560 (V 45)= 1958 SCJ 696, State of Madras v. M/s. Gannon Dunkerley & Co. (Madras) Ltd.	13
(1955) AIR 1955 Pat 375 (V 42), Hemendra Lal Roy v. Indo-Swiss Tdg. Co. Ltd.	15
(1946) AIR 1946 All 502 (V 33)= ILR (1946) All 476, Nainital Hotel v. Nainital Municipality	19
(1938) AIR 1938 PC 130 (V 25)= 39 Cri LJ 452, Babulal Choukhani v. Emperor	10
(1938) AIR 1938 Lah 338 (V 25)= 40 Pun LR 143, Firm Attarsingh Sant Singh v. Municipal Committee, Amritsar	19, 20
(1938) 1938-4 All ER 630=55 TLR 212, Read v. Croydon Corporation	24
(1936) AIR 1936 Cal 753 (V 23)= 41 Cal WN 225, Rash Behari Shaw v. Emperor	10
(1909) (1909) 1 KB 737, County of Durham Electrical Power Distribution Co. v. Commissioner of Inland Revenue	17
(1909) (1909) 2 KB 604=78 LJKB 1158, County of Durham Electrical Power Distribution Co. v. Commr. of Inland Revenue	18
Johar Goho, for Plaintiff; R. L. Sinha and R. N. Das, for Defendant.	

JUDGMENT :— In this Commercial Cause, the plaintiff Co. Associated Power Co. Ltd. is suing Ram Taran Roy, carrying on business under the name and style of Roy Dutta & Co. for the recovery of Rs. 7460.06 P as the price for the supply of electrical energy.

2. There were a number of points raised in the Written Statement but the issues have now been considerably narrowed, in the circumstances, I am just about to mention. Mr. Sinha, learned counsel for the defendant, raised only the following issue:

"Has this Court jurisdiction to try this suit on the ground that this is a suit not for goods supplied but for electricity consumed?"

3. Mr. Sinha, appearing for the defendant, abandoned all other contentions raised in the Written Statement and subject to the above issue, he admitted all other facts pleaded in the plaint. It is also to be recorded that Mr. Sinha for the defendant does not contest either the content or the amounts and figures pleaded in the plaint.

4. The only question for decision now in this suit is to determine the point whether electricity is within the meaning of "goods" used in Cl. 4(iv) of the First Schedule of the City Civil Court Act, 1953. In other words, the main contention is that it is the City Civil Court only which has jurisdiction to try this suit and not the Original Side of this High Court. Cl. 4 (iv) of the First Schedule of the City Civil Court Act, *inter alia*, reads as follows:—

"Subject to entry 1 and entry 2, suits and proceedings exceeding five thousand rupees in value.—

***arising out of transactions of merchants and traders relating to the buying or the selling of goods or relating to the construction of mercantile documents."

5. It may be recorded here that by a written agreement dated 30-7-57 the plaintiff agreed to supply and the defendant agreed to take electrical energy to be used by the defendant in the defendant's colliery at Kajoragram in the district of Burdwan. The overriding consideration in this agreement is that it is a purely commercial transaction for supply of electricity to a colliery.

6. S. 5(ii) of the City Civil Court Act provides that "subject to the provisions of sub-sections (3), (4) and of Sec. 9, the City Civil Court shall have jurisdiction and the High Court shall not have jurisdiction to try suits and proceedings of a civil nature, not exceeding ten thousand rupees in value."

7. It is contended by Mr. Sinha that as the claim is only for Rs. 7460.06 P, the proper Court with proper jurisdiction was the City Civil Court in this case. In answer, Mr. Goho, learned counsel for the plaintiff, relied on Cl. 4(iv) of the First Schedule of the City Civil Court Act as quoted above to say that this Court has jurisdiction as it is a suit exceeding Rs. 5000/-. The legal debate has centered lastly round the meaning of the word "goods" in Cl. 4(iv) of the First Schedule of the City Civil Court Act. According to Mr. Goho, learned counsel for the plaintiff, electricity is "goods" and according to Mr. Sinha, counsel for the defendant, it is not "goods" within the meaning of that clause in the City Civil Court Act.

8. I shall now briefly examine the different arguments advanced by Mr. Sinha, appearing for the defendant. His first argument naturally is that the word "goods" in its ordinary and common connotation, cannot and should not include something like electricity which is not tangible and just only current or energy. If the distinction that this argument tries to make is between matter and energy then perhaps the answer in modern

science of physics will be that matter is energy and energy is matter and therefore electricity according to the modern notions of physics can very well come within the expression "goods."

9. Mr. Sinha, thereafter relied on the State list, being list 2 of the 7th Schedule of the Constitution of India, items 53 and 54 where the following expressions occur:—

"53. — Taxes on the consumption or sale of electricity."

And

"54.— Taxes on the sale or purchase of goods other than newspapers."

From this Mr. Sinha tries to deduce the conclusion that the Constitution of India drew a distinction between 'electricity' and 'goods' and therefore provided separately for taxes on electricity and taxes on goods. But that inference cannot be drawn from the Constitution. Article 366 (12) of the Constitution provides expressly that unless the context otherwise requires "goods includes all materials, commodities and articles." The definition appears to be wide enough. Electricity, it is contended, comes within materials or commodities or articles. Even if it did not, the separate mention in items 53 and 54 of List 2 cannot by itself justify a conclusion that the Constitution of India intended to draw any distinction between electricity and goods. Even if it did, that was for allocating taxes and not for drawing a distinction between "electricity" and "goods".

10. But Mr. Sinha is on a stronger wicket when he relies on Pollock and Mulla's Commentary on the Indian Sale of Goods Act, 3rd Edition, page 13 where the following passage occurs:—

"It is doubtful whether the Act is applicable to such things as gas, water and electricity."

In other words, the learned commentators on the Sale of Goods Act were expressing doubts how far gas, electricity and water could be called "goods" under that Act. In support of this view Mr. Sinha relies on the observations of the Division Bench of this Court in *Rash Behari Shaw v. Emperor*, 41 Cal WN 225 at pp. 242-43 = (AIR 1936 Cal 753 at p. 766) where the Court observed: "In our opinion that view (view expressed by Sir Frederick Pollock and Sir Dinshaw Mulla as quoted above) is correct certainly as regards electricity". The Privy Council in *Babulal Choukhani v. King Emperor*, AIR 1938 PC 130 had occasion to consider this problem and Lord Wright at page 135 in that case observed that there could be theft of electricity and that the technical rules applicable to proving the theft of a chattel did not apply to the

theft of electricity. Lord Wright observed at page 135 of that report:—

"That offence was clearly established, because the user of electric current without the intention of paying is beyond question a dishonest user. That is all that is required under Section 39 which creates a statutory theft sufficiently established against whoever dishonestly abstracts, consumes or uses the energy. The technical rules applicable to proving the theft of a chattel do not apply to proof of this special offence".

The Privy Council did not go into the question of whether the view expressed by Pollock and Mulla saying that electricity could not be goods, was correct or not.

11. Section 2(7) of the Indian Sale of Goods Act provides:—

"Goods means every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the Contract of Sale."

Naturally Mr. Goho relies strongly on this definition of goods in Section 2(7) of the Sale of Goods Act to say that it is an all-inclusive and residuary definition and it says that goods means every kind of moveable property other than the two exceptions, namely, (1) actionable claims and (2) money. Mr. Goho contends that there can be no doubt that electrical energy is movable. He therefore contends that it comes within the residuary definition and it must be held to be goods within the meaning of Section 2(7) of the Sale of Goods Act and the doubt expressed by Sir Frederick Pollock and Sir Dinshaw Mulla was more inspired by the English Act, where the definition was materially different, than by the actual definition under the Indian Sale of Goods Act. As at present advised I am inclined to accept this submission of Mr. Goho.

12. The point needs a little more analysis. We have seen that the City Civil Court Act does not define "goods". The Constitution and the Sale of Goods Act do. Both of them, as shown, are wide enough to include "electricity" within the meaning of the expression "goods". The Transfer of Property Act does not define goods or the movable property. But section 3(36) of the General Clauses Act defines movable property to mean "property of every description except immoveable property." That again is a kind of residuary definition within which "electricity" can certainly come as movable property.

13. The Supreme Court in *State of Madras v. M/s. Gannon Dunkerley and Co. (Madras) Ltd.*, AIR 1958 SC 560, dis-

cussed at page 567 the question of sale and exchange of property for a price. It was not concerned in that decision with the point of meaning to be given to the word "goods".

14. The other decision of the Supreme Court is *K. L. Johar & Co. v. Deputy Commercial Tax Officer*, AIR 1965 SC 1082. At p. 1089, the learned Judge observed as follows:—

"The matter came up again before this Court in *Gannon Dunkerley's* case and it was held that the expression 'sale of goods' was at the time when the Govt. of India Act was enacted, a term of well-recognised import in the general law relating to the sale of goods and in the legislative practice relating to the topic and must be interpreted in Entry 48 in List II of the Seventh Schedule as having the same meaning as in the Sale of Goods Act."

The importance of this observation is that the sale of goods should not be given a too artificial and technical interpretation.

15. The case of *Hemendra Lal Roy v. Indo-Swiss Tdg. Co. Ltd.*, AIR 1955 Pat 375 does not help Mr. Sinha because there it was pointed out at p. 378 that the electrical undertaking consisting of power house, other structures and plants and machinery were really fixtures and could not be called "goods." That question does not arise here.

16. There are provisions in the Electricity Act relating to theft of electricity or price for electricity but they do not conclude this point.

17. The best case, which supports Mr. Sinha's contention, is *County of Durham Electrical Power Distribution Co. v. Commissioner of Inland Revenue*, (1909) 1 KB 737, where Channell J. at p. 741 observed as follows:—

"Here I think it might have been argued, though I do not pretend to know enough about the scientific aspects of the case to speak with any certainty, that this supply of electrical current was rather the doing of work than the supply of goods, but, be that as it may, the case has been argued upon the footing that it is a supply of goods."

18. The only defect of this authority is that there was no decision on the point whether electricity was "goods" and that it was assumed in that case that supply of electricity was regarded as supply of goods. The hesitant observation of Channell J., therefore, was obiter dictum and even then was not very strong. That case went up in Appeal and reported in (1909) 2 KB 604. But there again there was no decision on this point. As Cozens-Hardy M. R. observed at p. 608:—

"This case has been argued on the assumption that electrical energy is to be

considered as goods, wares or merchandise for the purposes of this clause, and we are dealing with it on that footing but it must not be taken that we have either assented to or dissented from the proposition which may some day require careful consideration."

19. Except judicial doubts, expressed in a very hesitant manner in some of the cases just noticed above, there appears to be no authority in support of the proposition that electricity cannot be goods. On the other hand, there are judicial decisions in India which say that electricity is goods. The first decision to notice is *Naini Tal Hotel v. Naini Tal Municipality*, AIR 1946 All 502 at p. 505. The Division Bench of the Allahabad High Court at p. 505 observed as follows in that case:—

"The remaining objection that electric energy is not 'goods' within the meaning of Art. 52 requires more consideration. It may be noted first of all that in the Allahabad case, cited in AIR 1938 Lah 338, no such objection appears to have been taken and it was assumed that the article applied to electric energy as much as to any other commodity. The word 'goods' is not defined in the Limitation Act, but according to the definition in the Indian Sale of Goods Act, the word means every kind of movable property other than actionable claims and money. Electric energy is bought and sold like any other commodity and there can therefore be no doubt that it is 'property'. Is it movable? There does not appear to have been authoritative pronouncement on this point, though doubt has been expressed as to the extent to which gas and electricity are 'goods' for the purpose of the English Sale of Goods Act."

It was distinctly held in the above case by the Division Bench of the Allahabad High Court that electrical energy was movable property and goods within the meaning of the Limitation Act.

20. It will be unnecessary to refer to the Lahore case in *Firm Attar Singh Sant Singh v. Municipal Committee Amritsar*, AIR 1938 Lah 338 at p. 339 already mentioned in the Allahabad decision. I shall only make a short reference to a more recent decision in *Municipal Committee, Harda v. Harda Electric Supply Co. (Pvt.) Ltd. Harda*, AIR 1964 Madh Pra 101. There is elaborate and learned discussion on this point at p. 106-7 of that report. The conclusion there arrived at was that electricity came within the meaning of the expression "goods" and "movable property". From the common-sense point of view also it seems to me to be the plain meaning.

21. There is also a more cogent consideration in this regard. The question is the principle of construction when a sta-

tute creates new jurisdiction and affects the old and existing ones. The point for construction in this suit is the meaning of the word "goods" in clause 4(iv) of the First Schedule of the City Civil Court Act. The plain question is, was it intended that the goods in that context was meant to be understood in a technical sense? Reading the scheme of jurisdiction as distributed between the City Civil Court and the High Court, and keeping in view the object of the City Civil Court Act as stated in the preamble to relieve pressure on the Original Side of this Court, it appears to me that although there is an overall outside financial limit of Rs. 10,000 for the City Civil Court, that limit is reduced to Rs. 5,000 in cases dealing with import or export of merchandise, stock of exchange transactions or future markets, documents of title to the goods under the Sale of Goods Act, transactions of merchants and traders relating to the buying or the selling of goods or relating to the construction of mercantile documents or relating or arising out of transactions of mercantile agents under the Indian Sale of Goods Act. The principle appears to be reduced value for City Civil Court Jurisdiction where the transaction concerned is of commercial nature because all these items mentioned in clause 4 of the First Schedule of the City Civil Court Act show that they are more or less of commercial nature. Therefore it was provided that the Original Side of this Court shall continue to have jurisdiction and the limit was that it must be over Rs. 5,000 and not below and if below then it would go to City Civil Court. This interpretation is more consistent with the language of the Act and the intention expressed there. For any other view would lead to this absurd result which I can foresee that a commercial suit for sale of batteries claiming, say, a sum of Rs. 6,000 could be filed in the High Court, but the same suit for the same amount of money for supply of electrical current which would be produced by joining the terminals of these batteries, would not lie here in the Original Side of this Court. That would be the plain result of accepting Mr. Sinha's submission. Mr. Goho criticised this by saying, and I shall quote his words, that battery is goods but when you join the terminal producing electricity, it is no longer goods?

22. When jurisdiction of a Court relates to such general expressions "transactions of merchants and traders", "buying and selling of goods", as in Cl. 4(iv) of the First Schedule of the City Civil Court Act, it is essential that no artificially technical and narrow interpretation should be adopted to cut down the broad connotation of such general expressions.

23. I am conscious of the language of the agreement for electric supply in this case and a copy of which has been annexed to the plaint. These are the standard forms. This agreement for supply of electrical energy does not use the traditional words of buyer and seller. The words used are "consumer" and not 'sale' but 'supply' and the payment is described as payment of energy bills under clause 13 of the agreement. But as I have said that for the purposes of construing the jurisdiction of this Court under clause 4(iv) of the First Schedule of the City Civil Court Act I am satisfied that the word "goods" is used there in its broad, plain and ordinary connotation without the subtlety or artificiality that electricity is energy and not matter. The language, "consumer" or "supply" is the usual language for supply of electricity. That does not make it inconsistent with the sale of electricity. Even in economics the word "consumed" or "consumer" is used in respect of many goods irrespective of the fact whether they represent energy or not. A point was made by Mr. Sinha that this was not a sale of goods in the sense that the buyer or the consumer got the goods for all purposes of sale, but were entitled to use the electrical energy supplied by the plaintiff at the particular colliery or at the defendant's precincts. That again is not in my view inconsistent with the sale of goods or with the sale of electricity as goods. Mr. Sinha also argued that by purchase of this electrical current the consumer did not become the absolute owner in the sense that he could not divert the goods or the electric current to somebody else. Even so that would still make it a sale of goods for there are many conditions of sale in these days for goods purchased which cannot be sold or sold under certain limitations. These considerations cannot decisively determine the effect and meaning of the word "goods" in clause 4(iv) of the First Schedule of the City Civil Court Act for purposes of jurisdiction. But on this agreement for supply of electricity in this suit Mr. Sinha faces insuperable difficulties. This agreement is certainly a "mercantile document" within the meaning of Cl 4(iv) of the First Schedule of the City Civil Court Act, for it is a document between merchants and traders, for supply of electricity at the business of Colliery of the defendant. All these questions which Mr. Sinha has raised on this agreement involve the construction, interpretation and meaning of words and clauses of the mercantile documents. Therefore this suit also comes within the jurisdiction of this High Court under the meaning of the expression, "construction of mercantile documents" used in clause

4(iv) of the First Schedule of the City Civil Court Act.

24. In conclusion I will refer to two English authorities. In the Thirteenth Edition of Chalmers' Sale of Goods, 1893 at page 183 there is an observation on which Mr. Sinha has naturally relied and that observation is in these terms:—

"Gas, water, electricity may be the subjects of larceny, but it is doubtful to what extent they are 'goods' for the purposes of this Act."

Now this comment does not advance Mr. Sinha's case any further. We have already noticed this view before. Except expressing doubt it does not go beyond to determine the point. We have noticed the English decisions also on this point. But what is necessary to notice is that the scheme of the definition of 'goods' in the English Sale of Goods Act as contained in Sections 5, 6 and 7 and section 62 of the English Sale of Goods Act is different. There under Section 62, for instance, goods include all chattels personal, excluding no doubt things in action and money. Here under section 2 (7) of the Indian Sale of Goods Act goods "means every kind of moveable property other than actionable claims and money". They are not therefore confined to personal chattels. The context and the expressions are entirely different in the English Act. It would therefore be wrong in my view to import English doubts as representing the law on the Indian statute. So far as I see that even in England nobody has yet said and decided that electricity is not goods. Reference was made to the decision in *Read v. Croydon Corporation*, (1938) 4 All ER 631 at page 647 where water appears to have been held to be goods and a similar argument that the contract there to supply water was a contract for services was repelled. The essence, however, of that decision was that it was decided on the basis of the relationship between a local authority supplying water and the rate-payer and not on the basis of a contract between parties to a contract for the sale of goods or for services. The claim there arose out of a statutory duty.

25. In the view that I have taken and for the reasons recorded above, I answer the issue in the affirmative and hold that this Court has jurisdiction to try this suit. I hold that electricity is goods within the meaning of clause 4(iv) of the First Schedule of the City Civil Court Act.

26. It follows therefore that there will be a decree for the amount claimed with interim interest and interest on judgment at 6 per cent per annum and costs.

Order accordingly.

AIR 1970 CALCUTTA 81 (V 57 C 9)

N. C. TALUKDAR, J.

Supriyo Sarkar. Accused-Petitioner v. Sunil Ranjan Sarkar, Complainant-Opp. Party.

Criminal Revn. No. 208 of 1969, D/- 9-6-1969.

Criminal P. C. (1898), S. 185(1) and (2)
 —Fields of consideration under sub-section (1) and sub-section (2) are different
 —Grounds of earlier commencement and of general convenience can be considered in case falling under sub-section (1)
 —Presence of additional accused in one proceeding has no bearing — (Civil P. C. (1908), Pre. — Interpretation of Statutes — Redundancy to be ruled out).

The provisions contained in S. 185(1) of Criminal P. C. do not fetter in any way the discretion of the High Court by enjoining any condition precedent for deciding as to in which of the two or more courts, subordinate to the same High Court, the enquiry or trial shall proceed. In sub-section (2) of the said section, however, the sine qua non for such interference is as to where the proceedings "were first commenced". The Legislature could not have intended placing such a fetter on the court's discretion under sub-section (1). The canons of interpretation of statute enjoin that some meaning and effect must be given to the significant absence of the expression "were first commenced" in sub-section (1) and the specific presence thereof in sub-section (2) of Section 185 of the Criminal P. C. The principles of interpretation of statutes rule out redundancy.

(Para 4)

The dominant consideration of an earlier commencement has been incorporated in sub-section (2) because it refers to a different state of circumstances. Where the two or more subordinate courts taking cognizance of the same offence are not subordinate to the same High Court and therefore to eliminate possible confusion and conflict, the principle of earlier commencement has been enjoined as the proper criterion, irrespective of any ground of general convenience or of any other sufficient reason, for ultimately determining as to which of the two High Courts would direct the trial of such offender to be held in any court subordinate to it. The same is not, however, the position as enjoined under sub-section (1) of Section 185 of the Code where the two Courts concerned are subordinate to the same High Court. The field of consideration is therefore wider and includes not only the ground of earlier commencement but also the ground of general convenience and any other sufficient reason, thereby not whittling down in any way

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the discretion of the High Court in deciding as to which of the two subordinate courts shall enquire into or try the offence. (Paras 4 and 5)

Further, upon ultimate analysis, the question of general convenience does not include the complainant and can only refer to the accused in such proceedings and the same again must depend on the facts of each case. Hence, where one of the accused applied for dropping of proceedings in court 'A' which was opposed not by the co-accused but by the complainant, held, that the opposition by the complainant could not be upheld.

(Para 5)

It was further held that the fact that in the proceedings pending before one of the courts, there were other persons proceeded against, would not make any difference and had no bearing upon the point for consideration, under Section 185 (1). AIR 1917 Cal 137 (FB); AIR 1920 PC 181 at p. 186 and AIR 1964 SC 766 at p. 772, Foll.

(Para 6)

Cases Referred: Chronological Paras
 (1964) AIR 1964 SC 766 (V 51)=

(1964) 1 SCJ 121, Ghanshyamdas v. Regional Assistant Commr. of Sales Tax, Nagpur

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(1920) AIR 1920 PC 181 (V 7), Quebec Railways Light, Heat and Power Co. Ltd. v. Vandry

4

(1917) AIR 1917 Cal 137 (V 4)=21 Cal WN 320 (FB), Charu Chandra Majumdar v. Emperor

3, 5

Prasun Chandra Ghosh, Birendra Nath Banerjee, for Petitioner; Manoranjan Das, Dipankar Ghosal, Rabiranjana Roy, Gopal Chandra Ghosh, for Respondent No. 1; Dipak Kumar Sengupta, for State.

ORDER :— This Rule arises out of an order dated the 7th February, 1969 passed by Shri S. C. Roy, Additional Chief Presidency Magistrate, Calcutta, in case No. C/833 of 1968, upon an application filed by the accused-petitioner Shri Supriya Sarkar for dropping the prosecution, holding that the point raised in the said petition can only be decided by the High Court under Section 185(1) of the Code of Criminal Procedure and directing the accused-petitioner to move the said Court for the necessary decision.

2. The facts leading on to the present Rule can be put in a short compass. A novel named "Patak", written in Bengali by the accused no. 1, Shri Samresh Basu, was printed and published by the present petitioner, Shri Supriya Sarkar in the Puja Number of the "Amrita" in the year 1375 B. S. In course of reading the said novel, the complaints concerned were of the view that the said novel contained several vulgar, indecent and obscene passages tending to corrupt the minds and morals of the young and to degrade the culture of the society. One

such complaint was lodged under Secs. 292/293 I. P. C. against two accused persons viz., Shri Samaresh Basu, the writer and Shri Supriya Sarkar, the printer and publisher of the magazine, by Shri Sunil Ranjan Sarkar, Advocate, who described himself as a litterateur and a lover of Bengali Literature, on 14-12-68 in the court of the Additional Chief Presidency Magistrate, Calcutta, being case No. C/833 of 1968. The case was sent for judicial enquiry and on a perusal of the same, summons was issued on the 6th January, 1969, by the learned Additional Chief Presidency Magistrate, Calcutta against the accused no. 1, Shri Samaresh Basu under S. 292, I. P. C. and the accused no. 2, Shri Supriya Sarkar, the present petitioner, under Ss. 292 and 293, I. P. C. Another complaint, being case no. C. 3409 of 1968 was also filed in the Court of the Police Magistrate, Alipore, 24 parganas by Sri Deb Kumar Ghosh, Secretary, Nityananda Library, Chetla and a member of the Cine Film Reform Association of India against the above-mentioned two accused and also Shri Tushar Kanti Ghosh the Editor of the "Amrita" under Sections 292 and 293 I. P. C. read with Section 114, I. P. C. relating to the same novel called "Patak". The Police Magistrate, Alipore, examined the complainants on solemn affirmation and summoned all the three accused persons under Secs. 292/293 I. P. C. Both the cases thereafter have been pending respectively before the learned Additional Chief Presidency Magistrate, Calcutta and the learned Police Magistrate, Alipore, 24-Parganas, two subordinate courts under the jurisdiction of the same High Court. An application was filed on 25-1-69 by the co-accused Shri Supriya Sarkar in the case pending before the learned Additional Chief Presidency Magistrate, Calcutta, submitting inter alia that the offences alleged in both the cases being identical, there cannot be two separate proceedings over the same issue and accordingly the proceedings pending before the learned Additional Chief Presidency Magistrate, Calcutta, may be dropped. An objection thereto was made on behalf of the complainant opposite-party no. 1, Shri Sunil Ranjan Sarkar. After hearing both the parties the learned Additional Chief Presidency Magistrate, Calcutta, held by his order dated the 7th February 1969 that the continuance of the two different proceedings in the two different Courts over the same offence may lead on to double jeopardy under Art. 20(2) of the Constitution of India and as the point involved in the petition can only be decided by the High Court, he directed the accused in the proceeding pending before him to move the Hon'ble High Court for a decision of the point under Section 185(1) of

the Code of Criminal Procedure and in that view he adjourned the case to 25-3-69 for further orders. An application for revision was accordingly moved on the 10th March, 1969 and the present Rule was obtained by the accused-petitioner. After the matter was heard in part it transpired that Shri Samaresh Basu, the accused no. 1 in the case, was not added as a party by the petitioner and on the prayer of the learned Advocate appearing on behalf of the petitioner, and in the interests of justice, the said accused was directed to be added as the opposite-party no. 2. Shri Samaresh Basu, however, did not ultimately appear though he was served upon.

3. Mr. Prasun Chandra Ghosh, Advocate (with Mr. Birendra Nath Banerjee, Advocate) appearing on behalf of the accused no. 2, the petitioner, has made a two-fold submission. The first contention of Mr. Ghosh is that in view of the pendency of two separate proceedings over the same offence in two different courts, the same would only lead on to double jeopardy and as such the proceedings pending in the court of the Additional Chief Presidency Magistrate, Calcutta, as prayed for, by the petitioner, should be dropped. The second contention of Mr. Ghosh is that the dominant consideration for interference under Section 185(1) of the Code of Criminal Procedure is the ground of convenience of the accused and not the factum of earlier commencement as enjoined under Section 185(2) of the said Code. In this context and in support of his contention, Mr. Ghosh relied on the enunciation made in Art. 705 in Kenny's Outlines of Criminal Law (19th Edn.) as also on the case of Charu Chandra Majumdar v. Emperor, reported in 21 Cal WN 320 = (AIR 1917 Cal 137) (FB). Mr. Monoranjan Das, Advocate (with Messrs. Dipankar Ghosal, Rabiranjan Roy, Gopal Chandra Ghosh, Advocates) appeared on behalf of the complainant opposite-party no. 1 after the arguments were heard in part but in the interests of justice, I adjourned the case to enable Mr. Das to make his submissions. An affidavit-in-opposition was also filed on behalf of the opposite-party no. 1 and was kept on the record. Mr. Das contended that the question of convenience of the accused is immaterial and the sine qua non for an interference under Section 185(1) of the Code of Criminal Procedure is as to which proceedings 'were first commenced' as enjoined under Section 185(2) of the Code of Criminal Procedure. The question, according to Mr. Das, is one of law and relates to the interpretation of Section 185(1) of the Code of Criminal Procedure. In this context Mr. Das further submitted that the proceedings before the learned Additional

Chief Presidency Magistrate, Calcutta, were started first as cognizance was taken on the 14th December, 1968 whereas in the case before the learned Police Magistrate at Alipore such cognizance was taken on the 18th December, 1968. Mr. Das also contended that the number of accused persons is not the determining factor for holding as to in which of the two courts, subordinate to the same High Court, an enquiry or trial for the offence shall go on. Mr. Dipak Kumar Sengupta, Advocate, appearing on behalf of the State has supported the Rule and has contended that the concept of an earlier commencement as enjoined under Section 185(2) of the Code of Criminal Procedure cannot be imported into Section 185(1) for the purpose of determining as to in which of the two subordinate courts, the enquiry or trial should go on. Mr. Sengupta further contended that it should not be overlooked that in the Alipore case there are three accused persons and not two as in the proceedings pending before the learned Additional Chief Presidency Magistrate, Calcutta and that the question being one of convenience of the accused, the proceedings in Alipore should continue as prayed for by one of the accused himself, and not objected to by the other.

4. Having heard the learned Advocates appearing on behalf of the respective parties and having considered the materials on the record, I will now proceed to determine the point at issue in the light of the same. The point involved in this Rule is of some importance and relates to the interpretation of Section 185 (1) of the Code of Criminal Procedure. It is pertinent in this context to refer to the language of sub-section (1) of Section 185 of the Code which runs as follows: "whenever a question arises as to which of two or more courts subordinate to the same High Court ought to inquire into or try any offence it shall be decided by that High Court." The provisions of sub-section (2) of the said section would also be relevant in this connection. It lays down that "where two or more courts not subordinate to the same High Court have taken cognizance of the same offence the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced may direct trial of such offender to be held in any court subordinate to it and if it so decides altogether proceedings against such persons in respect of such offence shall be discontinued." It will appear therefore that the provisions contained in Section 185(1) of the Code of Criminal Procedure do not fetter in any way the discretion of the High Court by enjoining any condition precedent for deciding as to in which of the two or more courts, sub-

ordinate to the same High Court, the enquiry or trial shall proceed. In sub-section (2) of the said section, however, the sine qua non for such interference is as to where the proceedings "were first commenced". The point for determination therefore is whether the concept of an earlier commencement as enjoined in sub-section (2) can be imported into sub-section (1) of Section 185 of the Code of Criminal Procedure, which is otherwise silent on the same. If it can be so imported and be deemed to be the only ground for interference thereunder, it is the Presidency Magistrate's Court, wherein the proceedings were first commenced, that should be the court where the proceedings should continue in preference to the other proceedings pending in the court of the learned Police Magistrate at Alipore. On an interpretation of the relevant provisions of the Code, I, however, hold that it is not so and that it had never been the intention of the legislature that it should be so. The canons of interpretation of statute enjoin that some meaning and effect must be given to the significant absence of the expression "were first commenced" in sub-section (1) and the specific presence thereof in sub-section (2) of Section 185 of the Code of Criminal Procedure. The principles of interpretation of statutes rule out redundancy, and as was observed by Lord Sumner in the case of Quebec Railways, Light, Heat and Power Co. Ltd. v. Vandy, AIR 1920 PC 181 at p. 186 that "effect must be given if possible to all the words used, for the legislature is deemed not to waste its words or to say anything in vain." Mr. Justice Subbarao (as His Lordship then was) also observed in the case of Ghanshyamdas v. Regional Assistant Commissioner of Sales Tax, Nagpur, AIR 1964 SC 766 at p. 772 that "A construction which would attribute redundancy to a legislature shall not be accepted except for compelling reasons." I respectfully agree with the same and I hold that the dominant consideration of an earlier commencement has been incorporated in sub-section (2) of Section 185 of the Code of Criminal Procedure for good reasons because the said sub-section refers to a different state of circumstances, where the two or more subordinate courts taking cognizance of the same offence are not subordinate to the same High Court and therefore to eliminate possible confusion and conflict, the principle of earlier commencement has been enjoined as the proper criterion, irrespective of any ground of general convenience or of any other sufficient reason, for ultimately determining as to which of the two High Courts would direct the trial of such offender to be held in any court subordinate to it. The same is not, however,

the position as enjoined under sub-section (1) of Section 185 of the Code where the two courts concerned are subordinate to the same High Court. The field of consideration is therefore wider and includes not only the ground of earlier commencement but also the ground of general convenience and any other sufficient reason thereby not whittling down in any way the discretion of the High Court in deciding as to which of the two subordinate courts shall enquire into or try the offence. If the legislature wanted to lay down that the sole ground for interference under Section 185(1) of the Code of Criminal Procedure is merely that of an earlier commencement of the proceedings concerned, it could have said so in express words. In view of the same and in consonance to the rules of interpretation of statute, a true and proper effect must be given to the provisions as incorporated in sub-section (1) to Section 185 of the Code. In my view the discretion conferred under the said sub-section is unfettered and untrammelled by any consideration of an earlier commencement only. The factum of earlier commencement may be one such consideration but not the only consideration or an inflexible consideration for exercising the discretion of the court conferred under Section 185(1) of the Code of Criminal Procedure. In that context undoubtedly the question of convenience of the parties may be a material consideration, the nature of the case and the facts thereof will also be another yard-stick for exercising the said discretion; and last but not the least, sufficient reason is also one of the criteria for such determination.

5. So far as the ground of convenience of the parties is concerned, there is no question however, of the complainant being inconvenienced because the complainants are different in the two different proceedings and as such, whoever may be the complainant will not be inconvenienced in any way wherever the proceedings may ultimately take place. Upon ultimate analysis the question of general convenience does not include the complainant and can only relate to the accused in such proceedings and the same again must depend on the facts of each case. In the instant case one of the accused is the petitioner and on his ground of convenience and prejudice he has prayed for the proceedings at Presidency Magistrate's Court, Calcutta to be dropped. The co-accused, who has been made a party, has not appeared to object but it is only the complainant who had objected to the prayer in the court below and has reiterated the said objection in this Court. In this connection Mr. Ghosh appearing on behalf of the accused-petitioner, Shri Supriya Sarkar has referred

to Art. 705 in Kenny's Outlines of Criminal Law (19th Edn.). The said article refers to venue. It has been observed therein that "At common law an offence can only be tried by the court within whose jurisdiction it (or a part of it) was committed, but by Section 11 of the Criminal Justice Act, 1925, as modified by the Magistrates Courts Act, 1952, S. 2(4), it is provided that a person charged with any indictable offence may be proceeded against, indicted, tried and punished in any place in which he was apprehended, or is in custody, or has appeared to a summons, on that same charge, just as if the offence had been committed there; unless it appears to the examining justices that the accused would suffer hardship if he were indicted and tried in such place." A further reference in this connection may be made to the case of 21 CWN 320=(AIR 1917 Cal 137) (F.B). It is undoubtedly true that the said case was decided in the context of the old Act before amendment of Act 18 of 1923, which not only amended sub-section (1) of Section 185 but also added sub-section (2) to the said section to set at rest the conflict in decisions between the Calcutta and the Madras High Courts. But the principles laid down therein relating to the ground of general convenience would hold good. The majority of the Full Bench held that Section 185 is not restricted to cases in which there is doubt as to whether one court or another has jurisdiction but includes cases in which the doubt is on the point where the choice between the two courts both of which have jurisdiction should be decided on the ground of general convenience. I respectfully agree with the observations made by the Full Bench and I hold that the ground of convenience is also one of the factors which should determine ultimately as to in which of the two or more courts subordinate to the same High Court, the offence shall be enquired into or tried. I uphold therefore the contentions raised in this behalf by Mr. Prasun Chandra Ghosh.

6. Before I part with the case, I must refer to another submission that was made on behalf of the petitioner viz. that in the proceedings pending at Alipore there are three accused persons and as such for a proper determination, the said proceedings should be allowed to continue. It was also prayed for by Mr. Das on behalf of the opposite-party no. 1 that if it be so necessary, he may be permitted to add the name of the third accused in the proceedings pending before the learned Additional Chief Presidency Magistrate, Calcutta. The learned Additional Chief Presidency Magistrate, Calcutta has rightly held that the inclusion of a third accused in the proceedings at Alipore does not make any difference and has no

bearing upon the point for consideration under Section 185(1) of the Code of Criminal Procedure. I agree with the said finding and this contention accordingly fails.

7. In the result, I make the Rule absolute; and I direct that, of the two courts subordinate to this court, Shri M. B. Mukherjee, Police Magistrate, Alipore shall try the case pending against the three accused persons under Ss. 292/293 I. P. C., being case No. C 3409 of 1968, expeditiously and in accordance with law.

Petition allowed.

AIR 1970 CALCUTTA 85 (V 57 C 10)

MASUD, J.

Bratindra Nath Dey, Petitioner v. Sukumar Ch. Dey, Respondent.

Testamentary Suit No. 1 of 1967, D/- 21-2-1969.

(A) Succession Act (1925), S. 74 — Un-natural provision in will — It is relevant factor in considering validity or execution of will or in determining testamentary capacity of testator where undue influence is alleged or due execution of will is challenged. (Para 7)

(B) Succession Act (1925), Ss. 300(2), 57 — Notification under when necessary. AIR 1950 Cal 377, Not foll.

Under S. 300(2) notification is required only when the High Court exercises its concurrent jurisdiction in a case other than the cases mentioned in S. 57 of the Act. S. 57 of the Act refers to cases of Wills made by a Hindu on or after first day of September 1870 within West Bengal and also other Wills made by a Hindu which are not mentioned under the two groups of wills mentioned in S. 57(a) and (b): (1910) ILR 37 Cal 224 & AIR 1959 Mys 83 (FB), Rel. on; AIR 1950 Cal 377, Not foll. (Para 10)

Cases Referred: Chronological Paras

- (1961) AIR 1961 J & K 61 (V 48),
Tilak Raj v. Prithipal Singh 9
- (1959) AIR 1959 Mys 83 (V 46) =
ILR (1957) Mys 457 (FB), In re
Gordon Frederic Muirhead 10
- (1950) AIR 1950 Cal 377 (V 37) =
54 Cal W. N. - 225, Maniklal v.
Hiralal Shaw 10
- (1946) AIR 1946 Oudh 73 (V 33) =
1945 Oudh W. N. 316, Frederick
George Stimpson v. E. M.
Bennett 10
- (1936) AIR 1936 P. C. 60 (V 23)
= 40 Cal WN 257, Bhojraj v.
Sita Ram 5

- (1931) AIR 1931 Cal 458 (V 18) =
ILR 58 Cal 418, Ram Prasad
Chimanlal v. Hazarimull Lalchand 9
- (1929) AIR 1929 Lah 282 (V 16) =
11 Lah LJ 11, Mst. Sobhag Rani
v. Mt. Lado Rani 10
- (1910) ILR 37 Cal 224 = 5 Ind Cas
1003, Nagendra Bala Debi v.
Kashipati Chowdhury 10
- (1894) ILR 21 Cal 279, Umesh
Chandra Biswas v. Rashmohini
Dassi 6
- (1847) 6 Moo P. C. 137 = 13 E. R.
636, Mitchell v. Thomas 6
- Dutt, for Petitioner; Ghosh, for Res-
pondent.

JUDGMENT:— This is an application on behalf of Bratindra Nath Dey, a grandson of the deceased testator for the grant of Letters of Administration to the estate of the deceased. The testator Triguna Charan Dey also known as Joy Chandra Dey died on the 27th of October 1959 at his residence at Dey Para in Chinsura in the district of Hooghly leaving the following persons as his legal heirs and near relations:—

- Sm. Sorojinibala Dassi, widow
- Sri Madhusudan Dey, son
- Sm. Bala Singh, Daughter
- " Parbati Bala Addya, Daughter
- " Lalitabala Dassi, widow of a predeceased son Debi Charan Dey who died on 15-2-57.
- Sri Nirod Baran Dey, grandson of the testator through the said Debi Charan Dey and who died unmarried on 16-7-60.
- Sri Sukumar Chandra Dey, son of the said Debi Charan Dey.
- Sri Dilip Kumar Dey, son of the said Debi Charan Dey.
- Sm. Sandha Dey, minor daughter of the said Debi Charan Dey.
- Sri Golok Behari Dey, minor son of the said Debi Charan Dey.

The said testator executed his will on August 8, 1950 at his residence in Chinsura. The present applicant is the son of Madhusudan Dey, who made this present application on 30th April 1966. The said Sukumar Chandra Dey has lodged caveat and is contesting the present application. The following issues have been settled:—

1. Did the testator have the testamentary capacity at the time of execution of the Will?

2. Has the Court jurisdiction to grant Letters of Administration in this matter?

3. What relief is the petitioner entitled to?

(After discussing the evidence in paras 2 to 4 the judgment proceeded:)

5. Now, taking into consideration the facts and the surrounding circumstances it appears to me that the testator was an unhappy man on account of the fact that his two sons and one daughter were not

normal. The daughter, who had committed suicide must have developed insanity after her marriage, otherwise she would not have been married at all. Be that as it may, there is nothing to show that in August 1950 the testator's physical and mental conditions were such that he was not in a position to understand the contents of the Will. On the contrary the evidence of the doctor is that he was in a position to understand things. Relying on *Bhojraj v. Sita Ram*, AIR 1936 PC 60, it has been argued by Mr. Ghosh, counsel for the respondent, this admission should not be relied upon in the context of other evidence. But there is no evidence on behalf of the respondent or of any witness that the testator had no capacity to understand things in August 1950. The signature in the Will has not been challenged at all. The name was signed by the testator in a clear legible way. Dr. Chatterjee has admitted that there was lapse of sanity and insanity occasionally. The Will was executed in August 1950 and the testator died in 1959. It is not the case of the respondent that during the period between 1950 and 1959 he was insane continuously. Assuming that he was suffering from insanity in 1950, there is no evidence showing that during long nine years he discussed the Will or wanted to change it. His wife has been carefully preserving the said will. If the will would have been unnatural or if the will would have been concocted or if the will would have been executed under some conspiracy, collusion or undue influence, his widow after his death could have destroyed it. As a Hindu widow she would have expressed her views that it was not her husband's intention to give effect to the provisions of the Will. It is true that she as executrix did not apply for grant of the probate, but it should be remembered that the testator died on 27th October, 1959 and she died on 26th August 1961. It is quite possible as suggested by counsel for the petitioner, that she did not take the trouble of taking steps to pay the Estate Duty during the year of mourning. Her decision to preserve the Will shows that she did not consider the Will to have been executed by the testator involuntarily, nor she wanted to have the administration of the estate disturbed during her lifetime. The normal condition of the testator at the time of the execution of the Will has also been confirmed by the attesting witness and also the present applicant.

6. Relying on *Umesh Chandra Biswas v. Rashmohini Dassi*, (1894) ILR 21 Cal 279, Mr. Ghosh has argued that due execution of a Will implies not only that the testator must be in such a state of mind as to know the execution of the document

as his Will but that he knew and approved the contents of the Will. According to him the petitioner has failed to prove that the alleged Will is the testator's Will and that he knew the contents of the Will. In my view this case is not of much assistance to the respondent. As stated earlier, there is evidence of the attesting witness and also the propounder of the Will and Dr. Chatterjee to the effect that in 1950 the testator did not suffer from any physical or mental ailment. There is also evidence that the attesting witness has signed his name in the Will in presence of the testator and other attesting witnesses. The signature of the Will has not been challenged as a forged one. The execution of the Will also has not been raised as an issue by the respondent. Although a feeble attempt has been made that the execution was done under the undue influence of the petitioner no particulars have been stated in the affidavit of the respondent to raise the plea of undue influence. Besides the petitioner was only 12 years old at the time of the execution of the Will. There is no suggestion in the cross-examination that the Will to which the testator put his signature was not the testator's Will. In the absence of any positive evidence on the part of the respondent it is not possible for me to hold that the testator did not know the contents of his Will. Further, the facts of the said decision in (1894) ILR 21 Cal 279 (*supra*) are distinguishable. There in the grounds of objection execution of the Will, physical and mental capacity of the testator and improbability of execution have been mentioned and only one general issue was raised which is as follows:—

"Was the Will duly executed by the testator according to law."

In this decision the High Court has relied upon an observation of Judicial Committee in *Mitchell v. Thomas*, (1847) 6 Moo PC 150 where the learned Judge has made the following observations:—

"This of course involves in the proposition that the testator knew and approved of the contents of the instrument, the proposition that he was a free and capable testator, since knowledge implies his possession of the capacity without which he could not know the contents of the Will, and approval cannot be real and complete without a free exercise of the Will."

The learned Judges of the High Court in the said decision have stated that in ordinary cases the execution of a Will by a competent testator raises the presumption that he knew and approved the contents of the Will, but where the mental capacity of the testator is challenged, the Court ought to find whether upon the

evidence the testator was of sound disposing mind and did know and approve the contents of the Will. The learned Judges there have allowed the appeal inasmuch as that although there was evidence to establish that the testator did know and approve of the contents of the Will the learned District Judge had not pronounced his opinion upon it. Accordingly, the High Court was of the opinion that the learned District Judge was wrong in not expressing his opinion on the point. But instead of remanding the case they examined the evidence themselves and came to the following conclusion:—

"Upon the evidence I am wholly unable to say that the plaintiff has given satisfactory proof that the Will propounded is that of a free and capable testator, or that there is any satisfactory evidence that Mohim (testator) knew and approved the contents of the Will."

This observation shows that the learned judges did not find any satisfactory proof that the Will executed was that of a free and capable testator. In the present case I am fully satisfied for reasons stated above that the testator signed the Will as a normal person and that he must be presumed to have the knowledge of the contents of the Will, particularly because there is no attempt for rebuttal of the said presumption nor has the execution of the Will been challenged before me. It may be added here that the counsel for the respondent has made various suggestions with respect to the circumstances under which the Will was executed. The respondent was a very young boy of less than 12 years old and he could not have any personal knowledge of those facts although he has verified in his affidavit in the present proceeding the truth of those statements on the basis of his knowledge. The respondent or his mother or any other member of the family has not been called as a witness to disprove the petitioner's case.

7. It has also been faintly suggested by Mr. Ghosh that the Will is an unnatural Will and injustice has been done to his client. It is true that the unnatural provision of a Will may be a relevant factor in considering the validity or execution of a Will or in determining the testamentary capacity of the testator. But in the absence of any issue challenging the validity of the Will on the grounds of undue influence or due execution such provision cannot be a determining factor. In any event the provisions of the Will do not appear to me to be unnatural. The residential house has been allotted to the petitioner in the Will whereas certain shops and a vacant plot of land where the testator contemplated to erect a resi-

dential house have been given to the heirs of his predeceased son Debi Charan Dey. Further the moveables have been bequeathed in the Will in equal shares to Madhu Sudan Dey and the respondents group.

8. For all these reasons I hold that Triguna Charan Dey had the testamentary capacity at the time of the execution of the Will and, as such, the issue is decided against the respondent.

Issue No. 2.

(a) The respondent has not raised any plea of jurisdiction in his affidavit, and, Mr. Dutt, on behalf of the petitioner, has submitted that this issue should not have been raised. At the time when the issue was raised Mr. Dutt did not object. But relying on Ram Prasad Chimanlal v. Hazarimull Lalchand, AIR 1931 Cal 458, and Tilak Raj v. Prithipal Singh, AIR 1961 J & K 61 Mr. Ghosh has strenuously argued that under O. VII, R. 1 of the Code of Civil Procedure it was incumbent upon the petitioner to state in the petition the facts and circumstances under which this Hon'ble Court has jurisdiction to hear the matter. It is in that context Mr. Dutt has submitted that the plea of jurisdiction should not be decided by me. As plea of jurisdiction has been argued by counsel for both the parties and as in the present case it is a pure question of law, I, however, feel that question of jurisdiction should be decided by me.

10. Mr. Ghosh has argued that the testator died in Chinsura leaving all his properties there and, as such, the Calcutta High Court has no jurisdiction in the matter. He, at a later stage, has conceded that S. 300(1) of the Indian Succession Act, 1925 gives a concurrent jurisdiction to the Calcutta High Court and that this Hon'ble Court can deal with this matter although no part of the property of the deceased has been left by him within the original jurisdiction of this Hon'ble Court. He, however, has stated that the petitioner should have stated that the necessary notification required under S. 300(2) of the Act should have been mentioned to invoke the concurrent jurisdiction of this Hon'ble Court. Reliance has been placed by Mr. Dutt in Maniklal Shah v. Hiralal Shaw, AIR 1950 Cal 377 where J. P. Mitter, J. has come to the conclusion that the necessary notification made under Probate and Administration Act of 1881 is a sufficient compliance with the requirement of the notification under S. 300(2) of the Indian Succession Act. I, however, told Mr. Dutt that I am not satisfied with the reasonings of the conclusion arrived at by the learned Judge. On that view, Mr. Ghosh has also reiterated my objection that a notification under Probate & Administration Act of 1881 cannot be treated as a

notification under S. 300(2) of the Indian Succession Act, 1925, which has repealed the Probate & Administration Act of 1881. Apart from the effect of S. 6 of the General Clauses Act, 1897 and that of Article 225 of the Constitution read with clause 34 of the Letters Patent, in opinion, no notification is necessary under S. 300(2) of the Act in the present case. It appears to me that under S. 300(2) notification is required only when the High Court exercises its concurrent jurisdiction in a case other than the cases mentioned in Section 57 of the Act. Section 57 of the Act refers to cases of Wills made by a Hindu on or after 1st day of September 1870 within West Bengal and also other Wills made by a Hindu which are not mentioned under the two groups of Wills mentioned in S. 57(a) & (b). The present Will admittedly is a Will which comes under the cases of S. 57(a) & (c) and in the premises no notification is necessary to invoke the concurrent jurisdiction of this Hon'ble Court. Reliance may also be placed on *Nagendra Bala Debi v. Kashipati Chowdhury*, (1910) ILR 37 Cal 224; AIR 1955 Cal 377 (supra) and *In re Gordon Frederic Muirhead*, AIR 1959 Mys 83. In any event, Mr. Dutt has referred me to *Mst. Sobhag Rani v. Mt. Lado Rani*, AIR 1929 Lah 282, and *Frederick George Stimpson v. E. M. Bennett*, AIR 1946 Oudh 73 in support of his contention that the Court has jurisdiction inasmuch as the G. P. Notes and the dividends of the shares of the companies having their registered offices in Calcutta are payable to the testator or his heirs within the jurisdiction of the Hon'ble High Court. As I have already held that this Court has jurisdiction under S. 300 of the Indian Succession Act, 1925 it is not necessary for me to decide this point. In the premises I decide the issue in favour of the petitioner.

Issue No. 3.

11. I hold for the reasons stated above that there will be order in terms of prayer 'A'. The petitioner's cost of the application will come out of the estate of the testator. Respondent shall bear his own costs.

Order accordingly

AIR 1970 CALCUTTA 88 (V 57 C 11)

A. K. DAS AND K. K. MITRA, JJ.

Atul Chandra Pal and others, Accused-Petitioners v. The State, Opposite Party.

Criminal Revn. Case No. 999 of 1966, D/- 14-1-1969.

(A) Essential Commodities Act (1955), S. 7(1)(a)(ii) — Rice (Eastern Zone) Move-

DM/JM/B878/69/JHS/B

ment Control Order (1959), S. 4 — Transport of rice from place in border area to place in Eastern Zone outside border area is not prohibited under S. 4 of 1959 Order — Transport — What is.

Transport of rice from a place in the border area to a place in the Eastern Zone outside the border area is not prohibited under S. 4 of the Rice (Eastern Zone) Movement Control Order, 1959. S. 4 speaks of transporting from any place in the border area to any other in that area and this involves the question of destination. The use of the word transport connotes movement from one place to another and the mere fact that the normal route is along the border area does not either indicate that it was transported to another place in the same area, while the known destination is elsewhere, that is, a place in the Eastern Zone outside the border area. To hold otherwise is to hold that goods on transit are transported to every point between the starting point and its destination.

(Paras 5 and 6)

(B) Penal Code (1860), S. 40 — Mens rea — When not essential for conviction.

The well established rule is that unless a statute clearly or by necessary implication rules out mens rea as a constituent part of crime, the defendant could not be held guilty of an offence under a criminal law unless he has guilty mind.

(Para 9)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 43 (V 53)=1966

Cri LJ 71, *Nathulal v. State of M. P.*

9

(1961) AIR 1961 Cal 240 (V 48)=

1961 (1) Cri LJ 488, *Madanlal Arora v. State*

9

S. S. Mukherjee and K. K. Mukherjee, for Petitioners; F. M. Sanyal, for Opposite Party.

DAS, J.:— This is a revisional application against an order of conviction under Section 7(1)(a)(ii) of Act X of 1955. The petitioners were sentenced to R. I. for three months each and the rice seized was confiscated. There was an appeal against the order but the learned Sessions Judge dismissed the appeal.

2. The facts leading to the prosecution are as follows :—

On April 5, 1964 the petitioners were detected moving with six cart-loads of rice in a field in mouza Laka within the five mile border area between West Bengal and Bihar. The Cordoning Officer intercepted the carts which were being driven by petitioners 2-5, who told that the rice belonged to petitioner no. 1, who was also moving with the carts. The carts with the men were taken to the police Station where a written complaint was filed by the Inspector. Investigation start-

ed and charge-sheet was submitted against parties.

3. Defence was a plea of innocence and the petitioners contended that rice was being taken to Burdwan in West Bengal and not to Bihar.

4. The learned Magistrate held on the evidence that rice was being smuggled to Bihar at that unearthly hour along routes seldom used by the villagers. The learned Sessions Judge held that

"it is an offence if any person transports rice to any place within the area of five miles of Bihar Border. The evidence is that the accused persons were found carrying rice within 2½ miles of the border area "without permit".

He therefore dismissed the appeal.

5. Admittedly, the parties had no license or permit for movement of paddy or rice. Sec. 4 of the Rice (Eastern Zone) Movement Control Order 1959 reads as follows:

No person shall transport, attempt to transport or abet the transport of rice—
(a) to any place in the border area from any place in the Eastern Zone outside that area; or

(b) from any place in the border area to any other place in that area; except under and in accordance with a permit issued by the State Government or any Officer authorised by that Government in this behalf.

This provision speaks of restrictions on transport of rice to or within the border area. Border area means the area falling within a five mile belt all along the border of the Eastern Zone which means the territory comprising the States of Orissa and West Bengal. Section 4 prohibits transport of rice,

(I) to any place within the border area from any place in the Eastern Zone outside that area, or

(II) from any place in the border area to any other place in that area without license or permit.

The prohibition, therefore, does not relate to transport from any place in the border area to any area in the Eastern Zone outside the border area. The defence version is that they were transporting the rice to Banduang which is within the Eastern Zone but outside the border area. Mr. Palit at one stage argued that Banduang is within the border area but there is no evidence to that effect. Transportation to Banduang from any place in the border area is not prohibited, and therefore no offence was committed.

6. Mr. Palit next argued that the rice in carts were intercepted at village Laka within border area and it was being brought from village Sindri within the same area. The movement was therefore from one place in the border area to another place in the same area where it was

intercepted. Section 4, however, speaks of transporting from any place in the border area to any other place in that area and this involves the question of destination. According to defence, it was being transported to Banduang and even prosecution witnesses conceded that it was the normal route to Banduang. The use of the word 'transport' in our view connotes movement from one place to another and the mere fact that the normal route is along the border area does not either indicate that it was transported to another place in the same area, while the known destination is elsewhere. To hold otherwise is to hold that goods on transit are transported to every point between the starting point and its destination.

7. Mr. Palit drew our attention to definition of the word 'transport' in Cl. (f) of Section 2 but it speaks of mode of transport merely obviously to include manual movement by individuals.

8. Prosecution failed to show by evidence that the parties either transported or attempted or abetted the transport to any other place in the border area and therefore the conviction cannot be justified. The idea is to prevent smuggling outside the Eastern Zone and not against transport to other parts of the Eastern Zone outside the border area and the manner in which the carts were intercepted did not satisfy the requirements for a successful prosecution.

9. Mr. Mukherjee, learned Advocate for the petitioner also challenged the learned Judge's finding regarding mens rea. The learned Judge held on the authenticity of a decision of this Court reported in AIR 1961 Cal 240 that mens rea is not necessary for a conviction under Sec. 7 of the Essential Commodities Act. This question was considered by the Supreme Court in a decision reported in 1966 Cr. LJ 71=(AIR 1966 SC 43), Nathulal v. State of M. P., where it was held that the mere fact that the object of the statute is to promote social welfare activity or to eradicate a grave social evil is not by itself decisive to exclude mens rea. Only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated that mens rea may, by necessary implication, be excluded from a statute. The nature of the mens rea that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof. The well established rule is that unless a statute clearly or by necessary implication rules out mens rea as a constituent part of crime, the defendant could not be held guilty of an offence under a criminal law unless he has guilty mind. The cartmen, petitioners 2-6 are hired labourers and had not necessarily

a guilty knowledge as transporting with licence or permit is permissible.

10. We have, however, already seen that the prosecution has failed to prove that the rice was being transported from a place in the border area to another place within such area and no offence was therefore committed.

11. The petition is, therefore, allowed and the Rule is made absolute. The conviction and the sentence passed against petitioners are set aside and they are acquitted. They are discharged from bail bond.

12. K. K. MITRA, J.:— I agree.

Petition allowed.

AIR 1970 CALCUTTA 90 (V 57 C 12)

D. BASU, J.

Jatadhar Mitra and others, Petitioners v. State of West Bengal and others, Respondents.

C. R. Nos. 295 (W) of 1962 and 1140 (W) of 1967, D/- 3-6-1969.

(A) Land Acquisition Act (1894), S. 6 (3) — 'Public purpose' — Declaration under S. 6, is conclusive — Validity of proceedings can still be challenged — Grounds stated.

Though under S. 6, sub-section (3) of the Land Acquisition Act, a declaration made under S. 6(1) is conclusive evidence that the land is required for a public purpose, the validity of the entire proceedings can still be challenged on the following grounds: (a) that the proceedings are colourable or in fraud of the statutory power, the real object being to acquire the lands for some 'private purpose'; (b) that no part of the compensation money is payable by the local authority; and (c) that to a case which attracts 'company provisions' under the Act, they have not been applied and complied with. AIR 1963 SC 151 (160,164) & AIR 1965 SC 646 (652) & AIR 1965 SC 427 & AIR 1960 SC 1203 & AIR 1962 SC 764 (767) & AIR 1965 SC 995, Foll. (Para 10)

(B) Land Acquisition Act (1894), Ss. 4, 6 and 40 — 'Company Provisions', when not applicable, though acquisition is for a company.

Where the declaration recites that the land is needed for a 'public purpose' and the compensation is payable out of the public revenues, the acquisition would not be invalid even though the acquisition is primarily for an individual or a company. For, even where the acquisition is primarily for the purpose of an individual or a company, it may at the same time serve a public purpose, in which case, of course, the compensation must be paid

in whole or in part out of the public revenues. Where the foregoing tests are satisfied, the 'Company provisions' of the Act need not be complied with, even though the acquisition is for the benefit of a company. (Para 10)

(C) Land Acquisition Act (1894), Ss. 4 and 6 — 'Public purpose' — Government declaring that the payment would be made "in due course on finalisation" — Lack of intention to pay on the part of Government, held, not inferable — Further, contribution not required to be made prior to proceedings under Ss. 4 and 6. AIR 1963 SC 151 (Paras 43-44), Foll. (Para 10)

(D) Land Acquisition Act (1894), Ss. 4 and 6 — 'Public purpose' — Token contribution by Government — Itself no ground to hold the exercise of power is colourable or mala fide — Existence of additional circumstances necessary to hold so — Onus on the person alleging fraud or mala fides—(Evidence Act (1872), Ss. 101-104).

The mere fact that only a token payment is to be made by the Government from out of the public revenues for the purpose of acquisition of certain land stated to be for public purpose does not render the proceedings, colourable or in fraud of the statute. In addition to the above, there must be shown any other circumstances rendering the proceedings colourable. The onus of showing such circumstances is on the person who alleges fraud or mala fides. It is not necessary that in every case the Government must make a substantial contribution. AIR 1963 SC 151 (Para 52), Foll. (Para 10)

(E) Land Acquisition Act (1894), S. 6 — Requisites needed for the declaration under — Facts that the institution for which the acquisition was made was not popular, held, could not be canvassed — It was a matter for the Government to consider.

In order to make a declaration under S. 6 of the Land Acquisition Act, Government must be satisfied about two things: (a) the need for acquiring the disputed land and (b) that the need is for a public purpose. Where it was contended that the institution for which the acquisition was being made had its own buildings and land and that there was no need for acquiring the disputed lands and that the institution was not a popular one and that there were others like it in the locality.

Held, (1) that the object with which the institution was formed being for establishing educational institutions and for which purpose it needed additional lands, the first contention that no land was needed could not be sustained. (Para 11)

and (2) that the second aspect, namely, that it was not a popular one was a matter for the Government and not for the Court to determine. AIR 1963 SC 151 (Paras 28 & 29) and AIR 1968 SC 432 (437) Foll. (Para 11)

(F) Land Acquisition Act (1894), S. 6 — 'Public purpose' — Need for—Government to apply its mind to see if it exists — Declaration using the word 'etc.', after mentioning some purposes — Use of 'etc'. deplored.

Where a declaration under S. 6 of the Land Acquisition Act mentioned that the land was needed for "educational institutions, staff quarters, swimming pool, etc." the use of word 'etc', showed some amount of carelessness in the drafting of the declaration opening it to contest on the grounds that it was vague, omnibus and that the Government had not applied its mind to the precise purposes for which the lands were needed. (Para 11)

(G) Land Acquisition Act (1894), Ss. 6 and 4 — "Public purpose" — Declaration need not recite the precise purposes — Enough, if from the evidence a public purpose can be discerned.

A declaration under S. 6 of the Land Acquisition Act need not necessarily recite the precise purposes. It is enough, if on the evidence, it transpires that there is a public purpose behind the declaration, in which event, it cannot be said that there is no public purpose or that the declaration is colourable. AIR 1960 SC 1203 (1208) & AIR 1963 SC 151 (160) Foll. (Para 11)

(H) Land Acquisition Act (1894), Ss. 4 and 6 — Quarters for members of staff of educational institution, if a public purpose.

The Memorandum of Articles of Association of an Institution stated that one of its objects was setting up of schools and the affidavits also revealed that in fact several boys' and girls' schools were established and being run. While so, certain lands adjacent to the campus were sought to be taken under the provisions of the Land Acquisition Act for the purpose, inter alia, of putting up quarters for teachers working in the several schools.

Held, that though normally putting up of quarters for individual members of the staff might not be said to serve a public purpose, the housing of teachers of the Schools must be held to be conducive to better instruction and discipline in those Schools thus serving a public purpose. AIR 1965 SC 646 Dist.; AIR 1965 SC 995 (1102-3), Foll. (Para 11)

(I) Land Acquisition Act (1894), Ss. 4 and 6 — Notification under, composite, mentioning both public and non-public purposes — Parcels of land not demarcated — Notification fails.

Where the notification issued under S. 6 of the Land Acquisition Act is composite and it is not known what particular parcel is required for the public and non-public purposes respectively, the whole of the notification will fail, where some of the purposes mentioned are held by the court to be a private purpose. Where, however, of the three purposes for which the land was being taken, one ceased to exist and the portion of land intended for it was also dropped from the proceedings, the two purposes being there, the declaration could not be held colourable. (Para 11)

(J) Land Acquisition Act (1894), Ss. 4 and 6 — Attempt to purchase by private treaty — No condition precedent to acquisition under the Act. AIR 1968 SC 1223 (1226), Foll. (Para 11)

(K) Land Acquisition Act (1894), Ss. 4 and 6 — 'Public purpose' — Presence of — Fact that proceeding was at instance of an individual or benefits him, no criteria.

Provided there is a public purpose behind a proposal for acquisition it does not matter whether an individual or group of individuals are going to be proximately benefited by the acquisition or whether the move for the acquisition is initiated by such person or persons who are going to be immediately benefited. AIR 1955 SC 41 (46) Foll. (Para 12)

(L) Land Acquisition Act (1894), S. 17(1) and (4) — Applicability — Conditions.

The conditions for the application of sub-section (4), read with sub-section (1) of Section 17 of the Act are — (a) satisfaction as to the urgency for the acquisition which is a subjective condition of the State Government and (b) the lands in question being 'waste or arable', which is an objective condition. S. 17(4) cannot be applied to any land which is shown not to be arable or waste. (1967) 71 Cal WN 129 & AIR 1967 SC 1081 (1086), Foll. (Para 13)

(M) Land Acquisition Act (1894), Ss. 17 (1), and (4), 5A and 6 — "Waste land" — Lands fit for habitation after putting up buildings, not waste lands — Treating them to be so and applying S. 17(4), held, invalid.

Lands which are fit for habitation after constructing buildings cannot be classified as waste. (Para 13)

The disputed lands were neither under cultivation nor fit for it and there were no trees or structures existing on them. No productive use was being made. But buildings might possibly be constructed on such lands and the institution for which they were being acquired itself intended to build on such lands.

Held, that the lands could not be treated as waste lands and proceedings commenced under S. 17 (4) of the Act. Such a procedure denied an inquiry under S. 5A. The declaration under Section 6 was

quashed. AIR 1967 SC 1081 (1085) Foll.
(Para 13)

(N) Land Acquisition Act (1894), Ss. 17 (1), (4), 5A and 6 — Sufficiency of grounds for 'urgency' not justiciable — Interference for Government's failure to apply its mind is, however, possible — (Constitution of India, Art. 226).

It is not competent for the court to inquire into the sufficiency of the grounds which led to the formation of the opinion of the Government that the need for acquisition was urgent and that, accordingly the inquiry under S. 5A should be dispensed with. Nevertheless, the Court can interfere if it is shown that the Government never applied its mind to the matter or that the action of the Government is mala fide. Where there is a recital in the impugned order that the Government was satisfied as to the urgency or other condition precedent for the exercise of the statutory power, such recital would, in the absence of any evidence as to its inaccuracy, be accepted by the Court as evidence that the necessary condition was fulfilled.

(Para 13)

In the instant case, the notification contained no mention of 'urgency' or of the Governor's 'satisfaction' and the lands sought to be taken were for the purpose of putting up buildings in addition to the ones already existing and used by the educational institutions:

Held, that the Government did not appear to have applied its mind if inquiry under S. 5A had to be dispensed with. The decision to quash the declaration under S. 6 was, however, not based on this finding. AIR 1967 SC 1081 & AIR 1967 SC 483 & AIR 1945 PC 156 (161) Foll.
(Para 13)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 482 (V 55) =
(1958) 1 SCR 597, Abdul Hussain v. State of Gujarat 11
- (1968) AIR 1968 SC 615 (V 55) =
(1968) 2 SCR 117, Ganga Bishan v. Calcutta Pinjrapole Society 13
- (1968) AIR 1968 SC 1223 (V 55) =
(1968) 2 SCJ 692 Ambalal v. Ahmedabad Municipal Corporation 11
- (1967) AIR 1967 SC 483 (V 54) =
1967 Cri LJ 520 Jaichand v. State of W. B. 13
- (1967) AIR 1967 SC 1081 (V 54) =
1967-1 SCR 373, Raja Anand v. State of U. P. 13
- (1967) 71 Cal WN 129, Abdul Jabbar v. State of W. B. 13
- (1965) AIR 1965 SC 427 (V 52) =
(1964) 1 SCA 588, Shyam Beharī v. State of M. P. 10
- (1965) AIR 1965 SC 646 (V 52) =
(1965) 1 SCA 593 State of W. B. v. Talukdar 10, 11

- (1965) AIR 1965 SC 995 (V 52) =
(1965) 1 SCA 606 Agarwala v. State of West Bengal 10
- (1963) AIR 1963 SC 151 (V 50) =
(1963) 2 SCR 774 Somwanti v. State of Punjab 10, 11
- (1962) AIR 1962 SC 764 (V 49) =
1962 Supp. (2) SCR 149 R. L. Arora v. State of U. P. 10
- (1961) AIR 1961 Bom 89 (V 48) =
ILR (1960) Bom 651 Navnitlal v. State of Bombay 13
- (1960) AIR 1960 SC 1203 (V 47) =
(1961) 1 SCR 128, Barkya v. State of Bombay 10, 11
- (1955) AIR 1955 SC 41 (V 42) =
(1955) 1 SCR 777, State of Bombay v. Bhanji 12
- (1945) AIR 1945 PC 156 (V 32) =
72 Ind App 241, Emperor v. Sibnath 13

A. D. Mukherjee, Subodh Kr. Bhattacharjee, for Petitioners; N. C. Chakravarty, Rajeswar Dhar, Sushil Kr. Biswas, for Respondents in C. R. No. 295 (W) of 1962. Nepal Chandra Sen, N. C. Chakravarty and Mrs. Nirmala Kr. Chaturvedi, for Respondent in C. R. 1140 (W) of 1967.

ORDER:— These two Rules relate to the same proceeding for acquisition under the Land Acquisition Act. Though numbered later, C. R. 1140 (W)/67 is, in fact, earlier in point of time.

2. The two cases relate to proceedings for acquisition of the petitioners' land as described at Annexure A of the petition, under the Land Acquisition Act (hereinafter referred to as 'the Act').

The notification under S. 4 was issued as early as the 2nd Feb. 1962 and is to be found at Annexure B to the Petition in C. R. 1140. Shortly after this notification was issued, on March 27, 1962, the petitioners moved this Court under Art. 226 of the Constitution and obtained C. R. 204(W)/62. That petition was, however, withdrawn with liberty to bring a fresh one and by virtue of that liberty, the petitioners filed the petition on May 28, 1962, which was numbered 320(W)/62, but that was dismissed in limine. On appeal, that order of dismissal was set aside and a Rule was issued by the Appeal Bench, on July 3, 1967 and that Rule now constitutes C. R. 1140(W)/67. As stated earlier, C. R. 1140 challenges the validity of the S. 4 notification only.

3. On May 16, 1962, the petitioners brought the next petition which has been numbered C. R. 295(W)/62, on the allegation that when they had brought the earlier application on March 27, 1962, they had no knowledge that a declaration under Section 6, too, had been issued in the Acquisition proceedings in respect of the disputed lands, but that they had since come to know of it from the copy

of a petition of Respondent no. 4 (Konnagar Kalyan Parishad) served upon them on April 30, 1962. In this petition, therefore, the petitioners have challenged the validity of the declaration under Section 6, dated February 27, 1962, which is to be found at Annexure B of the petition in C. R. 295.

4. It would be useful to set out the text of the Section 4 notification:

"Whereas it appears to the Governor that land is likely to be needed for a public purpose . . . , for the construction of educational institutions, staff quarters and swimming pool etc. of the Konnagar Kalyan Parishad . . . it is hereby notified that a piece of land comprising the survey plots as described in Schedules A and B below . . . is likely to be needed for the aforesaid public purpose partly at the public expense and partly at the expense of the Konnagar Kalyan Parishad"

5. Sch. A includes certain 'waste and arable lands' and specifies plots 1722, 1725 1727, 1728 and 1729.

6. Sch. B relates to 'other than waste and arable lands' and mentions: (a) Plot 1723 in full and (b) 1850 in part.

7. Applying Section 17(4) to the lands included in Sch. A, the hearing of objections under Section 5A of the Act has been dispensed with, with respect to these lands.

8. The aforesaid notification is challenged on the grounds that —

(a) The purposes mentioned in the notification do not constitute a 'public purpose.'

(b) No part of the expenses for the acquisition is being paid by the Government.

(c) Respondent 4 (the Kannagore Kalyan Parishad), for which the lands are sought to be acquired is a 'company' hence, the proceedings are not valid as there has been no compliance with the provisions of Part VII of the Act.

(d) The plots included in Sch. A are not 'waste and arable' lands and, therefore, Section 17 (4) of the Act is not applicable to them and the opinion of the Governor to this effect is not founded on any materials.

(e) The impugned proceedings are colourable and mala fide.

9. The declaration under Section 6 substantially reproduces the recitals in the Section 4 notification, substituting the word 'needed' for the words 'likely to be needed', and omitting the plots included in Sch. B of the S. 4 notification. The grounds of challenge by the petitioner against the declaration are substantially the same as those against the notification.

10. I. Existence of a public purpose.

Since the petitioners have come to Court after the issue of the declaration

under Section 6, sub-section (3) of that Section operates to make the declaration conclusive evidence that the disputed lands were required for a public purpose. But even then, it has been held that the petitioners shall be entitled to challenge the validity of the entire proceedings on the following grounds—

(a) That the proceedings are colourable or in fraud of the statutory power, *Somawanti v. State of Punjab*, AIR 1963 SC 151 at pp. 160, 164; *State of W. B. v. Talukdar*, (1965) 1 SCA 593 at p. 601 = (AIR 1965 SC 646 at p. 652) the real object being to acquire the lands for some 'private purpose': *Agarwala v. State of West Bengal*, (1965) 1 SCA 606 = AIR 1965 SC 995.

(b) An acquisition for a public purpose cannot be sustained unless some part of the compensation money is payable out of the public revenues or from some fund controlled or managed by a local authority, *Shyam Behari v. State of M. P.*, (1965) 1 SCA 588 at p. 591 = (AIR 1965 SC 427 at p. 429). A mere recital that the land is needed for a public purpose is not enough.

(c) But where the declaration recites that the land is needed for a 'public purpose' and the compensation is payable out of the public revenues, in the foregoing sense, the acquisition would not be invalid even though the acquisition is primarily for an individual or a company: *Barkya v. State of Bombay*, (1961) 1 SCR 128 = (AIR 1960 SC 1203). For, even where the acquisition is primarily for the purposes of an individual or a company it may at the same time serve a public purpose, in which case, of course, the compensation must be paid in whole or in part out of the public revenues: *R. L. Arora v. State of U. P.*, AIR 1962 SC 764 at p. 767; AIR 1965 SC 995: Where the foregoing tests are satisfied, the 'company provisions' of the Act need not be complied with.

It follows from the Supreme Court decisions just cited that since the impugned notification states that the lands are needed for a 'public purpose', the 'Company provisions' of the Act need not be complied with in the instant case, even though the acquisition is for the benefit of a company, i. e., respondent no. 4, provided the other tests for acquisition for a public purpose are satisfied.

(a) So far as the payment of compensation is concerned, the recital in the notification under S. 4 is that it is to be partly at the expense of the Government and partly at the expense of the Parishad.

In the petition the only averment made is that the Government is not showing any intention of making any contribution towards the compensation money to be paid. Respondents produced the Notifica-

tion no. 554/18-2-61 in support of para 7 of the counter-affidavit of respondents 2-3 in C. R. 1140, to show that the Education Department has declared that a 'token grant' of Rs. 10/- will be made by the Government towards the said acquisition, 'in due course on finalisation'. There is no reason to infer that such payment will not eventually be made nor is it necessary under the law that the contribution must be made prior to the proceedings under Ss. 4 and 6. Such a contention had, in fact, been made in Somawanti's case AIR 1963 SC 151 but that was rejected by the Court. Even absence of a provision in the Budget was not considered material in this context: AIR 1963 SC 151 (Paras 43-44).

(b) Mr. Mukherjee, on behalf of the petitioners, has next contended that the sum of Rs. 10 is so insignificant that it should be considered as no contribution on the part of the Government and the acquisition must therefore be held to be a colourable one or an acquisition for the purposes of the company and not for a public purpose.

This was indeed the argument on behalf of the petitioners in Somawanti's case, AIR 1963 SC 151 (ibid), where the contribution proposed to be made by the Government was Rs. 100 out of a total expense of 4½ lakhs. But though Subba Rao J., in the minority, expressed 'he view that where Government does not pay the whole of the compensation money, it must contribute a substantial portion of it; otherwise, it would be an abuse of the statutory power of the Government to compulsorily acquire private property; the majority, speaking through Mudholkar J. did not agree that in every case Government must make a substantial contribution; but where it makes a 'token contribution', it would be open to the party aggrieved to point out other circumstances, which, together with the fact of token contribution, might establish that the use of the power by the Government was colourable (para 52 of AIR 1963 SC 151).

In the instant case, neither party had originally brought before the Court any estimate of the amount of compensation money that may be eventually payable for the disputed lands, but the fact that the Government itself described the sum of Rs. 10 as a 'token grant' indicates that Rs. 10 is not any substantial portion of the expenses of acquisition. In the supplementary affidavit in C. R. 295, the petitioner has stated that the value of the disputed lands would exceed Rs. 2 lakhs.

We have, therefore, to inquire whether there are any other circumstances which, along with this fact of token contribution out of the public revenues render the

proceedings colourable or in fraud of the statute. The onus of showing such circumstances is, of course, upon the petitioner who alleges fraud or mala fides.

11. Petitioners seek to establish that the impugned orders are mala fide from different circumstances which, according to them, would go to show that the Government did not apply its mind to the need for acquiring the disputed lands for the purposes of the Parishad, and whether it would serve any public purpose: vide AIR 1963 SC 151 (paras 28, 29, 36).

(a) Firstly, it has been contended that the Parishad has lands of its own and does not need any additional lands for the purposes alleged. Such a contention was made in the case of Abdul Hussain v. State of Gujarat, AIR 1968 SC 432 at p. 437, para 12, but it was negated by the Supreme Court because the Company, for whose purposes the lands were proposed to be acquired, adduced materials to show why the existing lands were unsuitable and why the disputed lands were needed. These materials were, of course, considered, in that case, at the inquiry under Section 5A which has not been held in the case before me.

As observed by Mudholkar J. in Somawanti's case AIR 1963 SC 151 (Paras. 28-29), in order to make a declaration under Section 6, Government must be satisfied about two things: (a) the need for acquiring the disputed land, and (b) that the need is for a public purpose.

The petitioner, in his petition, introduces facts to show that there was no need for acquiring lands for the construction of a swimming pool or staff quarters as mentioned in the declaration. Particulars of educational institutions were, of course, not given in the impugned declaration, but the need for such institutions has been elaborated in paras 15 and 24 of the affidavit-in-opposition of the Parishad in C. R. 295. In these paragraphs, it has been stated that owing to the influx of a huge refugee population and their settlement at Konnagar, the need for additional educational institutions was felt and that the Parishad was established in 1949 for setting up additional educational institutions for the public at Konnagar. In pursuance of this object, it is stated, the Parishad has since established three Primary Schools, one Secondary School under the name of the Rajendra Smriti Vidyalaya; a training School for women, known as the Aris & Crafts Centre; a pre-Basic Nursery School, known as Sishu-Sikhsa Sadan; a Junior Basic School named Siksha Sadan; a Girls' Senior Basic School called Balika Siksha Sadan; a Four-class Junior High School called Arabindo Vidyapeeth; two Libraries and a Gymnasium, and it is stated in para 24 that additional lands

are necessary for the expansion of the aforesaid institutions, such as —(a) to obviate teaching by shifts, which is now necessary for want of accommodation; (b) to provide open lands within the compound of the basic schools; (c) to provide separate accommodation for the Senior Basic School for Girls, which is now held in the premises of the Rajendra Vidyalaya, which is a Boys' School; (d) the last-mentioned purpose is all the more imperative because it is proposed to raise the Girls' School to the status of a Higher Secondary School.

As against this, it was stated in the affidavit-in-reply of December 14, 1962 that the institutions run by the Parishad are not popular and that there are a number of other institutions in the locality. This is, however, no ground for holding that Government did not apply its mind to the need for further land for the institutions run by the Parishad which was evidently formed, inter alia, for establishing educational institutions (vide Memorandum of Association), as early as 1949. The success or otherwise of the institutions established by the Parishad is a matter for the Government, and not this Court, to determine.

But the petitioners, in their supplementary affidavit of July 4, 1968, introduced the fact that the Parishad owns a large plot, numbered 1857, out of which 2 bighas have been given over by the Parishad to the Rajendra Vidyalaya which was built only on a portion thereof and the rest of the land measuring .44 acres is lying vacant, within compound walls, while the Parishad is still retaining 1 bigha and odd of vacant land. The respondents had no further opportunity to rebut these statements, but from para 5 of the application for vacating injunction, filed by the Parishad on June 15, 1962, it would appear that the .44 of vacant land referred to in the petitioners' supplementary affidavit, has been allotted to the Gymnasium of the Parishad. This affidavit shows how the entire lands belonging to the Parishad have been utilised.

But it has been further contended, on the basis of the averments in the supplementary affidavit-in-reply of July 16, 1968, that the very fact that by a deed of gift of June 27, 1962, the Parishad could part with 2 bighas of land to the Rajendra Vidyalaya subsequent to the impugned declaration shows that there was no further need of any land for the said Vidyalaya. But a perusal of the recitals of the said deed at Annexure R to the supplementary affidavit-in-reply shows that this is not a new gift but that a formal deed had been resorted to in order to affirm the title of the Vidyalaya in respect of the 2 bighas which had previously been delivered to the Vidyalaya

and upon which the Vidyalaya had built its existing structures.

If so, it is difficult to hold, with any amount of certainty that the alleged need of the Parishad for extending its existing institutions is fictitious.

(b) The petitioners, therefore, advert to the next branch, to show that the Government did not apply its mind to the question whether the disputed lands were needed for a public purpose.

(i) On this point, Mr. Mukherjee, for the petitioners, first drew my attention to the recitals in the impugned declaration to show that the very fact that the word 'etc.', was used after mentioning educational institutions, staff quarters and swimming pool' shows that the declaration was vague and omnibus and that the Government did not apply its mind to the precise purposes for which the lands were needed.

(ii) It has next been contended that even though plot no. 1723 which is a tank has been excluded from the S. 6 declaration, the object of constructing a swimming pool still remains in the S. 6 declaration and that this shows that the Government did not apply its mind while issuing the declaration under S. 6.

(iii) As regards the construction of staff quarters, it has been contended that this is not a public purpose at law at all.

The use of the word 'etc.', of course, shows some amount of carelessness on the part of those who drafted the impugned declaration, and, as my experience in previous cases goes, this is not a solitary instance of such carelessness. I wonder when the officers who are responsible for exercising this potent instrument of compulsory acquisition will realise how it affects the citizens concerned who are expropriated thereby and how their carelessness gives rise to unnecessary litigation and embarrassment to the Government. It is also true that the construction of a swimming pool is not relied upon in the counter-affidavit of the Parishad (Paras 13, 15 of the counter-affidavit of November 30, 1962) as one of the purposes for which the disputed lands are alleged to be needed.

But as has been rightly pointed out on behalf of the respondents, it is not necessary to recite the precise purposes in the declaration for acquisition, AIR 1960 SC 1203 at p. 1208. If it transpires on the evidence that there was a public purpose behind the declaration, it cannot be held that there was no public purpose or that the declaration was colourable vide para 19 of AIR 1963 SC 151 at p. 160.

Now, in the instant case, it is fairly established that there are certain educational institutions set up by the Parishad for whose expansion, more lands are

needed. As regards 'staff quarters', in the declaration, of course, it is not mentioned for what staff the quarters are needed. But in para 14 of the counter-affidavit of the Parishad it is stated that the quarters are required for housing the teachers of the Schools mentioned in the counter-affidavit, within their campus. It is, however, contended, on the authority of some observations in the Supreme Court decision in Talukdar's case, AIR 1965 SC 646 at p. 653, that the housing of teachers would serve no public purpose.

In the case of AIR 1965 SC 646 at p. 653, it was of course held that the quarters meant for the individual members of the staff cannot be said to serve a public purpose.

On the other hand, in AIR 1965 SC 995 at pp. 1102-3, the construction of quarters for 'social workers', inter alia, was held to constitute a public purpose inasmuch as the memorandum of association of the Sangha, which was produced in Court, showed that the object of the Sangha was "to help the distressed, to nurse the sick, to feed the hungry, to clothe the naked" It was held that the accommodation of workers engaged in such purposes was itself a public purpose. The observations in Talukdar's case, AIR 1965 SC 646 were distinguished on the ground that in that case, it was not disclosed by the Ramkrishna Mission, for whose purposes the land was required, either to the Government or to the Court, for what 'particular work' the staff-quarters were required. In the case before me, however, it has been established from the Memorandum of Association of the Parishad that the creation of educational institutions like schools is one of the objects of the Society and the affidavits on record show that the Parishad has, in fact, set up a number of institutions for boys, girls and others. There is little doubt that the housing of the teachers of the Schools will be conducive to better instruction and discipline in those institutions, thus serving a public purpose.

It thus appears that at least two of the purposes mentioned in the declaration exist in fact and that they are public purposes. The question remains what would be the legal effect where the acquisition is sought to be made for purposes two of which are public and one of which does not exist. In Talukdar's case, AIR 1965 SC 646 at p. 654, para 15 it was held that where the notification is composite and it is not known what particular parcel is required for the public and non-public purposes respectively, the whole of the notification must fail, where some of the purposes mentioned are held by the Court to be private purposes.

That decision, to my mind, is not applicable to the instant case. My finding is

not that one of the purposes mentioned is not a public purpose, but that the construction of swimming pool has been retained in the declaration under Section 6 even after the tank plot which was included in the Section 4 notification, presumably for converting it into a swimming pool has been left out from the acquisition proceeding. This as I have held, is due to sheer inadvertence or carelessness. This fact, alone cannot condemn the declaration as colourable, when it is supported by two public purposes, in fact.

(c) Petitioners, accordingly, point out two other circumstances, from which the proceeding may be branded as colourable or collusive, namely,

(i) that the Parishad has not utilised the grant of money already made in its favour by the Government;

(ii) that the token contribution of Rs. 10/- towards the impugned acquisition has not been offered by the Government after a proper consideration of all relevant facts but merely because it has been sought for by the Parishad.

The first contention is in connection of the grant of Rs. 60,000 which was made by the Central Government on February 24, 1961, by the letter at Annexure A to the counter-affidavit of the Parishad. The grant was made for "the purchase of land required for the educational institutions run by the Parishad". It was argued, firstly by Mr. Mukherjee, that the grant was made for developing the existing institutions on the Parishad's own lands. But the words 'purchase of land' indicate that additional lands were required to be purchased for developing the existing institutions. Failing in this, it was contended that the grant was made for private purchase and not for compulsory acquisition. But it would not be reasonable to restrict the word 'purchase', which has been used in the generic sense, in this Departmental correspondence to voluntary purchase, to the exclusion of compulsory purchase. On the other hand, so far as the provisions of the Land Acquisition Act are concerned, it has been observed by the Supreme Court, *Ambalal v. Ahmedabad Municipality* in AIR 1968 SC 1223, at p. 1226, para 9 that it is not a condition for compulsory purchase for public purposes that attempts to purchase the land required by private treaty must have failed. On the other hand, the very fact that the sum of Rs. 60,000 was lying unutilised for over one year, that is, the time limited by the grant for utilisation of the money might have satisfied the State Government as to the need for utilising it by resorting to compulsory acquisition at an early date.

19. An examination of the judgment however does not make it clear if the petitioner's prayer in that case was also for a writ of habeas corpus. Even so the petition in terms asked for a writ in the nature of certiorari under Article 32 of the Constitution and Section 491 Criminal Procedure Code was not invoked at all. The question raised in the petition and considered by their Lordships was also a pure question of jurisdiction inasmuch as it was contended that the offence with which the petitioner was charged was a civil offence as defined in Section 3(ii) of the Army Act 1950, which subject to the provisions of Sections 125 and 126 of the said Act could be tried either by a Court-martial or by a criminal Court. The contention urged on behalf of the petitioner was that the Court-martial had no jurisdiction to try and convict the petitioner having regard to the mandatory provisions of Section 125 of the Act and having regard to the fact that the Officer Commanding of the unit had in the first instance, decided to hand over the matter for investigation to the civil police. Certain other questions relating to the legality of the procedure followed at the trial of the case and the necessity of a speaking order by the confirming authority were also raised. The learned Judges went into those questions and ultimately dismissed the petition holding that there was neither any error of jurisdiction nor any error of law on the face of the record which entitled the petitioner to a writ of certiorari for quashing the order.

20. The question of maintainability of the petition was neither raised before their Lordships nor discussed by them. In any event, the prayer in the petition was in terms for grant of a writ of certiorari and there is no indication in the judgment at all that there was any prayer for a writ of habeas corpus. The petition was also filed by the petitioner himself who was personally aggrieved and affected by the order.

21. It is true that under Article 141 of the Constitution the law declared by the Supreme Court is binding on all the courts and therefore, even the principles enunciated by the Supreme Court including its obiter dicta, when they are stated in clear terms, have a binding force. But when a question is neither raised nor discussed in a judgment rendered by the Supreme Court it is difficult to deduce any principle of a binding nature from it by implication. I cannot therefore agree with the learned counsel that the case is an authority for the proposition that while dealing with a petition for a writ of habeas corpus the court should call for the record and proceedings of every case in which a court of competent jurisdiction or a duly convened and constituted Court-martial has recorded a finding of guilt and passed

a sentence of imprisonment and examine the legality of conviction and sentence.

This is not to say that the proceedings of a Court-martial are entirely immune from scrutiny by this Court. In fact, that was not the position even before the advent of the Constitution and there are several reported cases where a writ of habeas corpus was issued under Section 491 Cr. P. C. when the jurisdiction of the Court-martial concerned was under challenge. The inquiry in all those cases was however directed to ascertain whether the person held in custody was subject to military law or the court itself was properly convened and constituted. That jurisdiction the High Court always had and has it even today. The question for decision however is whether the ambit of that jurisdiction has in any way been enlarged by Article 226 of the Constitution.

22. On behalf of the respondents, Mr. O. P. Malhotra, has referred to us to a Bench decision of this Court in S. P. N. Sharma v. Union of India, 1968 DLT 256= (AIR 1968 Delhi 156). In that case the petitioner's trial by General Court-martial and the finding and sentence by the said Court as also the confirmation of the sentence by the confirming authority were challenged on the ground of infringement of Articles 14, 21, 22 (1) & (2) of the Constitution and violation of some of the provisions of the Air Force Act and the Rules framed thereunder. Founded on these main challenges the petitioner's prayer was that he be set at liberty. The Bench approvingly referred to an earlier judgment of my Lord the Chief Justice sitting singly as a Judge of the Punjab High Court in Mrs. Saroj Prasad v. Union of India, (Criminal Writ No. 1-D of 1963) D/- 13-5-1963 (Punjab) and also referred to a short extract from a concurring note added by Bachawat J. in the Supreme Court's judgment in Ghulam Sarwar v. Union of India, AIR 1967 SC 1335 where it was said:—

"It is to be noticed that the present petition does not challenge the validity of an order of imprisonment passed in a criminal trial. I must not be understood to say that the remedy of a writ of habeas corpus is available to test the propriety or legality of the verdict of a competent Criminal Court."

And finally summed up the position in the following words:—

"The principle that a writ of habeas corpus is not grantable in general when the party is convicted in due course of law is attracted with greater strictness to a person convicted by a duly constituted Court-martial, the finding and sentence of which have, in due course, been confirmed by a competent authority. Nothing has been shown which would induce us to hold that the finding and the sentence as confirmed are tainted with such a seri-

ous jurisdictional infirmity that they should be described as non est and ignored. We may repeat that we are not entitled to go into the regularity of steps taken by the Court-martial in the course of trial or by the Confirming authority in the finding and the sentence which do not go to their jurisdiction and confirming. If we may say so with respect we have not been persuaded to hold that there was any such irregularity or illegality which would go to the jurisdiction of the Court-martial or the confirming authority".

23. Learned counsel's only criticism of this judgment was that there is no discussion in it of the High Court's power to examine the legality of conviction and sentence on a writ of certiorari in the light of Article 21 of the Constitution. According to the learned counsel, the expression "procedure established by law" means "procedure prescribed by the law of the State" as observed by Kania C. J. in *A. K. Gopalan v. State of Madras*, AIR 1950 SC 27 at p. 39, and since the rules made under the Air Force Act 1950 form part of the procedure established under the Act a conviction resulting from a trial held in contravention of those rules necessarily amounts to depriving the convicted person of his liberty contrary to the procedure established by law. She further argued that a material irregularity in procedure affects the jurisdiction of the Court and therefore, renders its decision illegal for want of jurisdiction.

24. Learned counsel also relied on the following statement of law in Halsbury's Laws of England (Simonds Edition) Vol. 11, Para 268, page 142:—

"Where the inferior tribunal has acted without jurisdiction certiorari to quash the proceedings may be granted. Want of jurisdiction may arise from the nature of the subject matter; so that the inferior tribunal had no authority to enter on the inquiry, or upon some part of it. It may also arise from the absence of some essential preliminary proceedings. Thus, although the inferior tribunal may have jurisdiction over the subject matter of the inquiry, it may be a condition precedent to the exercise of its jurisdiction that the proceedings should be begun within a specified time, or that some step should have been previously taken by the person who institutes proceedings before the tribunal".

25. Our attention was also invited to a judgment of Viscount Reading C. J. (Darling and Avory, JJ. with him) in *Rex v. Governor of Lewes Prison ex parte Doyle*, (1917) 2 KB 254 where the point raised on behalf of the prisoner was that the warrant of commitment and the conviction were/or alternatively one or the other was bad, and that the proceedings were invalid on the ground that the Field

General Court-Martial had heard the case in camera.

25-A. Learned counsel argued that although the question of holding the trial in camera was merely a question of procedure yet the validity of conviction and commitment was allowed to be canvassed in that case on that ground. As would appear from the following passage in the judgment of the learned Chief Justice, the actual decision, far from supporting the argument of the learned counsel goes against it. The contention regarding invalidity of the trial on the ground of its having been held in camera was repelled and after citing two earlier decisions the Learned Chief Justice observed:—

"Those two authorities clearly support the principle that we are entitled, and I think bound to look at the conviction in the present case, and it is stated on the face of it that Doyle is a person subject to military law. That being so, it establishes that he could be tried by a field general Court martial, and that therefore there is no ground for saying that the conviction is wrong. It would cure any defect (if there was any) in the warrant of commitment, and I come to the conclusion both as regards the warrant of commitment and also as to the form of conviction that the contentions fail".

26. Counsel for the petitioner next referred us to some cases dealing with the grounds on which the decisions of Tribunals exercising judicial and quasi-judicial functions have been quashed on certiorari. No decided case was, however, brought to our notice in which a writ of certiorari was issued for quashing a decision on the ground of error in procedure of the kind with which we are concerned in the present case. Subject to the locus standi of the person moving the petition, a writ of certiorari or a direction or order under Art. 226 of the Constitution may perhaps be issued for the purpose of examining the record and proceedings of a duly constituted Court martial having jurisdiction over the person and also over the subject matter of the charge provided other conditions, such as error of law apparent on the face of the record or violation of principles of natural justice, are satisfied. No final opinion need however, be expressed on that point in the present case. But I am not at all prepared to hold that such a writ or order can ever be issued for examining mere errors of procedure.

27. This brings me to the question relating to the scope of Rule 15 of the Air Force Act Rules. In order to appreciate the content and scope of this Rule it is necessary to discuss its salient features.

28. The Rule forms part of Section 1 of Chapter IV which deals with investigation of charges and remand of the accused for trial. Rule 14 enjoins upon every

Commanding Officer to take care that a person under his command, charged with an offence is not detained in custody for more than forty-eight hours after the committal of such person into custody is reported to him, without the charge being investigated, unless investigation within that period seems to him impracticable having regard to the exigencies of public service. The rule further provides that every case of a person who is detained in custody for a period beyond forty-eight hours must be reported by the Commanding Officer to the officer to whom application is required by law to be made to convene a general or District Court-martial for the trial of the person charged. Such report has to be accompanied by a statement of reasons for detention.

29. Rule 15 deals with investigation of charges within the period mentioned in Rule 14. The requirement of sub-rule (a) is that the charge must be heard in the presence of the accused and the accused must have full opportunity to cross-examine any witness against him and to call any witness and make any statement in his defence.

30. Sub-rule (b) makes it obligatory on the Commanding Officer to dismiss a charge brought before him if in his opinion, the evidence does not show that some offence under the Act has been committed. He may also do so if in his discretion he thinks that the charge ought not to be proceeded with. Sub-rule (c) lays down that at the conclusion of the hearing of a charge if the Commanding Officer is of the opinion that the charge ought to be proceeded with, he shall, without unnecessary delay, either dispose of the case summarily or refer the case to the superior Air Force authority or adjourn the case for the purpose of having the evidence reduced to writing.

31. Sub-rule (d) deals with the preparation of the Summary of Evidence and requires that the evidence of the witnesses who were present and gave evidence before the Commanding Officer, whether against or for the accused shall be taken down in writing in the presence and hearing of the accused. The recording of the Summary of Evidence may be before the Commanding Officer himself or before such other officer as he may direct.

31-A. Sub-rules (e) to (g) deal with the manner of recording evidence at that stage.

32. It will thus be seen that by its very nature the hearing of evidence by the Commanding Officer at the initial stage when the person charged with an offence is brought before him is for the purpose of ascertaining whether the charge should be dismissed or should be proceeded with. If the Commanding Officer is of the opinion that the charge ought not to be

proceeded with, the person charged with the offence has to be released forthwith. On the other hand if the Commanding Officer is of the opinion that the charge ought to be proceeded with he may then follow one of the three courses open to him under sub-rule (c).

33. The object of the rule is therefore, to hold a sort of preliminary investigation by the Commanding Officer with a view to ascertain whether a prima facie case exists to justify further detention of the accused in custody beyond the period of forty-eight hours prescribed by Rule 14. The Investigation contemplated by R. 15 does not require that the evidence of witnesses examined by the Commanding Officer should necessarily be reduced to writing. Its only requirement is that the charge should be heard in the presence of the accused and he should be given an opportunity not only to cross-examine any witness against him but also to call any witnesses and make any statement in his defence.

34. Once the Officer Commanding comes to the conclusion that the charge ought to be proceeded with then there must be a formal recording of statements of witnesses as provided by sub-rules (d) to (g). Rule 16 provides inter alia for the remand of the accused for trial by Court martial.

35. It is thus implicit in the procedure prescribed by R. 15 that any error or irregularity at a stage before the case is adjourned for the purpose of having the evidence reduced to writing will not vitiate the subsequent trial as the guilt of the accused has to be established not on the basis of what the Commanding Officer might have done or might not have done at the initial stage. Any irregularity in procedure at that initial stage might have a bearing on the veracity of witnesses examined at the trial or on the bona fides of the Commanding Officer or on the defence that may be set up by the accused at the trial; but the irregularity can by no means be regarded as affecting the jurisdiction of the Court to proceed with the trial.

36. I am therefore, of the opinion that in the instant case even if it is assumed that there has been non-compliance with the requirements of Rule 15 in the manner alleged by the petitioner, the non-observance of the Rule is not such as to vitiate the trial and ultimate conviction of the petitioner.

37. The petitioner's grievance about the addition of charges 5 and 6 at a subsequent stage has also no substance as the charges framed at the stage of proceedings under Rule 15 are not final. Subject to the right of amendment envisaged in Rule 48 it is only the charge-sheet on which the accused is arraigned before the Court which is material as it

is that charge-sheet alone which forms the basis of the trial and not any other charge-sheet which may have been prepared at the initial stage. Even the charge-sheet on which the accused is arraigned before the Court can be amended under sub-rule (b) of Rule 48 which runs as under:—

"If on the trial of any charge it appears to the Court at any time before they have begun to examine the witnesses, that in the interests of justice any addition to, omission from, or alteration in, the charge is required, they may report their opinion to the convening authority, and may adjourn, and the convening authority may either direct a new trial to be commenced, or amend the charge, and order the trial to proceed with such amended charge after due notice to the accused."

38. In the course of arguments one other point was mooted; but since we have not had the advantage of a full argument which the point deserves, I should not like to express a definite opinion on it and would only state the point and refer to a few cases which appear to me to have a bearing on the controversy. The point is one of *locus standi* to maintain the present petition and was thus put in argument. It was urged that if the petition in this case was to be treated as one for grant of a writ of certiorari, then such a petition could only be filed by the petitioner himself and not by his wife on his behalf as in the eye of law no personal right of hers had been affected by the impugned order and as such she had no *locus standi* to maintain the petition.

39. The question for consideration therefore, is whether the petition as presented in this Court, can be treated as one for a writ of habeas corpus only or also for a writ of certiorari. It will be noticed that the petition has been moved by the prisoner through his wife Shrimati Sarswati. It is also described as a petition for a writ of habeas corpus under Art. 226 of the Constitution and Sec. 491, Criminal P. C. It is well settled that a person illegally imprisoned or detained in confinement without legal justification is entitled to apply for a writ of habeas corpus, but it is not essential that the application should proceed directly from him. Proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment may also be instituted by a person other than the prisoner who may have some interest in him. In *Cobbett v. Hudson*, (1850) 15 QB 988 a wife was held entitled to apply for such a writ on behalf of her husband. In *re: Thompson*, (1860) 30 LJ MC 19 father was held entitled to apply on behalf of his son. Both these cases are

mentioned in foot-note to Para 65 at page 37 of Halsbury's Laws of England, 3rd Edition Vol. 11. Even the right of a stranger has been recognised to make such an application provided he has authority to appear on behalf of the prisoner or has a right to represent him. In the foot-note referred to above there is reference to an un-reported case *In re: Klimowicz* (1954). The foot-note shows that in that case, a writ was granted, on the application of the Home Secretary, directed to the master of a Polish ship lying in the Thames upon which a person seeking political asylum in the United Kingdom was being detained.

40. These cases are a clear authority for the maintainability of the present petition for a writ of habeas corpus moved by the petitioner's wife. The question however, is whether a petition for grant of a writ of certiorari can also be moved by a person who is not directly affected or aggrieved by the order. The question is not free from difficulty and its solution is made more complex by the variety of views expressed by Judges in different cases. The primary rule as to who may be granted certiorari, as formulated by Blackburn, J. in *R. v. Surrey Justices*, (1870) 5 QB 466 was stated by Parker, J. (as he then was), in the following words in *R. v. Thames Magistrates' Court*, ex parte Greendaum, (1957) 55 LGR 129:

"Anybody can apply for it—a member of the public who has been inconvenienced, or a particular party or person who has a particular grievance of his own. If the application is made by what for convenience one may call a stranger, the remedy is purely discretionary. Where, however, it is made by a person who has a particular grievance of his own, whether as a party or otherwise, then the remedy lies *ex debito justitiae*."

41. S. A. de Smith in his latest book on "Judicial Review of Administrative Action" (1968 Edition) after noticing a number of cases has summed up the position as follows:—

"It is thought that the present law may properly be stated as follows. Certiorari is a discretionary remedy, and the discretion of the Court extends to permitting an application to be made by any member of the public. A person aggrieved, i.e., one whose legal rights have been infringed or who has any other substantial interest in impugning an order, may be awarded a certiorari *ex debito justitiae* if he can establish any of the recognised grounds for quashing; but the Court retains a discretion to refuse his application if his conduct has been such as to disentitle him to relief. Only in highly exceptional circumstances would the Court exercise its discretion in favour of an applicant who was not a person aggrieved."

42. The Supreme Court's view is reflected in its decision in *Calcutta Gas Co. Ltd. v. State of West Bengal*, AIR 1962 SC 1044 where it was held:—

"Article 226 in terms does not describe the classes of persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. The existence of the right is the foundation of the exercise of jurisdiction of the High Court under Art. 226. The legal right that can be enforced under Art. 226 like Art. 32, must ordinarily be the right of the petitioner himself who complains of infraction of such right and approaches the Court for relief. The right that can be enforced under Art. 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified".

43. In *Dr. P. S. Venkataswamy Setty v. University of Mysore*, AIR 1964 Mys 159 while dealing with the position under Art. 226 of the Constitution the learned Judges (N. Sreenivasa Rau, C. J. and A. Narayana Pai J.) observed:—

"In India, unlike England, there is nothing like a writ of right because, the issue of any type of writ, order or direction under Art. 226 is clearly a matter of discretion with the Court. The question therefore, whether the petitioner has or has no locus standi to make the petition to seek the issue of a writ appropriate to the facts of his case is necessarily related to the nature of the relief he seeks. The only general proposition which can be stated on the question of locus standi of petitioners in writ petitions or petitions under Art. 226 of the Constitution is that ordinarily a petitioner will have to make out some personal interest which the law recognises as sufficient, unless having regard to the nature of the relief and particular facts and circumstances of the case the petitioner is merely in the position of an informer or a relator and the situation is such that it becomes the duty of the Court to act in public interest or to uphold the Constitution".

44. Similar dicta are to be found in the decisions of almost all the High Courts. An examination of those cases however, shows that most of them have failed to provide a full exposition of the relevant principles and many of the dicta are ambiguous. It may be that one day the question is directly raised in an appropriate case and is exhaustively dealt with by the Supreme Court. Till then no useful purpose will be served by dealing with this matter at length, especially when we have not had the benefit of full argument from the counsel and we have also decided to dismiss the petition.

45. The result of the foregoing discussion is that the petition fails and is accordingly dismissed.

46. **INDER DEV DUA, C. J.:** I agree.

47. **S. K. KAPUR J.:** I agree.

Petition dismissed.

AIR 1970 DELHI 37 (V 57 C 7)

FULL BENCH

**I. D. DUA C. J., S. K. KAPUR AND
V. S. DESHPANDE JJ.**

The Municipal Corporation of Delhi through G. M. D. T. U. Scindia House, New Delhi, Appellant v. Kuldeep Lal Bhandari and others, Respondents.

L. P. A. No. 50-D of 1966, D/-9-12-1968.

Letters Patent (Cal.) Cl. 10 — 'Judgment' — Award of Motor Accidents Claims Tribunal — Appeal against under S. 110-D of Motor Vehicles Act — Decision of single Judge is "judgment" — Nature of jurisdiction of claims Tribunal and of High Court, explained — AIR 1968 Punj & Har 277, Dissented from — (Motor Vehicles Act (1939), S. 110-D) — (Constitution of India, Arts. 136 and 227) — (Civil P. C. (1908), Ss. 109, 110).

A decision given by a Single Judge of the High Court in appeal under Section 110-D of the Motor Vehicles Act, against an award of the Motor Accidents Claims Tribunal, is a "Judgment" within the meaning of Cl. 10 of the Letters Patent. (Para 23)

The question, whether a particular decision of the High Court is a judgment or is only a determination turns on the connected question whether the decision is given by the High Court acting as a High Court or whether it is given by it acting as a Tribunal or a persona designata. (Para 19)

The theory that an appeal takes colour from the original proceeding is not to be carried too far. Three aspects to be considered are, (1) the nature of the Tribunal, (2) the nature of the proceeding before it, and (3) the nature of the decision given by it. It would not be correct to say that merely because the tribunal was not a Court or the proceeding before it was not a suit or its decision was not a judgment but an award, the High Court hearing appeal against its decision would not be a Court or the proceeding before the High Court would not be in its ordinary jurisdiction or that the decision of the High Court on such appeal would not be a judgment. Therefore, even if the original proceeding took place before the Arbitrator resulting in an award, the appeal to the High Court will not turn the High Court itself into a persona designata or an Arbitration Tribunal and will

not, therefore, make the judgment of the High Court an award. (Para 14)

In hearing the appeal under S. 110-D of the Motor Vehicles Act, the High Court must be held to be acting as a High Court and not as a Tribunal, inasmuch as the claim for compensation for negligence is a common law right not created by a statute and the claim is considered by the Tribunal in its entirety without limitation, with the result that an appeal to the High Court is made in its ordinary Civil Jurisdiction. In fact, an appeal by special leave under Art. 136 lies to the Supreme Court against the determination or order of a Tribunal. The High Court also has the superintendence over other Courts and Tribunals under Art. 227 of the Constitution. It has never been doubted that the Supreme Court and the High Court act as the Supreme Court and the High Court in functioning under Arts. 136 and 227 of the Constitution respectively and do not act as an Arbitrator or a Tribunal in doing so. For the same reason the High Court would also act as the High Court and not as a tribunal in hearing the appeal under Section 110-D of the Act. AIR 1968 Punj & Har 277, Dissented from; ILR (1957) Punj 615 & (1912) 39 Ind. App. 197 (PC), Disting. and Explained.; AIR 1968 SC 384 & (1945) 49 Cal WN 10, Rel. on. (Para 14)

The provisions of Cl. 11 of the Letters Patent not only make the High Court a Court of appeal from other Civil Courts and Courts subject to the Court's special superintendence but also invest it with appellate jurisdiction in such cases as may, after the date of the publication of the Letters Patent, be made subject to appeal to it by any law made by a competent legislative authority for India. Section 110-D of the Act may be said to be such a law. (Para 20)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 384 (V 55) =
 (1968) 1 SCR 372, Collector of
 Varanasi v. Gauri Shankar 12, 13, 14,
 17, 18, 19
- (1968) AIR 1968 Punj & Har 277
 (V 55) = ILR (1968) 1 Punj 625.
 F. Dabwali Transport Co. v.
 Madan Lal 12
- (1965) AIR 1965 SC 1442 (V 52) =
 (1965) 2 SCR 756, South Asia In-
 dustries (P.) Ltd. v. S. B. Sarup
 Singh 11
- (1963) AIR 1963 Punj 221 (V 50) =
 64 Pun LR 870, Shri Chand v.
 Union of India 14
- (1961) AIR 1961 Madh Pra 324
 (V 48) = 1961 Jab LJ 806, Hitkarni
 Sabha v. Jabalpur Corporation 7
- (1958) AIR 1958 SC 947 (V 45) =
 1959 SCR 1177, Hans Kumar v.
 Union of India 12, 13, 19

- (1957) ILR (1957) Punj 615 = 1958-1
 Lab LJ 603, Gopal Singh v. State
 of Punjab 12, 16
- (1953) AIR 1953 SC 198 (V 40) =
 1953 SCR 1159, Asrumati Debi v.
 Kumari Rupendra Deb 21
- (1953) AIR 1953 SC 357 (V 40) =
 1953 SCR 1028, National Sewing
 Thread Co. Ltd. v. James
 Chadwick & Bros. 11
- (1950) AIR 1950 SC 188 (V. 37) =
 1950 SCR 459, Bharat Bank v.
 Employees of Bharat Bank,
 Delhi 19
- (1945) 49 Cal WN 10, Nur Mohammed
 v. S. M. Solaiman 22
- (1944) (1944) 1 All ER 60 = 170
 LT 29, Race Course Betting
 Control Board v. Secretary of
 State for Air 5
- (1936) AIR 1936 PC 93 (V 23) =
 63 Ind App 180, Hem Singh v.
 Basant Das 10
- (1934) AIR 1934 PC 81 (V 21) =
 61 Ind App 158, Mong Ba Thaw
 v. Ma Pin 10
- (1916) AIR 1916 PC 21 (V 3) = 43
 Ind App 192, Secretary of State
 for India v. Chelikani Rama Rao 10
- (1913) 1913 AC 546 = 82 LJKB
 1197, National Telephone Co. Ltd.
 v. Postmaster General 9, 13
- (1912) 39 Ind App 197 = ILR 40
 Cal 21 (PC), Rangoon Bototoung
 Co. Ltd. v. Collector of Rangoon
 10, 15, 16

S. N. Chopra with R. L. Tandon and
 Vijay Kishan, for Appellant; G. S. Vohra,
 for Respondents.

V. S. DESHPANDE J.:— (For him-
 self and Inder Dev Dua, C. J.) Due to an
 accident to the D. T. U. bus No. DLP 658
 belonging to the appellant Municipal
 Corporation of Delhi, a lady named
 Mrs. B. Bhandari suffered injuries which
 resulted in her death. The respondents,
 as her legal representatives, claimed
 compensation from the appellant before
 the Motor Accidents Claims Tribunal,
 Delhi, on the ground that the injuries
 caused to Mrs. Bhandari were due to
 the negligence of the appellant's em-
 ployees, viz. the Driver and the Con-
 ductor of the bus. The claim was dis-
 missed by the Tribunal but was partial-
 ly decreed by a learned Single Judge
 of the then Circuit Bench of the Punjab
 High Court for Delhi in an appeal pre-
 ferred to the High Court against the
 award of the Tribunal under Sec-
 tion 110-D of the Motor Vehicles Act,
 1939.

2. The present appeal was preferred
 before a Division Bench of this Court
 under Clause 10 of the Letters Patent
 applicable to this High Court. It is
 common ground that such an appeal
 lies from the judgment of a single Judge

of the High Court. The respondents have, however raised a preliminary objection against the maintainability of this appeal on the ground that the decision of the learned single Judge against which this appeal purports to be made is not a "judgment" within the meaning of Clause 10 of the Letters Patent. The Division Bench speaking through my Lord the Chief Justice surveyed the relevant case law on the subject and referred the matter to the Full Bench on the 15th May, 1968 in view of the apparent lack of agreement among the judicial decisions.

3. The central question for consideration by us is whether the judgment under appeal given by the learned single Judge in an appeal against the award of the Claims Tribunal under Section 110-D of the Motor Vehicles Act, 1939 (hereinafter called the Act) is:— (1) a judgment, (2) given by a Judge of this Court within the meaning of Clause 10 of the Letters Patent.

4. In view of the lack of agreement among the judicial decisions noticed in the referring order, it is necessary to go to the first principles underlying the question. It is to be noted that the claim for compensation made by the relatives of the deceased is based on the alleged negligence of the employees of the appellant-Corporation. Its nature is simply a suit for negligence. Negligence is a well-established ground for claim for damages in the law of torts. Such a claim has been a part of common law for many years and has been entertained by Civil Courts in their ordinary jurisdiction. Claim for damages for injuries caused by the persons in charge of the motor vehicle was also entertained by ordinary Civil Courts in India prior to the enactment of Motor Vehicles (Amendment) Act, 100 of 1956, which for the first time empowered the State Governments to constitute one or more Motor Accidents Claims Tribunals. Under Section 110 of the amended Motor Vehicles Act, the State Government may constitute one or more Motor Accidents Claims Tribunals for such areas as may be specified.

It is only in respect of those areas for which such Claims Tribunals are constituted, that the jurisdiction of the Civil Courts is taken away by the Claims Tribunals. For the rest of the areas, the Civil Courts will continue to entertain these claims. The significance of this fact for the nature of the jurisdiction of the Claims Tribunal is that the nature of the claim which is entertained by the Claims Tribunal is precisely the same which is entertained by a Civil Court. The Tribunal itself is not, however, a Civil Court, inasmuch as the very purpose of establishing it was to adjudicate all these claims

more expeditiously than would be done by a Civil Court. This is why the procedure of making the claim before the Tribunal under Section 110-A and the enquiry made by the Tribunal under Section 110-B are of a summary nature as distinguished from the ordinary procedure of the Civil Courts. Section 110-C gives certain specified powers of a Civil Court to the Tribunal showing thereby that the Tribunal is not an ordinary Court of law. S. 110-D gives right of appeal to the High Court against an award of the Tribunal except when an award is for an amount which is less than Rs. 2000.

5. The decision of the Tribunal is called an "award." The word "award," not being defined in the Act, has to be construed in its general sense. The ordinary dictionary meaning of an award is a judicial decision. It is true that the decision of an Arbitrator is also called an award. But, it would not be correct to think that the award is given only by an Arbitrator and that whenever the decision is called an "award," the Tribunal giving it must be an Arbitration Tribunal. It is well known that numerous statutory Tribunals have been created in recent times by Legislation. The decisions of many of them are called awards. But these Tribunals are not considered Arbitration Tribunals, merely by the fact that their decisions are called awards.

As stated in 2 Halsbury's Laws of England, (III Edition) paragraph 132:—

"It is, however, a question in each case whether a particular tribunal set up by a statute for dealing with particular questions, is an arbitration tribunal. Where the expression "arbitration" is not used, and other essential features of arbitration are absent, the presumption is that such a tribunal is not an arbitration tribunal but either a Court of law or a special tribunal governed exclusively by its own code (p)."

In *Race Course Betting Control Board v. Secretary of State for Air*, (1944) 1 All ER 60, the question was what was the nature of the General Claims Tribunal established under the Compensation (Defence) Act, 1939. Uthwatt, J., was of the opinion that since the Tribunal was not a Court, it would be an Arbitration Tribunal. The Court of appeal, however, differed from this view. In their opinion, there is a third class of Tribunals which are neither Arbitration Tribunals nor Courts. These are special Tribunals governed entirely by the statutes creating them and the only remedies of those dissatisfied with the finding of such a Tribunal are those which are given by the particular statutes deal-

ing with such a Tribunal. Lord Greene M. R. at page 63 of the Report refused to attach any weight to the word "referred" in support of the contention that the matter referred to the Tribunal should be regarded as arbitration proceeding merely because of the use of the word "referred". Mackinnon L. J. at page 64 of the report noted that the decision of the Tribunal was called "award" but stated that there was nothing to prevent the Legislature creating a Tribunal of a special kind which is neither a Court of record nor an Arbitration Tribunal.

6. Under the Arbitration Act, 1940 reference to arbitration is made either because of an agreement between the parties or because of a statutory provision. The award of such an Arbitrator is final and is not open to appeal. In both these fundamental respects the Claims Tribunal under the Act differs from an Arbitration Tribunal. We are, therefore, of the view that Motor Accidents Claims Tribunal is neither a Court nor an Arbitration Tribunal, but is a Statutory Tribunal, the incidents of which are governed entirely by the provisions of the Act.

7. The decision of the Tribunal except when it awards compensation of less than Rs. 2000 is open to appeal to the High Court under Section 110-D of the Act. It is to be noted that the claim for compensation of negligence in all its aspects is tried before the Claims Tribunal. There are no limits on the jurisdiction of the Tribunal in trying the claim and in deciding it. This may, for example, be contrasted with the jurisdiction of the Court under Section 18 of the Land Acquisition Act. A reference thereunder is made to the Court by the Collector for determination of objections to the measurement of the land, the amount of compensation, the persons to whom it is payable or the apportionment among the persons interested. Unlike an ordinary Court, the Court acting under Section 18 of the Land Acquisition Act is precluded from considering any other matter relating to the award. On the principle that an appeal is a continuation of the original proceeding, an appeal to the High Court under Section 54 of the Land Acquisition Act against the decision of the Court under Section 18 thereof would also, it appears, be limited to the same matters in respect of which only a reference could be made by the Collector to the Court under Section 18. This was so held in *Hitkarini Sabha v. Jabalpur Corporation*, AIR 1961 Madh Pra 324, in paragraph (5). Further, Section 12 of the said Act provides that the award of the Collector shall, except as provided in the Act, be final regarding the area and value of the land and the compensation among the parties interested. In this context the appeal provided for by Section 54 is only

by way of an exception to the finality laid down by Section 12. Such exception cannot be enlarged by recourse to the Letters Patent.

8. The difference between the jurisdiction of a Claims Tribunal under the Act and the jurisdiction of an Arbitration under Section 19 of the Defence of India Act, 1939 is even more marked, inasmuch as the latter is expressly called an Arbitrator with the arguable implication that his award is final only subject to one statutory appeal given by Section 19 (f) thereof.

9. It is in this background that we have to consider the nature of the jurisdiction of the High Court dealing with an appeal under Section 110-D of the Act. As already stated above, the claim for compensation caused by negligence is well known to the law of torts, as a part of common law independent of any statute. The claim not being a creation of any particular statute, it would be reasonable to suppose that the provisions of the Motor Vehicles (Amendment) Act, 1956 were intended only to expedite the trial of such a claim by the establishment of Claims Tribunals. The statute did not otherwise intend to cut down or modify or change, in any way, the common law right. Section 110-F barred the jurisdiction of Civil Courts only to entertain the original claim as a trial Court. This bar operated only when in the particular area the Claims Tribunal had been established. In the other areas the Civil Courts continue to entertain such a claim. The appeal to the High Court under Section 110-D of the Act enables the High Court to consider the claim in its entirety free from any limitations in the same way as the High Court would consider the claim in an appeal from a Civil Court from an area in which a Claims Tribunal has not been established. This, therefore, is pre-eminently a case to which the following observation of Lord Parker of Waddington in *National Telephone Company Ltd. v. Postmaster General*, (1913) AC 546 at page 562, applies:—

"Where by statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is, I think, that the Court will determine the matters, as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same."

In that case, the reference to the Railway Canal Commission was made by agreement of parties. It was argued, therefore, that the Commission acted not as a Court, but as Arbitrators, and, therefore, no appeal would lie against its decision. The contention was rejected and it was held that the reference to the Commission was to it as a Court and not as Arbitrators.

Viscount Haldane, L. C. at page 552 observed as follows:

"When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches".

Lord Moulton at pages 559-560 explained the view further in the following words:

"The sole question therefore, for decision is whether the Railway and Canal Commission, when acting under the powers of the section quoted above, are acting as a Court. To my mind the language of the section leaves no room for doubt on this point. The matter is referred to "the Railway and Canal Commission", i.e. to a well-known Court, named by its statutory name. In such a case the *prima facie* and natural meaning of the language used is that it is referred to the Court as such, and any one who would maintain that the true meaning is that it is referred to the existing personnel of the Court as arbitrators merely has to face so strong a presumption in favour of the ordinary meaning of the language that, in order to succeed in this contention, he must shew that other portions of the enactment relating thereto establish beyond all reasonable doubt that his contention is correct".

10. The principle was applied by the Privy Council and later by the Supreme Court in the following cases: In *Secretary of State for India v. Chelikani Rama Rao*, (1960) 43 Ind App 192 = (AIR 1916 PC 21) the claim of a person to an interest in land reserved by the Government as a forest area was tried first by the Settlement Officer. An appeal was provided to the District Judge. There was no express provision for further appeal to the High Court. The question was whether the District Judge acted as such in his ordinary capacity and jurisdiction, so that an appeal would lie to the High Court under the Code of Civil Procedure. Lord Shaw delivering the Judgment of the Board distinguished the previous decision of the Privy Council in *Rangoon Boto-toung Co. Ltd. v. Collector of Rangoon*, (1912) 39 Ind App 197 (PC) and observed as follows:

"The claim was the assertion of a legal right to possession of property in land and if the ordinary Courts of the country are seized of a dispute of that character it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation".

The decision was followed by the Privy Council in *Mong Ba Thaw House case*, (1933) 61 Ind App 158 = (AIR 1934 PC 81). In *Hem Singh v. Basant Das*, (1935) 63 Ind. App. 180 = (AIR 1936 PC 93) the

question was whether the appeal to the Privy Council was competent. Under Section 12 of the Sikh Gurudwara Act, (Punjab Act 8 of 1925), Tribunals are constituted by the local Government with power to determine claims made in accordance with the provisions of the Act. The jurisdiction of the Civil Courts to deal with such claims is expressly barred. Section 34 of the Act gave a right of appeal to the High Court against the final order of the Tribunal. In dealing with the preliminary objection relating to the competency of the appeal against the judgment of the High Court to the Privy Council, Sir George Rankin, who delivered the judgment of the Board, pointed out at page 190 of the Report that (1) the Tribunal was given the same powers as are vested in Civil Courts, (2) Its procedure was to be the procedure of the Code of Civil Procedure, (3) the formal expression of its decision was described as a decree, and (4) the matters on which the Tribunal gave decisions concerned questions relating to the property etc. It was therefore, held that no special jurisdiction was conferred on the High Court by Section 34 of the Act, but that the jurisdiction conferred on the High Court by Section 34 was intended to include the new subject matter as part of ordinary appellate jurisdiction of the High Court. At pages 191-192 of the report, Sir George Rankin again pointed out the nature of the questions which would come up before the Tribunal and concluded as follows:—

"Having regard to the character, the variety and the importance of the questions to be dealt with by a Tribunal and to the terms in which the right of appeal to the High Court is provided by the section, their Lordships are of opinion that provisions of the Civil P. C. with reference to appeals to His Majesty in Council applied to decrees of the High Court made under Section 34 of the Sikh Gurudwara Act."

11. In *National Sewing Thread Co. Ltd. v. James Chadwick and Bros*, AIR 1953 SC 357, the appeal to the High Court from the decision of the Registrar under Section 76 of the Trade Marks Act, 1940, was held to mean that the jurisdiction had been invested in the High Court as an established Court with all incidents attached thereto. In *South Asia Industries (P.) Ltd. v. S. B. Sarup Singh*, AIR 1965 SC 1442, it was held that the appeal to the High Court under Section 39 of the Delhi Rent Control Act, 1958 without any limitation thereon would have been regulated by the practice and procedure obtaining in the High Court including the right of appeal under Cl. 10 of the Letters Patent, but for Section 43 thereof, which expressly gave finality to an order passed on such appeal.

12. The latest decision of the Supreme Court is, perhaps, most important. It is *Collector of Varanasi v. Gauri Shanker*, AIR 1968 SC 384. The decision of the High Court in an appeal under S. 19 (f) of the Defence of India Act, 1939 against the award of the Arbitrator under the said Act was held to be a determination by the High Court and as such amenable to special appeal to the Supreme Court under Art. 136 of the Constitution. In an earlier decision in *Hans Kumar v. Union of India*, AIR 1958 SC 947, it had been held that the High Court in dealing with the appeal under Section 19 (f) of the Defence of India Act, 1939 does not act as a Court and the judgment of the High Court was not a judgment within the meaning of Cl. 10 of the Letters Patent. This decision was followed by a Division Bench of the Punjab & Haryana High Court in *Fazilka Dabwali Transport Company v. Madan Lal*, AIR 1968 Punj & Har 277, which was the only decision brought to our notice in which the question considered was whether the decision of a single Judge of the High Court in an appeal against the award of the Motor Accidents Claims Tribunal under Section 110-D of the Motor Vehicles Act was a "judgment" within the meaning of Cl. 10 of the Letters Patent. The question was answered in the negative on a reasoning which may be summarised as below: The Claims Tribunal is not a Court. An appeal is a continuation of the original proceeding. The appeal to the High Court, therefore, takes the colour from the original proceeding before the Claims Tribunal. The proceeding before the Claims Tribunal gets the complexion of arbitration inasmuch as its decision is called an "award". As the decision of the Tribunal is not a judgment, the decision of the High Court in appeal is also not a judgment, but is an award. The proceedings before the Arbitrator under the Defence of India Act, 1939, those before the Commissioner under the Workmen's Compensation Act, 1923 and those in the Court under Section 18 of the Land Acquisition Act were also in the nature of arbitration proceedings. The appeals from their decisions to the High Courts and the decisions of the High Court in those appeals were held not to be appeals to the High Courts and not to have resulted in "judgments" in AIR 1958 SC 947; *Gopal Singh v. State of Punjab*, ILR (1957) Punj 615, and (1912) 39 Ind. App. 197 (PC), respectively.

13. The provisions of the above mentioned statutes and the nature and the proceedings thereunder are clearly distinguishable from those of the Motor Vehicles Act and the nature of the proceedings before the Motor Accidents Claims Tribunal. It would be useful to examine the distinction. Section 19 of the Defence of India Act, 1939 expressly re-

fers to an Arbitrator and the award given by him. The decision of the Supreme Court in AIR 1958 SC 947 was based expressly on the principle that the award of an Arbitrator is final and unappealable. The said decision rested on two main grounds viz. that the High Court did not act as a High Court, but as an Arbitration Tribunal in considering the appeal against the award of the Arbitrator and secondly, that the judgment given by the High Court in the appeal was not a judgment, but an award. The first of these two grounds has been expressly dissented from by the Supreme Court in its later decision in AIR 1968 SC 384, in which the Supreme Court preferred to follow the view expressed by the House of Lords in (1913) AC 546, and observed as follows:

"Prima facie it appears incongruous to hold that the High Court is not a 'Court'. The High Court of a State is at the apex of the State's judicial system. It is a Court of record. It is difficult to think of a High Court as anything other than a 'Court'. We are unaware of any judicial power having been entrusted to the High Court except as a 'Court'. Whenever it decides or determines any dispute that comes before it, invariably does so as a 'Court'. That apart, when Section 19 (1) (f) specifically says that an appeal against the order of an arbitrator lies to the High Court, we see no justification to think that the legislature said something which it did not mean".

14. The implication of the above observation of the Supreme Court is that the theory that an appeal takes colour from the original proceeding is not to be carried too far. It is to be noted that there are three aspects to be considered, viz.

- (1) the nature of the Tribunal,
- (2) the nature of the proceeding before it, and
- (3) the nature of the decision given by it.

It would not be correct to say that merely because the Tribunal was not a Court or the proceeding before it was not a suit or its decision was not a judgment, but an award, the High Court hearing appeal against its decision would not be a Court or the proceeding before the High Court would not be in its ordinary jurisdiction or that the decision of the High Court on such appeal would not be a judgment. Therefore, even if the original proceeding took place before the Arbitrator resulting in an award, the appeal to the High Court did not turn the High Court itself into a *persona designata* or an Arbitration Tribunal and did not, therefore, make the judgment of the High Court an award. If the High Court acts as such in considering an appeal from the award given by an Arbitrator under Section 19 of the

Defence of India Act, then it would appear that the High Court would also be acting as a High Court in hearing an appeal under Section 54 of the Land Acquisition Act, *Shri Chand v. Union of India*, 64 Pun LR 870 = (AIR 1963 Punj 221) and also in hearing an appeal under Section 30 of the Workmen's Compensation Act against the decision of a Commissioner given thereunder.

We need not, however, consider here these more far-reaching implications of the Supreme Court decision in AIR 1968 SC 384. But, the limited implication which is relevant for our purpose is that in hearing the appeal under Section 110-D of the Act, the High Court must be held to be acting as a High Court and not as a Tribunal, inasmuch as the claim for compensation for negligence is a common law right not created by a statute and the claim is considered by the Tribunal in its entirety without limitation with the result that an appeal to the High Court is made in its ordinary Civil Jurisdiction. In fact, an appeal by special leave under Art. 136 lies to the Supreme Court against the determination or order of a Tribunal. The High Court also has the superintendence over other Courts and Tribunals under Art. 227 of the Constitution. It has never been doubted that the Supreme Court and the High Court act as the Supreme Court and the High Court in functioning under Arts. 136 and 227 of the Constitution respectively and do not act as an Arbitrator or a Tribunal in doing so. For the same reason the High Court would also act as the High Court and not as a Tribunal in hearing the appeal under S. 110-D of the Act.

15. The nature of the proceeding before the Court under Section 18 of the Land Acquisition Act is limited to the four matters referred to in Section 18. The decision of the Privy Council in (1912) 39 Ind App 197 (PC) was expressly based on the particular facts of the case in which two judges of the Rangoon High Court acted both as the Court under Section 18 of the Land Acquisition Act and as the High Court under Section 54 of the said Act. The Privy Council, therefore, treated the decision as an award and not a decision in an appeal from the award.

16. The nature of the proceeding before the Commissioner under the Workmen's Compensation Act and the decision given by him were not investigated by the Punjab High Court in ILR (1957) Punj 615; the Court simply followed the Privy Council decision in (1912) 39 Ind App 197 (PC) referred to above and held that the judgment of the High Court in an appeal against the decision of the Commissioner would not be judgment within the meaning of Cl. 10 of the Letters Patent. We

have already explained that the Privy Council decision was based on the special facts of the case. Since no other reasons are given by the Punjab High Court their decision in this case does not afford any guidance to us.

17. We may here recall that one aspect of the question for consideration before us is whether the decision under appeal is the decision of the High Court. In view of the Supreme Court decision in AIR 1968 SC 384, the High Court must be held to have acted as a High Court in hearing the appeal. The other aspect of the question alone now remains to be considered, viz. whether the decision by the High Court is a judgment or not.

18. For the purpose of the Supreme Court in AIR 1968 SC 384 it was not necessary to decide whether the decision of the High Court was a judgment. It was sufficient that it was a determination against which an appeal to the Supreme Court would lie under Art. 136 of the Constitution.

19. As observed by Fazl Ali, J. in *Bharat Bank v. Employees of Bharat Bank*, AIR 1950 SC 188 in paragraph (5) the word "determination" was used under Art. 136 to widen its scope to include appeals not only from judgments of the High Courts but also from determinations of Tribunals. The question, therefore, whether a particular decision of the High Court is a judgment or is only a determination must turn on the connected question whether the decision is given by the High Court acting as a High Court or whether it is given by it acting as a Tribunal or a *persona designata*. Under Section 11-D the High Court can act only as a High Court not merely because this is the effect of the Supreme Court decision in AIR 1968 SC 384 cited above, but also because the Claims Tribunal is dealing with a common law right in all its amplitude and without any statutory limitations. The appeal to the High Court is also, therefore, concerned with a common law right unfettered by any statute. The jurisdiction of the High Court would also, therefore, be its ordinary jurisdiction and not any special jurisdiction fettered by any statute. Once this is established, the decision given by the High Court must be regarded as a judgment. A close study of the reasoning of the Supreme Court decision in AIR 1958 SC 967 referred to above, would show that these two features are inseparable from each other. One cannot exist without the other. We have already considered judicial decisions above in which the decisions given by the High Court were held not to be judgments. In each of them the High Court was held not to be acting in its ordinary jurisdiction, but in its special jurisdiction under the terms of a particular statute or as a *persona designata*, or as a Tribunal or as

Arbitrator. None of these decisions can apply to the present case. There is no escape, therefore, from conclusion that the decision of the learned single Judge under appeal was a judgment of the High Court within the meaning of Cl. 10 of the Letters Patent.

20. In this connection, it may be observed that the provisions of Cl. 11 of the Letters Patent not only make the High Court a Court of appeal from other Civil Courts and Courts subject to the High Court's special superintendence but also invest it with appellate jurisdiction in such cases as may, after the date of the Publication of the Letters Patent, be made subject to appeal to it by any law made by a competent legislative authority for India. Section 110-D of the Act may be said to be such a law.

21. We may add that the judgment under appeal satisfies the other requirements of a 'judgment' within the meaning of Cl. 10 of the Letters Patent laid down by the Supreme Court in *Asrumati Debi v. Kumari Rupendra Deb*, AIR 1953 SC 198, viz.

- (1) it terminates the suit or proceeding and
- (2) it affects the merits of the controversy between the parties.

We further understand that the State Governments have framed Rules under Section 111-A of the Act making the award of the Claims Tribunal executable as a decree. If so, the judgment under appeal is also executable as a decree. This is an additional reason why it has to be regarded as a judgment and not as an award or a mere determination.

22. Before closing, we may refer to the Division Bench decision of the Calcutta High Court in *Nur Mohammed v. S. M. Solaiman*, (1945) 49 Cal WN 10, in which the question was whether the judgment of a learned single Judge of the High Court under Section 46 of the Calcutta Municipal Act was appealable as a judgment of the High Court to a Letters Patent Bench. Mitter, J., speaking for the Court on a review of the case law, came to the following conclusions which may be usefully reproduced below:

- "(1) that the general rule is that when a matter reaches a Civil Court, the procedure of Civil Courts would be attracted including the provisions regulating appeals from its judgments, decrees or orders, but
- (2) this general rule is applicable only when the matter comes to that Court as part of its ordinary jurisdiction and not by reason of a special jurisdiction having been conferred upon it: The last-mentioned proposition defines the precise scope of the principle.

The nature of the dispute would be a material factor to be taken into consideration in coming to the conclusion whether a special jurisdiction was intended to be conferred on the Civil Court. If the dispute relates to a right or liability which is itself the creation of the statute and which apart from the statute would not come within the jurisdiction of the Civil Court, the jurisdiction conferred by it on the Civil Court, be it the High Court or a subordinate Civil Court, to determine the said dispute would be considered to be a special jurisdiction".

23. For the reasons stated above, therefore, we reject the preliminary objection and hold that the decision under appeal is a decision of a learned single Judge of the High Court and that it amounts to a judgment within the meaning of Cl. 10 of the Letters Patent. The result is that the appeal would now go back to the Division Bench to be heard on merits.

24. Costs shall be costs in the cause.

25. S. K. KAPUR J.:— I agree.

Reference answered.

AIR 1970 DELHI 44 (V 57 C 8)

HARDAYAL HARDY AND
OM PARKASH JJ.

Mangal Sen, Appellant v. Union of India, Respondent.

F. A. O. 23-D of 1961, D/-20-5-1969.

(A) Court-fees and Suits Valuations — Court-fees Act (1870), Sections 3, 4, 7 and 8, Sch. I, Art. 1 and Sch. II, Art. 11 — "Order relating to compensation for acquisition of land for public purpose" — 'Order' to be understood in the sense it is used in Civil P. C. — Award of compensation by arbitrator under provisions of Central Act 60 of 1948 — Award is not an 'order' — Appeal against 'award' attracts fixed court-fee under Art. 11 of Sch. II of the Court-fees Act — Ad valorem court-fee on basis of S. 8 not payable. AIR 1946 Cal 524 & AIR 1959 Cal 609 & AIR 1968 Andh Pra 348, Diss. — (Resettlement of Displaced Persons (Land Acquisition) Act (1948), S. 7) — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Fiscal Statute) — (Civil P. C. (1908), S. 2 (2) and S. 2 (14)).

An award of compensation by the arbitrator appointed under Section 7 of the Resettlement of Displaced Persons (Land Acquisition) Act is neither a decree nor an order having the force of a decree and hence an appeal against it under S. 7 (3) of the said Act attracts fixed court-fee under Sch. II, Art. 11 of the Court-fees Act and payment of court-fee on ad valorem basis under Section 8 of the Court-fees Act on the difference between the amount awarded and the amount claimed cannot be in-

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sisted upon. The fact that Section 8 of the Court-fees Act does not use the expression 'order' simpliciter but instead uses the expression 'order relating to compensation under any Act for the time being in force is not decisive of the matter and S. 8 cannot on that basis be applied to an appeal from the award. In a fiscal statute like the Court-fees Act what really matters is the charging provision of the Act under which a particular document would fall before it can be said what stamp it should bear. It being an enactment dealing with revenue, no amount is leviable unless it clearly falls under the provisions of that Act. (Paras 23 & 31)

The charging provisions under the Court-fees Act are Sections 3 and 4 read with Schedules I and II. Sections 7 and 8 are merely computing sections. It is under the provisions of the various Articles of the Schedules that the amount of court-fee has to be determined.

(Para 24)

Before a document can be filed in a Court, it must bear the court-fee chargeable under the 1st and 2nd Schedule of the Act. If it is a memorandum of appeal, it must either be an appeal from a decree or an order having the force of a decree or an order which is neither one nor the other. If it is neither an appeal from a decree nor an order having the force of a decree then it can only fall under Schedule II, Art. 11. It does not make the slightest difference whether it is an order under one Act or another nor does it make any difference whether it is an order relating to compensation or some other matter. (Para 25)

Section 8 no doubt provides for mode of computation of court-fee on an order relating to compensation but before any question of computation of court-fee can arise, the order itself must fit in the strait jacket of one or the other provision of Sch. I or II and this can only be if it is held that Section 8 is confined to orders as understood in the Civil P. C. and where any document does not fall within a decree or an order having the force of a decree it should be held to be covered by Art. 11 of Schedule II. AIR 1957 Punj 32 & AIR 1945 Bom 348 & AIR 1957 Nag 8, Foll.; AIR 1946 Cal 524 & AIR 1959 Cal 609 & AIR 1968 Andh Pra 348, Diss.; AIR 1932 Cal 346 & 1966-68 Pun LR (D) 299 (FB), Dist.; AIR 1939 All 127, Ref.

(Para 27)

(B) Constitution of India, Arts. 366 (10), 31 (5) & (6), 31-A, 31-B and Sch. IX — Provision in a Pre-Constitution Act void ab initio is not 'existing law' — Provision does not attract Art. 31 (5) or 31-A, inclusion of the Act (Resettlement of Displaced Persons (Land Acquisition) Act 1948) in Sch. IX of Constitution notwithstanding — (Resettlement of Displaced Persons (Land Acquisition) Act (1948), S. 7 (1) (e) Pro-

visos — Provisos ultra vires S. 299 (2) of the Government of India Act, 1935 — Hence ignored — Provisos not 'existing law' under Art. 366 (10) of Constitution — (Government of India Act (1935), Section 299 (2)).

Clause (e) of Section 7 (1) of the Resettlement of Displaced Persons (Land Acquisition) Act with its provisos provides that the compensation has to be determined having regard to the provisions of Section 23 (1) of the Land Acquisition Act (1894) provided the market value under the said Section 23 (1) shall be deemed to be the market value of the land on the date of the publication of notice under section, or on 1-9-1939 with an addition of 40% whichever is less and provided further, in case the land is held under a purchase made between 1-9-1939 and 1-4-1948 under a registered document or a decree for pre-emption, the compensation shall be the price actually paid by the purchaser. The provisions under the said two provisos thus prohibit compensation being given on the basis of the market value of the land as existing on the date of the notification. These provisos are therefore, ultra vires Section 299 (2) of the Government of India Act, 1935 which governed the powers, authority and jurisdiction of the Legislature, at the time when the Resettlement of Displaced Persons (Land Acquisition) Act has been passed. Sub-section (2) of Section 299 barred passing of any law providing for acquisition of property without payment of compensation, i.e., just equivalent of what the owner has been deprived of. The said provisos thus being void ab initio and since they are, therefore, to be ignored, they are not 'existing law' within the meaning of Art. 366 (10) of the Constitution. Not being existing law, they are not saved by Art. 31 (5) or 31-A. Art. 31-A cannot have any bearing in the context of a provision which has had no legal existence at the time the Constitution came into force. Nor Cl. (6) of Art. 31 is applicable to the above Act having been enacted more than 18 months before the commencement of the Constitution. The inclusion of the Act in the Ninth Schedule also does not save the impugned provision from being declared void or from having become void because the attack against the validity of the impugned provision is not directed on the ground of its being inconsistent with or taking away or abridging any of the fundamental rights contained in Part III of the Constitution. The attack is exclusively aimed on the ground that it is ultra vires Section 299 (2) of the Government of India Act 1935 and is not saved as existing law after the coming into force of the Constitution. Hence the arbitrator appointed under Section 7 of the above Act has to make an award for

the compensation on evidence of both the parties ignoring the provision under the impugned provisos to Section 7 (1) (e) of the Act. AIR 1965 SC 1096 & AIR 1968 SC 377 & AIR 1967 SC 637 & AIR 1965 SC 1017, Foll.; AIR 1966 Punj 507 & AIR 1954 SC 170, Ref.

(Paras 34, 43, 45 to 47)

Cases Referred: Chronological Paras

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(1968) 1 SCR 463, Union of India
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Chandrabhan Lal 29
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State 11, 12, 20, 30
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v. Bela Banerjee 36, 38
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v. Province of Bengal 17, 19, 30
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Jangbari v. Govt. of Bombay
11, 12, 14,
17, 19, 30
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ILR (1939) All 142, Debi Din v.
Secretary of State 13, 15
(1932) AIR 1932 Cal 346 (V 19) =
ILR 59 Cal 528, Anandalal
Chakrabarti v. Karnani Industrial
Bank Ltd. 13, 15
Mohan Behari Lal, for Petitioner;
Kartar Singh Chawla, for Respondent.

HARDAYAL HARDY J.:— This appeal is directed against an award made

by an arbitrator appointed under Section 7 of the Resettlement of Displaced Persons (Land Acquisition) Act 60 of 1948, hereinafter to be called the Act. The appeal which should ordinarily have been heard by a Single Bench, was ordered by the Hon'ble the Chief Justice to be placed before a Division Bench for reasons mentioned in his order dated October 26, 1967 and that is how it was laid before us.

2. The appellant is the owner of certain land in village Basai Darapur which along with the land of some other owners, was acquired under Government's notification No. F-1 (136) 48 LSG dated 1-1-1949 published in the Delhi State Gazette for the purpose of re-settlement of displaced persons. The project for which the acquisition of land was made is known as "The Industrial Area Scheme".

3. As the controversy in this case relates to the quantum of compensation, the provision of the Act with which we are concerned is Section 7 which lays down the method for determining compensation for the land acquired under the Act. The section provides that where the amount of compensation can be fixed by agreement it shall be paid in accordance with that agreement; but where no such agreement can be reached then the Provincial Government shall appoint as arbitrator a person qualified for appointment as a Judge of a High Court. Under Cl. (d) both the Provincial Government and the person to be compensated are required to state at the commencement of the proceedings before the arbitrator what in their respective opinions is a fair amount of compensation.

4. Clause (e) with its two provisos lays down the principles in accordance with which the compensation payable under the Act is to be determined. The clause reads:—

"The arbitrator, in making his award, shall have due regard to the provisions of sub-section (1) of Section 23 of the Land Acquisition Act, 1894 (1 of 1894).

Provided that the market value referred to in clause first of sub-section (1) of Section 23 of the said Act shall be deemed to be the market value of such land on the date of publication of the notice under section, or on the first day of September, 1939, with an addition of 40 per cent whichever is less.

Provided further that where such land has been held by the owner thereof under a purchase made before the first day of April, 1948, but after the first day of September, 1939, by a registered document, or a decree for pre-emption between the aforesaid date, the compensation shall be the price actually paid by the purchaser or the amount on payment of which he may have acquired the land in the decree for pre-emption as the case may be".

Sub-section (3) provides for an appeal from the award to the High Court and makes the decision of the High Court final.

5. Sub-section (4) lays down that save as provided in this section, nothing in any law for the time being in force shall apply to arbitrations under this section.

6. As there was no agreement between the appellant and the State Government the latter appointed Shri K. S. Sidhu, a Subordinate Judge in Delhi, as arbitrator who made his award on September 28, 1960 whereby he fixed the compensation at Rs. 908 as against sum of Rs. 38530/12/- claimed by the appellant.

7. The present appeal is for the enhancement of compensation and has been filed under sub-section (3) of S. 7. The memorandum of appeal is stamped with a fixed court-fee of Rs. 5.25.

8. At the commencement of the arguments a preliminary objection has been taken by the learned counsel for the State on the ground that the memorandum of appeal is deficiently stamped in that the appeal being against an order relating to compensation the memorandum is required to bear ad valorem court-fee on the amount represented by the difference between the amount awarded and the amount claimed by the appellant.

9. In order to appreciate the objection it is necessary to look into the various sections of the Court-fees Act. Section 4 deals with fees on documents of the kinds specified therein when filed in the High Court while Section 6 deals with fees on

documents filed in mofussil Courts. Section 4 is in Chapter 2 which deals with fees in High Courts and Chapter 3 which contains Sections 6 to 19 deals with fees in other Courts and public offices.

10. Sections 7 and 8 provide for computation of fees. Section 8 which alone is relevant for the purpose of the argument raised before us reads as under:—

"The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes, shall be computed according to the difference between the amount awarded and the amount claimed by the appellant".

As to what is the amount of court-fee chargeable in various cases is given in Schedules I and II of the Act. Schedule I deals with ad valorem court-fee and Schedule II with fixed fees.

Article 1 of Schedule I (Punjab Amendment) is a residuary Article. It runs:—

"1. Plaint, written statement pleading a set off or counter claim or memorandum of appeal (not otherwise provided for in the Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in Section 3".

Other Articles of Schedule 1 are not necessary for the purpose of this case. In Schedule II the only Article which is necessary to be considered is Art. 11 which provides:

"11. Memorandum of appeal (a) to any civil Court other than a High Court, or to any Revenue Court or Executive Officer, other than the High Court or Chief Controlling Revenue or Executive Authority

(b) to a High Court or Chief Commissioner, or other Chief Controlling Executive or Revenue Authority.

The contention urged on behalf of the appellant is that this case falls under Article 11 of Schedule II in that it is a memorandum of appeal in a case where the appeal is not from a decree or an order having the force of a decree and is presented to a High Court and is therefore, liable to a fixed fee of Rs. 5.25. It is urged that Shri K. S. Sidhu was acting as an arbitrator and not as a Court. The award made by him is neither a decree nor an order having the force of a decree.

11. Reliance is placed by the learned counsel appearing for the appellant on a Bench decision of the Punjab High Court in *Kanwar Jagat Bahadur Singh v. Punjab State*, AIR 1957 Punj 32 and on a Single Bench judgment of the Bombay High Court in *Hirji Virji Jangbari v. Govt. of Bombay*, AIR 1945 Bom 348.

12. The case of *Kanwar Jagat Bahadur Singh* AIR 1957 Punj 32 is under the Punjab Requisitioning and Acquisition of Immovable Property Act 11 of 1953. Assessment of compensation for property requisitioned or acquired under that Act is provided for in Section 8 while S. 9 deals with payment of compensation. Provision for appeals from the award is made under Section 11, the relevant portion of which is in these terms:—

"11. Any person aggrieved by an award of the arbitrator made under Section 8 may, within thirty days from the date of such award, prefer an appeal to the High Court within whose jurisdiction the requisitioned or acquired property is situate."

The District Judge who was appointed arbitrator under the Act had enhanced the compensation awarded to the appellant by

the Collector by Rs. 53,678-11-0 but the latter being dissatisfied with the award had preferred an appeal to the High Court under Section 11 and his prayer was for enhancement of compensation by Rupees 2,68,274-5-0. The memorandum of appeal was stamped with Rs. 4 under Schedule II Art. 11 of the Court-fees Act. The State filed cross-objections on which they paid ad valorem court-fee. At the hearing of the appeal, the Advocate-General appearing for the State contended that the fee paid on the appeal filed by the appellant was inadequate. Learned Judges (J. L. Kapur and Bishan Narain JJ.) relying upon the judgment of Bombay High Court in AIR 1945 Bom 348 held that the award made by an arbitrator was not a decree nor an order having the force of a decree within the words used in Art. 11 of Sch. II.

13. On behalf of the State, the learned Advocate-General relied on Section 8 of the Court-fees Act and on two judgments, one of Calcutta High Court in the case of Anandalal Chakrabarti v. Karnani Industrial Bank Ltd., ILR 59 Cal 528 = AIR 1932 Cal 346 and the other of Allahabad High Court in Debichand v. Secretary of State, AIR 1939 All 127 and submitted that the effect of S. 8 was that in cases where an appeal was brought against an order relating to compensation under any Act for the time being in force for the acquisition of land the amount of fee payable on a memorandum of appeal under the Court-fees Act had to be computed according to the difference between the amount awarded and the amount claimed.

13-A. Repelling the objections raised by the learned Advocate-General the learned Judges held:—

"The only way that the various sections and the Schedules of the Court-fees Act can be reconciled is that Section 8 should be confined to orders as understood in the Civil P. C. and that where any matter does not fall within a decree or an order having the force of a decree, the matter should be held to be covered by Art. 11, Sch. II, and once we hold that, Art. 1 of Sch. I is excluded".

14. The case of Hirji Virji Jangbari AIR 1945 Bom 348 decided by N. J. Wadia, J. of Bombay High Court was one of an appeal against an award for compensation made by an arbitrator under Section 19 of the Defence of India Act, 1939 in respect of property acquired by Government under the provisions of Rule 75-A, Defence of India Rules 1939. An examination of the provisions relating to assessment and payment of compensation and to appeals under the Act and the Rules under discussion in that case shows that the provisions in that case were more or less identical with those in the case before the learned Judges of the Punjab High Court.

15. While dealing with the two cases from Calcutta and Allahabad on which reliance was placed on behalf of the Government, Wadia, J. observed:—

"It is to be noted however, that both in the Calcutta Improvement Act (5 of 1911), under which the award in ILR 59 Cal 528 = (AIR 1932 Cal 346) had been made, and in the U. P. Town Improvement Act of 1919, under which the award in ILR (1939) All 142 = AIR 1939 All 127 had been made, there are express provisions that the Tribunals making the awards are to be deemed to be Courts under the Land Acquisition Act. Section 69, Calcutta Improvement Act, of 1911 provides that the Board may acquire land under the provisions of the Land Acquisition Act for carrying out any of the purposes of the Act. Section 70 provides that a Tribunal should be constituted for the purpose of performing the functions of the Court in reference to the acquisition of land for the Board under the Land Acquisition Act; and Section 71 provides that for the purpose of acquiring land under the Act for the Board the Tribunal shall be deemed to be the Court and the award of the Tribunal shall be deemed to be the award of the Court under the Land Acquisition Act and shall be final. Ss. 56, 57 and 58, U. P. Town Improvement Act of 1919 contain similar provisions by which the Tribunal acquiring land under the Land Acquisition Act is deemed to be the Court for the purpose of the Land Acquisition Act and the award of the Tribunal is deemed to be the award of the Court under the Land Acquisition Act. There is no provision in Section 19, Defence of India Act, and, in the rules made thereunder, by which the award of the arbitrator can be deemed to be an award of the Court under the Land Acquisition Act. Both these cases are therefore, distinguishable from the present case."

16. A comparison of the relevant provisions of the two statutes with which the learned Judges of the Punjab High Court and Wadia, J. of the Bombay High Court were concerned with the provisions of the statute, with which we have to deal in this appeal clearly establishes their close identity. In a way therefore, I feel bound by the authority of the Bench decision of the Punjab High Court. Mr. Kartar Singh Chawla learned counsel for the State however, challenges the correctness of that decision and has reinforced his argument not only by reference to the two decisions of Calcutta and Allahabad High Courts cited above but also by citing several other judgments from other High Courts including two later judgments of Calcutta High Court. To these judgments I may now turn for discussion.

17. The first case to which we have been referred is a decision of Lodge J. in

for the reconstruction of the branches of the B. N. U. in Goa, Daman and Diu and of Caixa Economica de Goa (with which institution we have no concern in these appeals) in the interests of the general public. The interest of the general public is outlined in Section 3 of the Regulation. That section enacts that in view of the closure of the Banks and the transfer of a substantial portion of their assets out of India on or about the appointed day and the difficulties experienced by depositors, the Banks shall, as from that day, be reconstructed in the interests of the general public in accordance with the provisions contained in the Regulation. The expression "Banks" is defined in Section 2(b) of the Regulation as—

- (i) the branches of Banco Nacional Ultramarino in Goa, Daman and Diu; and
- (ii) the Caixa Economica de Goa.

According to Section 2(a) the expression "appointed day" means the 20th of December 1961. It is admitted by the defendants that all the valuable assets of the branches of B. N. U. in Goa were removed to Lisbon or other Portuguese territories under the directions of head office of B. N. U. on or about 20th of December 1961. It is also not in dispute that B. N. U. was a bank which used to issue currency on behalf of the Portuguese Government. Soon after 20th of December 1961 a piquant situation emerged in the territories of Goa, Daman and Diu. The currency issued by the Portuguese Government through B. N. U. did not constitute legal tender after India had occupied those territories. There were a large number of citizens who had credit balance in their accounts with the branches of B. N. U. The Government of India, it appears, was influenced greatly by the apparent distress of the holders of the Portuguese currency notes and the persons who had credit balances in the various branches of B. N. U. in Goa, Daman and Diu into finding some solution of the resultant spectacle. The first step in the direction was taken on 11th of January 1962 by the then Military Governor, Maj. Gen. K. P. Kandeth. He issued an order assuming all powers, authority and jurisdiction over the branches of B. N. U. and appointed Shri B. R. Gadre as the Custodian for the purpose of taking over and administering the affairs of the said branches. He directed that Shri B. R. Gadre shall have authority to release to such person and on such terms and conditions as he may deem fit, import and export or other bills, manifests, and any other documents, and do all such other acts in so far as they may be required for clearing the goods imported into or exported from Goa, Daman and Diu. Subject to these directions, the Military Governor enjoined that until other arrangements were made in

respect of those branches, they shall continue to be closed and they shall not make any payment to any depositor or discharge any liabilities or obligations to any creditor or release any documents or assets of the Bank. The next big step was in the shape of the Regulation, which, it appears, was promulgated sometime in November 1962. By Section 4 of that Regulation a Custodian could be appointed to take charge of the branches of B. N. U., and by Section 5(1) it was provided that as from the appointed day, all properties and assets, all rights, powers, claims, demands, interests, authorities and privileges, and all obligations and liabilities of the Banks shall, subject to the other provisions of the Regulation, stand transferred to and vest in the Custodian. Section 7(2) of the Regulation states that the Custodian shall have the right to realise at any time after the appointed day the debts or other amounts due to the branches of B. N. U. including any debts or other amounts due from the head office of the B. N. U. By Sections 9, 10 and 11 provisions were made for discharging the liabilities of the branches of B. N. U. By Section 6(1) it was provided that for the purpose of enabling the Custodian to discharge the obligations imposed on him under the Regulation, the Central Government may, after due appropriation made by Parliament by law, grant to the Custodian such loans on account of either of the Banks as it may deem fit. In sub-section (2) of Section 6 it was stated that the terms and conditions on which such loans may be granted shall be determined by the Central Government, and it shall be competent for that Government to adjust any loan or any portion thereof against any subsidy which that Government may, after due appropriation made by Parliament by law in this behalf, grant to the Custodian for discharging the liabilities and obligations of the Banks or either of them.

13. The learned counsel for the defendants very unequivocally stated at the bar that they had no objection to raise against the vires of the Regulation. However, they unanimously contended that since by Section 5 (1) only the rights of the branches have been transferred to and vested in the Custodian and that since the debts claimed by the Custodian from the various defendants are actually owned by B. N. U. and not by its branches in Goa, the Custodian, who represents the branches, cannot claim decrees in the suits. In other words, the precise point raised by the learned counsel for the defendants was that Section 5 (1) vests in the Custodian the properties, assets, and rights of the branches of B. N. U. and that since the debts do not form part of the properties and assets and rights of those branches, the suits are clearly *miscon-*

ceived. Hence the principal question that falls for determination is whether the branches of B. N. U. in Goa had any properties, rights and assets of their own within the meaning of Section 5(1) of the Regulation. It was vehemently asserted by Shri Tamba, the learned Government Pleader representing the Custodian, that what the Regulation meant to transfer to and vest in the Custodian were the rights acquired and the obligations undertaken by B. N. U. through its branches in the territories of Goa, Daman and Diu. The learned counsel for the defendants said in reply to that contention of Shri Tamba that it may have been the intention of the President to vest in the Custodian the rights acquired and the obligations undertaken by B. N. U. through its branches in the aforesaid territories but the actual words used in Section 5(1) of the Regulation clearly fall short of that intention. Shri Costa also emphasised that the rights acquired and obligations incurred by B. N. U. through its branches in Goa can never be considered as the rights and obligations of the branches as they are actually the rights and obligations of B. N. U. and that as such the President could not have transferred those rights and obligations to the Custodian.

14. The last mentioned point raised by Shri Costa may be disposed of before taking up consideration of the main point commonly pressed by the defendants' counsel. Article 240(1) of the Constitution provides that the President may make regulations for the peace, progress, and good government of the various Union territories including Goa, Daman and Diu. In sub-article (2) it is stated that the regulation so made may repeal or amend any Act made by Parliament or any existing law which is for the time being applicable to the Union territory, and that the regulation when promulgated by the President shall have the same force and effect as an Act of Parliament which applies to that territory. Obviously, the powers of the President are plenary and absolute and are in no way less, if not greater, than those of the Parliament since he has the undoubted right of even making a regulation repealing or amending an Act passed by the Parliament. Article 245(2) enacts that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. Since in terms of sub-article (2) of Article 240 a regulation promulgated by the President under Article 240(1) has the same force and effect as an Act of Parliament, the Regulation No. II of 1962 cannot be deemed to be invalid on the sole ground that it would have extra territorial operation. Article 245(2) saves it from the

charge of invalidity on that account. The Parliament, it cannot be gainsaid, has the right to make laws on all conceivable subjects pertaining to the territories of India subject undoubtedly to the safeguard that such laws are not opposed to any constitutional provision. Likewise, the President has the absolute and sovereign authority to make any regulation respecting the Union Territories provided the regulation is for the peace, progress and good government of the territory concerned and is not in conflict with any provision of the Constitution. None of the counsel for the defendants contended that the Regulation No. II of 1962, with which we are concerned in the present appeals, is in conflict with any provision contained in the Constitution or it is not in accord with the purposes mentioned in Art. 240(1). Hence, it follows that the President could have transferred, by means of a regulation made under Article 240, the rights and obligations of B. N. U. acquired and incurred through its branches in Goa to the Custodian for the purpose of reconstruction of those branches.

15. The question of the validity of the Regulation can be properly adjudged if we examine it in its true perspective. The B. N. U. closed its branches in Goa with effect from 20th of December 1961. There were two sections of citizens in Goa who suffered catastrophically the effect of that closure, they being (i) who held currency notes issued by B. N. U. and (ii) who had credit balances in the various branches of B. N. U. With effect from 20th of December 1961 the B. N. U. fell in the category of a foreign bank vis-a-vis India including the territories of Goa, Daman and Diu, and for that reason it could not have operated in India without first obtaining the permission of the Reserve Bank of India. The first concern of the new sovereign of the erstwhile Portuguese territories of India was obviously to look after the welfare of the citizens. The section of the community which was affected by the closure of the branches of B. N. U. could legitimately press on that sovereign that a solution to their problem created by the closure of the branches of B. N. U. should be provided. None can deny that it was a legitimate demand of that section of the community. It appears that after thorough scrutiny of that problem it looked clear to the Government of India, the new sovereign, that the distress of the aforementioned section of the community could be relieved if the branches of B. N. U. were reconstructed. The reconstruction of such branches was a matter, I have no doubt, which fell within the legislative competence of the President, who, as stated above, has the plenary sovereign legislative power respecting the Union territories listed in

Article 240 of the Constitution. It was not beyond the power of the President to provide in the Regulation that for the purpose of reconstruction of the branches the Custodian shall have right to realise moneys due by the customers to the various branches and to discharge the obligations of the branches from out of the moneys thus collected. To enable the Custodian to discharge his obligations under the Regulation, the Central Government undertook to place adequate sums at his disposal—vide Section 6(1) of the Regulation—and by Section 7(2) of the Regulation the Custodian was authorised to realise debts and other amounts due to the various branches from others including the head office of B. N. U. In Section 5(4) it was provided that notwithstanding anything contained in sub-sections (1) to (3) of Section 5 the assets and liabilities of the branches of B. N. U. in Goa, Daman and Diu in respect of any currency notes issued by the former Portuguese administration in India or the B. N. U. exclusively for circulation in Goa, Daman and Diu shall be transferred to and vest in the Central Government. It is thus evident that the Regulation was an all comprehensive measure respecting the rights and obligations of the branches of B. N. U. in the erstwhile Portuguese India. The Regulation was obviously meant to afford relief to the persons who held the currency notes circulated in Goa, Daman and Diu either by the Portuguese administration in India or the B. N. U. and also to that sizable section of the community which had credit balances in their accounts with those branches. If in affording relief to such categories of persons the Regulation provided that the amounts due to the branches by its debtors shall vest in the Custodian and the latter shall also have the authority to realise them, no fault can be found with such a legislative measure. What the Regulation meant to achieve was to restore the various branches of B. N. U. to that state in which they were prior to their closure on 20th of December 1961 and then to square up their accounts through the instrumentality of the Custodian. It has to be emphasised that a huge majority of customers of the branches were Goan citizens and so the President who is charged by the Constitution with the administration of the Union territories could not be oblivious or indifferent to the demands of the situation created by the end of the Portuguese rule and closure of the branches of B. N. U. Hence I repel the contention of Shri Costa that the President had no right to authorise the Custodian to realise the assets acquired by B. N. U. through its branches in Goa, Daman and Diu.

16. I may mention here in passing that it is well settled that a "debt" is property and that it is a chose in action which is heritable and assignable. In this connection I invite attention to the case of Delhi Cloth and General Mills Co. Ltd. v. Harnam Singh, AIR 1955 SC 590. The Supreme Court observed further in that authority that choses in action arising out of contract have two aspects: (1) as property and (2) as involving a contractual obligation for performance. The property aspect is relevant for the purposes of assignment, administration, taxation and the like; the contractual aspect for performance. Debt being intangible, cannot have location, the Supreme Court pointed out, except notionally and that to give it notional position rules have to be framed along arbitrary lines. Determination of the legal liabilities which arise out of facts relating to a debt raises complex questions of private international law and two distinct lines of thought emerge in that connection. One is that which is applied by English Courts, namely, the "lex situs"; the other is the one favoured by Cheshire in his book on Private International Law, namely, the "proper law of the contract." The expression "proper law of contract" is defined by the Supreme Court as the law of the country in which its elements are most densely grouped and with which factually the contract is most closely connected. In face of these observations of the Supreme Court it looks apparent that the debts due by the various defendants to the branches of the B. N. U. are properties and that the law governing the contracts giving rise to such debts would be that of the country in which "the elements of the contract are most densely grouped and with which factually the contract is most closely connected." Such law obviously is the law prevalent in the territories of Goa, Daman and Diu and not the one obtaining in Portugal where the head office of B. N. U. is situated. The Supreme Court also observed in the cited case that proper law of the contract is the law that obtains not when the contract was made and the obligation fashioned but the law in force at the time when performance is due. A proper law intended as a whole to govern a contract, the Supreme Court observed, is administered as a living and changing body of law and effect is given to any changes occurring in it before performance falls due. Since the Custodian now seeks the performance of the contracts relevant to the debts due by the defendants, it is the law now in operation which will govern the disputes between the parties. Therefore, the provisions of the Regulation relied upon by Shri Tamba, the counsel for the Custodian, are unassailable in the

background that President had the undoubted right to enact those provisions.

17. Another proposition, relevant to our present case, enunciated by the Supreme Court in the aforementioned authority was that in banking transactions it is well settled that (i) the obligation of a bank to pay the cheques of a customer rests primarily on the branch at which he keeps his account and the bank can rightly refuse to cash a cheque at any other branch, and (ii) a customer must make a demand for payment at the branch where his current account is kept before he has a cause of action against the bank. The rule is the same, the Supreme Court emphasised, whether the account is a current account or whether it is a case of deposit. Either way, there must be a demand by the customer at the branch where the current account is kept, or where the deposit is made and kept, before the bank need pay, and for these reasons the 'situs' of the debt is at the place where the current account is kept and where the demand must be made. These propositions of law afford additional justification for the President to make a regulation for reconstruction of the branches of B. N. U. and settlement of their accounts. As a result, I find no substance in the contention of Shri Costa that the President could not have made a provision for transferring the rights acquired and obligations incurred by the B. N. U. through its branches in Goa to the Custodian.

18. The defendants' counsel did not join issue with Shri Tamba respecting the banking practice, propounded by the latter, that the loan raised by a customer from a particular branch of a bank has to be re-paid at the same branch. This well established banking practice also furnished a necessity for reconstruction of the branches of B. N. U. in Goa, Daman and Diu, to enable the debtors of B. N. U. to discharge their obligations if they so desired, as also to create an authority which could take steps to recover the unpaid amounts from recalcitrant debtors.

19. This brings us to the consideration of the first main argument raised by the learned counsel for the defendants. According to their contention all that was transferred to the Custodian is mentioned in Section 5(1) of the Regulation and that provision only says that all properties and assets, all rights, powers, claims, demands, interests, authorities and privileges and all obligations and liabilities of the branches of B. N. U. shall stand transferred to and vest in the Custodian, of course subject to the other provisions of the Regulation. It was urged by the defendants' counsel that the amounts claimed from the defendants are a part of the assets of B. N. U. and not of the branches of the B. N. U. and as

such Section 5(1) does not relate to such assets. The counter submission of Shri Tamba was that Section 5(1) does embrace the rights acquired and the obligations undertaken by B. N. U. through its branches in the territories of Goa, Daman and Diu if we examine the provision in the background of the objectives leading to the promulgation of the Regulation. The rejoinder of the defendants' counsel to that submission of Shri Tamba was that the phraseology of Section 5(1) cannot bear such an interpretation and there is no warrant for straining the phraseology for achieving the desired objective. Shri Tamba contended, to meet the latter stand of the counsel, that if the interpretation placed by the defendants' counsel on Sec. 5(1) were accepted, the Regulation will cease to have any practical effect and as such that interpretation has to be discarded. Shri Tamba placed reliance on the principles of interpretation of statutes enunciated by the Supreme Court in the case of *R. M. D. Chamarbaugwalla v. Union of India*, AIR 1957 SC 628, in support of the proposition propounded by him. The relevant headnote of the authority reads as under:—

"When a question arises as to the interpretation to be put on an enactment, what the court has to do is to ascertain 'the intent of them that make it', and that must of course be gathered from the words actually used in the statute. That, however, does not mean that the decision should rest on a literal interpretation of the words used in disregard of all other materials. The literal construction then has, in general, but prima facie preference. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act; to consider (1) what was the law before the Act was passed; (2) What was the mischief or defect for which the law had not provided; (3) What remedy Parliament has appointed; and (4) The reason of the remedy."

After taking into consideration the historical necessity leading to the promulgation of the Regulation and the objectives thereof as gathered from its preamble and Section 3, I am inclined to accept the interpretation placed by Shri Tamba on Section 5(1) of the Regulation. I agree with him that if the interpretation solicited by the defendants' counsel were to prevail, the Regulation would remain a dead letter and the legislative work and effort culminating in its promulgation would go all in vain.

20. Maxwell says on page 7 of his treatise on Interpretation of Statutes, 11th Edition, that if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the

legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. Again, on page 12 he states that it is but a corollary to the general rule of literal construction that nothing is to be added to or to be taken from a statute, unless there are some adequate grounds to justify the inference that the legislature intended something which it omitted to express. On page 17 he observes that where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating, and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system. Language, the learned author observes, is rarely so free from ambiguity as to be incapable of being used in more than one sense, and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many. The following passage from page 17 of the work would indicate what havoc can be done, of course not always, if literal interpretation is insisted on:—

"If a literal meaning had been given to the laws which forbade a layman to 'lay hands' on a priest, and punished all who drew blood in the street, the layman who wounded a priest with a weapon would not have fallen within the prohibition, and the surgeon who bled a person in the street to save his life would have been liable to punishment. On a literal construction of his promise Mahomed II's sawing the Venetian governor's body in two was no breach of his engagement to spare his head;"

On page 19 under the heading "Historical Setting" the author states that as regards the history or external circumstances which lead to the enactment, the general rule which is applicable to the construction of all other documents is clearly applicable to statutes, viz., that the interpreter should so far put himself in the position of those whose words he is interpreting as to be able to see to what those words relate. Emphasising the same point it is stated on page 22 that regard must be had not only to the words used, but to the history of the Act and the reasons which led to its being passed. The last para on page 22 is rather instructive and so I am tempted to reproduce the same. It runs as under:—

"The court is not to be oblivious. . . . of the history of law and legislation. Although the court is not at liberty to construe an Act of Parliament by the motives which influenced the legislature, yet when the history of law and legislation tells the court, and prior judgments tell

this present court, what the object of the legislature was, the court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding out what it means, and not with a view to extending it to something that was not intended."

21. In the case of *Commissioner of Income-tax v. Teja Singh*, AIR 1959 SC 352, the Supreme Court held that a construction which would defeat the object of the legislature must, if that is possible, be avoided. In support of this proposition the Supreme Court relied upon the following observations of Fry L. J., at page 519, in the case of *Curtis v. Stovin*, (1889) 22 QBD 513:—

"The only alternative construction offered to us would lead to this result, that the plain intention of the Legislature has entirely failed by reason of a slight inexactitude in the language of the section. If we were to adopt this construction, we should be construing the Act in order to defeat its object rather than with a view to carry its object into effect."

22. Taking these well established principles of interpretation of statutes into consideration I have no difficulty in accepting the contention of Shri Tamba that the real intention behind Section 5(1) of the Regulation was to transfer to the Custodian the rights acquired by B. N. U. through its various branches in the territories of Goa, Daman and Diu. The literal interpretation of the provision, as canvassed by the defendants' counsel, has to be rejected only because it would make the Regulation altogether futile. Such an interpretation, therefore, cannot commend itself to the court, especially when the other interpretation gives life and purpose to the Regulation and helps in achieving its stated and known objectives. We know it for certain that the Regulation was enacted to discharge the liabilities of the branches with the amounts collected from the debtors of those branches and the subsidy granted by the Central Government of India if there arose any necessity for the same. Reference in this connection is invited to Sections 9 to 11 and Section 6(1) of the Regulation. I would, therefore, hold that Shri Coelho was right in his conclusion that when the Regulation speaks of rights and obligations of the branches of B. N. U. in the territories of Goa, Daman and Diu, those rights and obligations should be understood to mean the rights acquired and the obligations undertaken by the B. N. U. through its branches in those territories. As a consequence I reject the first argument addressed by the defendants' counsel.

23. I now take up the consideration of the second point raised by the learned counsel for the defendants. They urged

vehemently that since the Custodian is not in a position to produce the bills of exchange and the promissory notes he is not entitled to claim any relief on the basis thereof. Shri Tamba's stand was that since the execution of the negotiable instruments has been admitted in the written statements and since it is commonly agreed that those negotiable instruments are not within the reach of the Custodian, having been removed by the officials of B. N. U. to Lisbon or somewhere else on or about 20th of December 1961, there is nothing that stands in the way of the Custodian to claim relief on the basis of those negotiable instruments. I think the stand of Shri Tamba is justified except in one respect which I shall presently point out. If the execution of the negotiable instruments has been admitted then non-production thereof in the court is not of any consequence. Suppose, to cite an instance, if a particular negotiable instrument lying in the house of its holder is burnt in a fire and that holder brings a suit on the basis thereof and the defendant happens to admit that he had executed the negotiable instrument on which the suit is founded, evidently the court will proceed to judgment on the basis that the defendant had executed the negotiable instrument although the latter could not be produced in the court in view of the circumstances mentioned. In the instant case as well, the negotiable instruments are as good as lost respecting at least the Custodian, the present plaintiff. In some similar circumstances the Punjab High Court held in the case of Okara Grain Buyers Syndicate Ltd. v. United Commercial Bank Ltd., AIR 1961 Punj 66, that the receipt in question would be deemed to be as good as lost because it happened to be in the possession of the District Magistrate, Montgomery, a place in West Pakistan, who, in view of the partition of the country, would not hand over the same to the Syndicate because the latter was a non-Muslim body. In the instant case too, it is not possible to visualise, in view of the embittered relations between India and Portugal, that the B. N. U. would ever agree to surrender the negotiable instruments to the Custodian. Hence, those negotiable instruments have to be deemed as good as lost and so the Court can adjudge the rights of the parties arising out of those negotiable instruments on the footing that they had been executed and accepted, and the sureties furnished respecting them, in the manner set out in the respective plaints.

24. The counsel for the defendants banked heavily on the facts, to reinforce their contention, that the bills of exchange and the promissory notes relied upon by the Custodian are admittedly

negotiable instruments, that B. N. U., the present holder of those instruments, can endorse those instruments in favour of others, and that the endorsee can maintain another suit against the defendants and force them to make the payment for the second time. I think this apprehension on the part of the defendants is not well founded. It is provided in Art. 34 of the Uniform Law on Bills of Exchange and Promissory Notes that a bill of exchange payable at sight has to be presented for payment within a period of one year from the date of its execution. It has been admitted on both hands that in the bills of exchange relied upon by the Custodian the time of payment had not been specified. As such in view of Art. 2 of the Uniform Law the bill was payable at sight and so it had to be presented within one year from the date of its execution. It is not the contention of any of the defendants that the bills of exchange sued upon had ever been presented to the parties concerned for payments. Article 53 of the Uniform Law enacts that after the period prescribed for presentation of bill of exchange payable at sight has run out, the holder loses his right of seeking relief against the endorsers, against the drawer and against the other parties liable with the exception of the acceptor. Hence it is the acceptor alone whose liability could have stood out if the bill of exchange had not been presented in the time prescribed by law. Article 70 of the Uniform Law prescribes that all actions arising out of a bill of exchange against the acceptor are barred after three years reckoned from the date of maturity. The negotiable instruments we have to deal with were all payable at sight and as such they matured on the dates on which they were respectively executed. Therefore, even the acceptor cannot be sued if the B. N. U. happens to endorse the bill in favour of some one else. Consequently there is no substance in the contention of the defendants that they can be made to pay twice over the amounts for which the bills of exchange had been executed. The provisions reproduced above respecting the bills of exchange also apply to promissory notes, vide Article 77 of the Uniform Law. Hence, the defendants who were parties to promissory notes are also immune from another suit at the hands of the holders of those documents.

25. Shri Tamba was fair enough in stating at the bar in the presence of the defendants' counsel that the Custodian was out to furnish security to the effect that if the holder of any instrument mentioned in the suits happen to file an action against any of the present defendants and succeeded in recovering the money from him, he (the Custodian) shall compensate

that defendant to the extent of what he (the Custodian) had realised from him pursuant to the decree that may be passed in the present case. The Custodian was brought to the Court room by Shri Tamba and he also gave an undertaking, though oral, to this Court on the same line. Hence, in face of this undertaking given by the Custodian and the legal conclusion recorded in the preceding paragraph, I negative the contention of the defendants' counsel that without the production of the negotiable instruments the suits could not be decreed. Those instruments have lost practical value for every one excepting the Custodian who filed suits on their footing within time.

26. I have already made reference to Article 53 of the Uniform Law in para 24 above. That Article provides that after the expiry of the period of limitation fixed for presentation of the bill of exchange payable at sight, the holder loses his right of recovery against all excepting the acceptor. Shri Tamba was unable to meet the conclusion which clearly flows from this statutory provision. Therefore, the Custodian's prayer against the drawers of negotiable instruments as well as the sureties who had made their signatures on those negotiable instruments has to be negated. Of course the liability of the acceptors of the bills of exchange still holds good because suits were filed against them within the period of limitation prescribed by Article 70 of the Uniform Law. The provisions of Article 53, I may emphasise, are made applicable to promissory notes by Article 77.

27. Shri Reis raised a question of fact respecting appeal No. 3467 of 1965. It was that in para 9 of the written statement the defendants had pleaded two payments in the account, that credit has been allowed to them respecting one payment and not the other, and that the court had no justification for disallowing the second payment without affording an opportunity to the defendants to establish the truth thereof by appropriate evidence. Shri Tamba justified the approach of the trial court on the basis that the particulars of the second payment having not been furnished in the written statement, the Court could not have taken note of it. I think Shri Tamba was right in adopting that stand. All that was mentioned respecting that payment was "such as the amount in respect of consignment of ore exported". Neither the date of the export of the ore, nor its quantity, nor other particulars such as its price were mentioned. In para 32 of replication the Custodian described the relevant allegation in para 9 of the written statement as "too vague and idle", and added that if the defendants had supplied the parti-

culars he (the Custodian) would have looked into the books of B. N. U. to verify their correctness. In their rejoinder the defendants failed to clarify the situation. They did not even care to take note of the objection pleaded by the plaintiff in his replication. Under the Portuguese Civil Procedure Code the defendants could have clarified their defence only through the pleadings and in no other manner. Recording of parties' statements for elucidation of doubtful points in pleadings as contemplated by the Indian Civil Procedure Code is not permitted by the Portuguese Civil Procedure Code. Therefore, the trial court was justified in ignoring the allegation made in para 9 of the written statement.

28. No other point arises for determination in any of the ten appeals.

As a result of the conclusions recorded above, appeal No. 3217 of 1964 against the judgment of Shri A. Lobo fails and is dismissed with costs. Appeals Nos. 3333, 3334 and 3336, all of 1964, are accepted, the judgments of the trial court are set aside, and all the three suits are decreed in the manner prayed for with costs of both the courts in favour of the plaintiff. Appeal No. 3477 of 1965 was filed by Georgina F. De Figueiredo, the original debtor, and by her mother D. Amalia Gomes e Figueiredo in her capacity as the guarantor and legal representative of the surety Jose Filomeno de Figueiredo, her son. The appeal of Georgina fails and is dismissed with costs. However, I accept the appeal of Amalia and dismiss the suit of the Custodian against her. But since Amalia has succeeded on a legal point which was not altogether free from difficulty, she will bear her own costs in both the courts. Appeal No. 3434 of 1964, and appeals Nos. 3466, 3467, 3487 and 3493, all of 1965, fail and are dismissed with costs. The decrees in favour of the Custodian will in each be subject to the undertaking given by him and his counsel as mentioned in para 25 above.

Order accordingly.

AIR 1970 GOA, DAMAN AND DIU 23
(V 57 C 4)

V. S JETLEY, J.C.

Union of India and another, Petitioners
v. Dr. Gopalkrishna K. Salelkar, Respondent.

Civil Misc. Appln. No. 12 of 1969, D/-
25-6-1969.

(A) Constitution of India, Art. 132—
Certificate of fitness— Not to be granted
as a mere formality— Case must involve
substantial question of law as to interpretation
of Constitution— Erroneous appli-

GM/GM/C993/69/KSB/D

cation of well settled principles regarding construction of Art. 311 to facts of a case does not raise such question.

What is necessary for the purposes of the certificate applied for under Article 132 is not a mere question of law but a substantial question of law as to the interpretation of the Constitution. In order to be substantial, it must be such that there may be some doubt or room for differences of opinion. (Para 3)

A question of law is not the same thing as a substantial question of law. A substantial question of law in its turn, is not the same thing as a substantial question of law as to the interpretation of the Constitution. (Para 3)

Constitutional appeals are placed by the Constitution in a special category and for good reasons. The Supreme Court is not constituted as an ordinary court of first appeal. The certificate applied for under Article 311 is not to be granted as a matter of mere formality. (Para 3)

The question of construction of Article 311 is no more an open question in view of the numerous decisions of the Supreme Court. The general principles are well settled. An erroneous application of these principles to the facts of a case does not raise a substantial question of law as to the interpretation of Article 311. AIR 1962 SC 1314 & AIR 1960 SC 356 Ref.

(Para 3)

(B) Constitution of India, Arts. 133 (1) (a), (b), (c) and 226— Cl. (c) of Art. 133(1) is wider in scope than Cls. (a) and (b)— Judgment or final order of High Court in proceedings under Art. 226 is open to appeal under Cl. (c) as proceeding is of civil nature— Discretion to grant certificate to be exercised judicially and not arbitrarily— It is intended to cover special cases which raise questions of considerable public or private importance.

(Para 4)

(C) Constitution of India, Art. 133(1)(c)—Certificate of fitness— Question of considerable public or private importance— Meaning of.

A question which does not affect a large number of persons cannot be said to be of considerable public importance. A question between the parties which is not likely to arise in future cannot be regarded as of considerable private importance.

(Para 4)

The question to be determined for the purposes of fitness under sub-clause (c) is not the propriety of the order against which the leave is sought but the importance of the question raised. AIR 1968 Goa 141 (143), Ref. to.

(Para 4)

(D) Constitution of India, Arts. 133(1)(c) and 226— Certificate of fitness— Termination of service of temporary civil servant in terms of R. 5(1), Central Civil Services (Temporary Services) Rules (1965)

without assigning any reasons though it was preceded by enquiry into his negligence— High Court quashing order of termination under Art. 226 on ground that termination order was by way of punishment in view of allegations of negligence against civil servant contained in counter-affidavit of Government in writ petition— Civil servant submitting his resignation thereafter— Held question involved was no longer a live question and was merely an academic question not likely to affect similar cases— Certificate refused— AIR 1958 SC 325 (328) & AIR 1961 Punj. 383 & 1968 SLR 148 (SC), Rel. on. (Para 4) Cases Referred: Chronological Paras

(1969) Civil Appeals Nos. 782 & 783 of 1966 D/- 30-4-1969=(1969) 1 SCWR 1086, State of U.P. v. Abdul Khaliq 3
(1968) AIR 1968 SC 1089 (V 55)= (1968) 2 SCA 414, State of Punjab v. Sukh Raj Bahadur 3
(1968) C.A. No. 2393 of 1966 D/- 5-1-1968=1968 SLR 148 (SC), Union of India v. R. P. Kapur 4
(1968) AIR 1968 Goa 141 (V 55), Gangadhar v. Asst. Collector of Customs 4
(1962) AIR 1962 SC 1314 (V 49)= (1962) 1 Lab LJ 656, Chunilal V. Mehta and Sons Ltd. v. C. S. & M. Co., Ltd. 3
(1961) AIR 1961 Punj 383 (V 48)= 63 Pun LR 212, Amirchand Tota Ram v. Smt. Sucheta Kripalani 4
(1960) AIR 1960 SC 356 (V 47)= (1960) 2 SCR 346, State of J. & K. v. Ganga Singh 3
(1958) AIR 1958 SC 325 (V 45), State of Mysore v. H. L. Chablani 4
S. Tamba, Govt. Pleader, for Petitioners; S. Sorabji, for Respondent.

ORDER:— This cause has been carefully instructed with affidavits by both counsel who have had the conduct of it, and has been argued at some length. It arises out of a decision given by my brother quashing the order passed by the petitioners terminating the services of the respondent. The petition now is for the certificates under Articles 132 and 133 of the Constitution.

2. It is necessary to glance for a few moments at the background of facts out of which this cause arises before considering its merits. The respondent— Dr. Gopalkrishna K. Salelkar— was appointed as a temporary lecturer in Medicine in the Goa Medical College on the 15th March, 1966. On 5th November, 1967, a patient by name Vithal, was admitted and treated in the Hospital attached to this College. He expired on the 8th November, 1967 at about 11-00 p.m. A preliminary enquiry after some time was ordered by the petitioners in order to ascertain whether the respondent was negligent in treating the deceased Vithal. In fact two committees

were appointed for this purpose. The petitioners presumably were not satisfied with the report of the first committee and hence the appointment of the second committee. The services of the respondent were later terminated by an order dated 15th June, 1968 in terms of Rule 5(1) of the Central Civil Services (Temporary Services) Rules, 1965 without assigning any blame for the alleged negligence. The respondent felt aggrieved by this order and by way of redress he approached this Court in the exercise of its writ jurisdiction under Article 226 of the Constitution.

In the application filed under this Article, broadly stated, his case was that his services were terminated by way of punishment without giving him a reasonable opportunity of being heard within the meaning of Article 311(2) of the Constitution and, therefore, the order terminating his services is bad and inoperative. It was also his case that this action taken is mala fide. In the counter-affidavit filed on behalf of the petitioners, the allegation that Article 311(2) was violated was denied. The order of termination, according to them, was in exercise of the contractual right under the said Rule 5(1) and, therefore, compliance with Article 311(2) was not necessary. The allegation of mala fides was also denied. In denying these allegations the petitioners affirmed in their counter-affidavit that the respondent was very negligent in the matter of treatment of the deceased. This approach was regarded by the learned Additional Judicial Commissioner as representing "the working of the mind of the Government before and at the time the impugned order was made." In this view of the matter he concluded that the impugned order was made by way of punishment for the alleged or the assumed negligence on the part of the respondent in the discharge of his duties, without complying with the requirements of Article 311(2) and, accordingly, it was quashed and the application filed by the respondent was allowed on 6th February, 1969. The petitioners felt aggrieved by this decision and hence their prayer for certificates under Articles 132 and 133 of the Constitution.

3. Shri Tamba, learned Government Pleader, argues that the true scope and ambit of Article 311 was misconceived by my brother and his decision is clearly erroneous. The admitted facts may first be stated. There was a preliminary enquiry against the respondent for ascertaining whether he was negligent in the treatment of the deceased patient; (2) that there was no formal departmental enquiry against him in accordance with Article 311(2) read with the relevant service rules; and (3) that the order of termination does not attribute

any negligence to the respondent but the counter-affidavit does it pointedly. Shri Sorabji, learned counsel for the respondent, contends that the said decision is correct, but assuming it is erroneous even then the petitioners have failed to make out a case for the certificates applied for,

Article 132(1), to the extent it is material for the present purpose, provides that an appeal shall lie to the Supreme Court from any judgment.... or final order of a High Court.... whether in a civil.... or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. Shri Tamba was asked to satisfy this Court as to how this Article is attracted. He repeated his argument that in view of the admitted facts and settled law, Article 311(2) was not attracted and therefore the decision is erroneous. According to him, what was stated in the counter-affidavit by way of reply is not decisive. What is decisive are the material facts existing upto the time of termination of the services of the respondent. In other words, if I may put it differently, if an undisclosed misconduct or negligence as a motive is not relevant when formal departmental enquiry is not held and the order of termination of services is in the exercise of contractual right under Rule 5, would it make any difference for the purposes of Article 311 (2) if such motive is disclosed in the counter-affidavit? Shri Sorabji contended that assuming the decision is erroneous, the application of well settled principles to a particular set of facts does not raise a substantial question of law nor an erroneous application of these principles to the facts of a particular case. In the connection he invited my attention to 'State of J. & K. v. Ganga Singh', AIR 1960 SC 356 (360), where, in relation to Article 14 of the Constitution, the Supreme Court observed:—

"The interpretation of Art. 14 in the context of classification has been finally settled by the highest Court of this land and under Art. 141 of the Constitution that interpretation is binding on all the Courts within the territory of India. What remained to be done by the High Court was only to apply that interpretation to the facts before it. A substantial question of law, therefore, cannot arise where that law has been finally and authoritatively decided by this Court".

Applying these observations to the facts of the present case, the law in relation to Article 311 has been finally settled by the Supreme Court in a number of decisions, and the argument that an erroneous application of that law raises a substantial question of law as to the interpretation of the Constitution does not appear

to be convincing. The law is in some respects a stream that gathers accretions with time from new circumstances and conditions but even so it has its landmarks. This is particularly true of Article 311 which, it is submitted with respect, has been minutely and closely examined by the Supreme Court. The State of U.P. v. Abdul Khaliq, (Civil Appeals Nos. 782 & 783 of 1968 by Special Leave decided on 30-4-1969 (SC)), was cited by Shri Tamba in support of his contention repeated earlier that where no charge sheet was ever served, but the fact that an enquiry was made into a complaint, does not mean that if the services of a temporary Government Servant are terminated after a report is received, any punishment is inflicted entitling the Government Servant to reasonable opportunity to show cause against the termination within Article 311(2). This decision of the Supreme Court relies on 'State of Punjab v. Sukh Raj Bahadur', AIR 1968 SC 1089 in support of this proposition of law. It was stated in that case that an order of termination of services in unexceptional form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution. These two decisions, with respect, are besides the point on the applicability of Article 132(1). What is necessary for the purposes of the certificate applied for under this Article is not a mere question of law but a substantial question of law as to the interpretation of the Constitution. In order to be substantial, it must be such that there may be some doubt or room for differences of opinion. In Chuni-lal V. Mehta and Sons Ltd. v. C. S. & M. Co. Ltd., AIR 1962 SC 1314 in relation to Article 133(1)(a), where the judgment, decree or final order appealed from affirms the decision of the court immediately below and Section 110 of the Code of Civil Procedure, the Supreme Court reiterated the law observing:—

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

The question of construction of Article 311 is no more an open question. The general principles are well settled. I agree with Shri Sorabji that an erroneous application of these principles to the facts of the present case do not raise a substantial question of law as to the interpretation of Article 311. The mistake lies in thinking so. A question of law is not the same thing as a substantial question of law. A substantial question of law in its turn, is not the same thing as a substantial question of law as to the interpretation of the Constitution. The petitioners, in my opinion, have made out no case for a certificate under Article 132(1). No constitutional question arises for decision of the Supreme Court in view of the law enunciated, on Article 311 in numerous decisions. Constitutional appeals are placed by the Constitution in a special category and for good reasons. The Supreme Court is not constituted as an ordinary court of first appeal. The certificate applied for under this Article is not to be granted as a matter of mere formality.

4. Shri Tamba also relied on sub-clause (c) of Article 133(1) of the Constitution in support of the certificate applied for. In the application sub-clauses (a) and (b) were wrongly invoked by the petitioners, as conceded by Shri Tamba. Sub-clause (c) is wider in scope than sub-clauses (a) and (b). An appeal under sub-clause (c) to the Supreme Court lies from the judgment or final order of a High Court in a writ proceeding which is clearly a civil proceeding, if the High Court certifies that the case is a fit one for appeal to the Supreme Court. The phraseology is wide but not too wide. The discretion is to be exercised judicially and not arbitrarily. It is intended to cover special cases which raise questions of considerable public or private importance. According to Shri Sorabji, the respondent, after the decision given by my brother in his favour, gave a month's notice in writing to the petitioners in accordance with Rule 5(1)(a) and thereafter he is no more in government service. This fact is admitted by the learned Government Pleader. Shri Sorabji submits that where the decision of the question would be merely academic, certificate applied for should not be granted. It seems this submission is not without force. In this connection he relied on 'State of Mysore v. H. L. Chablan', AIR 1958 SC 325 (328) and 'Amirchand Tota Ram v. Sucheta Kripalani', AIR 1961 Punj 383. In AIR 1958 SC 325 it was admitted that the respondent was reinstated in service pursuant to the order of the High Court. On behalf of the appellant-State it was submitted that the respondent was merely officiating as Assistant Superintendent of Jails and the order directing his reinstatement in that post would prejudicially

affect the right of the State Government to revert the respondent to his substantive post. It was, however, stated on behalf of the respondent that he had already been reverted to his substantive post. It was in this situation that the Supreme Court did not think it necessary to make any pronouncement in that case on the question which was merely academic, as to what power the High Court has of directing restoration to office on a prayer in a writ of mandamus against Government under Article 226 of the Constitution. In AIR 1961 Punj 383, the Punjab High Court, while considering the question of granting a certificate under Article 133(1)(c), dealt with the question whether the burden of proof of want of consent is upon the respondent that a particular corrupt practice was committed by her agent despite orders to the contrary given by her. It had already been found that the relationship of agency had not been created, on the facts and circumstances of the case and, therefore, the High Court held that the question of burden of proof was merely academic. The certificate applied for was not granted for this and other reasons mentioned in that decision. In *Union of India v. R. P. Kapur, C. A. No. 2393 of 1966* decided on 5-1-1968 (SC) the Supreme Court observed that the Government must make a determination under Rule 9 (2) of the All India Service (Discipline and Appeal) Rules, 1959 determining the salary and allowances payable to the officer. The Supreme Court refused to express any opinion on the correctness of the view pronounced by the High Court on the obligation of the Union to determine the quantum of pay and allowances payable to a public servant pending an enquiry when the order of suspension is either revoked or withdrawn. The reason given was that the question is not at all a live question between the parties. The Supreme Court does not decide questions which are or have become academic. It is admitted by Shri Tamba that there is no other similar case pending in this Court or in subordinate Courts where misconduct is attributed to a temporary Government servant in counter-affidavit or in the written statement. A question which does not affect a large number of persons cannot be said to be of considerable public importance. A question between the parties which is not likely to arise in future cannot be regarded as of considerable private importance. I may have been inclined to grant the certificate applied for in spite of the fact that the respondent is no more in Government service if the decision of my brother was likely to affect similar cases. It may be added that ordinarily in cases of termination of services of temporary Government employees under Rule 5 misconduct is not attributed to them in the pleadings on behalf

of the Government. The defence always is that the services are terminated by the exercise of a contractual right in accordance with this Rule and, therefore, Article 311(2) is not attracted. The question to be determined for the purposes of fitness under sub-clause (c) is not the propriety of the order against which the leave is sought but the importance of the question raised in the application under Article 226. (*Gangadhar v. Asst. Collector of Customs, AIR 1968 Goa 141 (143)*). The issue, in this case, is no more a live one. *Finis litium* is a desirable object, although it must not be sought by a sacrifice of justice which is and must remain the supreme object. In a manner of speaking, it is now flogging a dead horse when an attempt is made to revive it. In this connection the following extract from the affidavit of the respondent's reply to the petition for the certificate applied for may be reproduced:—

"I further say that I have resigned from Government service with effect from 8th March, 1969, and in any view of the matter the issue is no longer a live one; further more there is no question of reinstatement. I may point out that even at the hearing of the Writ Petition, I had made an offer without prejudice that if the Government made a statement in Court that no reflections or stigma was intended or meant to be cast on me as a professional man by the impugned order, I would withdraw the petition. The said offer was however turned down by the Government. I say that it is apparent that the conduct and action of the Government is not fair nor bona fide, and the intention of the Government appears to be to harass an ordinary citizen like me and to subject me to further proceedings and costs for reasons best known to themselves".

It is always the duty of the Courts to consider Article 311 in the light of the law declared by the Supreme Court. This duty is reflected in Article 141 of the Constitution. Each case of this Article is to be decided on its own facts keeping in view the law settled by the Supreme Court. The decisions in other cases are merely illustrative. I do not consider this to be a fit case for exercising the discretion vested in favour of the petitioners.

5. In the view taken of the facts of this case, the prayer for the certificates applied for under Articles 132(1) and 133(1)(c) of the Constitution cannot be granted. The petition accordingly is rejected.

6. Announced.

Leave refused.

AIR 1970 GOA, DAMAN & DIU 28
(V 57 C 5)

R. S. BINDRA, A.J.C.

Maria Cristina D'Souza Soddar, Appellant v. Maria Zurana Pereira Pinto and another, Respondents.

Civil First Appeal No. 6 of 1968 D/- 27-12-1968, against judgment of Sr. Civil Judge Margao, D/- 8-3-1968.

Goa, Daman and Diu Civil Courts Act (1965), Ss. 35 and 22 — Suits instituted under Portuguese Civil Procedure Code — Remedy of appeal and limitation governed by that Code only — Extension of Indian Civil Procedure Code to the Union Territory during pendency of suits, notwithstanding — Change of names of Courts under S. 35 did not put an end to Portuguese Courts — S. 22 has no application to appeals against suits filed under Portuguese Code — (Limitation Act (1963), S. 29 (2) and Sch. I, Art. 116 — Appeal time — Period applies to appeals under Indian Civil Procedure Code and not to those under Portuguese Civil Procedure Code — S. 29(2) does not repeal provisions under the Portuguese Code) — (Goa, Daman, Diu (Extension of Code of Civil Procedure and Arbitration Act) Act of 1965, S. 4 — Repeal of Portuguese Code did not affect rights and remedies accrued).

The suit in question was filed in the Comarca court at Margao on 15-3-1960. It was decreed on 8-3-68 and the appeal was filed on 25-6-68 in the Judicial Commissioner's Court of Goa, Daman and Diu. The question was whether the appeal was within time and before proper forum. According to the Portuguese Civil Procedure Code, the appeal was to be filed in the Court which decided the suit and that too within 8 days from the date of disposal of the suit. The appellant contended that since with effect from 15-6-66 the Indian Civil Procedure Code had been extended to the Union Territory, the Comarca courts ceased to exist, that those courts were substituted by the courts of Senior Civil Judges and that appeals from the judgments of Senior Civil Judges had to be filed in the High Court as provided for under S. 22 of the Goa, Daman and Diu Civil Courts Act. It was further urged that since the Limitation Act was a procedural statute, it applied to a pending litigation and that since the Limitation Act of 1963 came into force on 1-1-1964 when the suit culminating in this appeal was pending, it was the period of limitation provided by the Act which should govern the appeal i.e., 90 days for an appeal to the High Court from any decree or order under Art. 116 of that Limitation Act.

Held, overruling the appellant's contentions, (1) that the change of nomen-

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clature introduced did not put an end to those Portuguese Courts as such and it could not be said that after 15-6-66 the provisions relevant to the institution of the appeals and the period of limitation governing them as mentioned in the Portuguese Code were no longer in operation. S. 35 of the above Civil Courts Act merely provides that any reference in any law in force in the Union Territory to the court of Comarca or to the Court of Julgado or to the Judge thereof, shall be construed as a reference respectively to the court of Senior Civil Judge and the Court of the Junior Civil Judge or to the Judge thereto. (Para 4)

(2) that the provision under S. 22 of the Goa, Daman and Diu Civil Courts Act which provides that appeals against judgments in suits of value more than Rs. 10,000/- shall lie direct to the High Court had no application in the present case since the right of appeal is a substantive right and as such the remedy of appeal shall be governed by the provisions of the Portuguese Code of Civil Procedure respecting the suits instituted under that Code despite the fact that during the pendency of those suits the Indian Code had come into force. Since the suit was instituted in 1960 under the Portuguese Code it carried with it all rights of appeal then in force and the Indian Code had not taken away that right expressly or by necessary intendment. (Para 5)

A plain reading of S. 4 of the Goa, Daman and Diu (Extension of Code of Civil Procedure and the Arbitration Act) Act, 1965 clearly indicates that though the Indian Code had replaced that much of law enacted in the Portuguese Code which corresponds to it (the Indian Code), the repeal did not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed part of the Portuguese Code. The Indian Code also left intact the legal proceeding or remedy in respect of this set of right, privilege, obligation or liability, and such legal proceeding or remedy could be continued or enforced as if the Indian Code had not been passed. Consequently, if the present appellants did not avail of the right of appeal as provided for in the Portuguese Code they shall not be permitted to avail of the right of appeal mentioned in the Indian Code because the suit was filed in terms of the Portuguese Code and the remedy of appeal provided by the latter Code was not abrogated by Act 30 of 1965. (Para 6)

and (3) that the Portuguese Code was a local law within the meaning of the expression in S. 29(2) of the Limitation Act of 1963 and so the periods of limitation provided by that Code are saved. As such the present appeal filed much beyond 8 days from the date of judgment was

clearly barred by time. Art. 116 of the Limitation Act related to appeals filed under Indian Code while the right to present appeal was one given by the Portuguese Code. Further, S. 32 of the Limitation Act bearing the heading 'Repeal' repeals only the Indian Limitation Act of 1908, and no other Act. Therefore, the relevant provisions of the Portuguese Code are still on the statute book of this Union Territory. AIR 1957 SC 540 & AIR 1956 Trav. Co 236, Foll. (Para 8)

Cases Referred: Chronological Paras

- (1957) AIR 1957 SC 540 (V 44) =
1957 SCR 488, Garikapati Veer-
ayya v. Subbiah Chowdhury 5
(1956) AIR 1956 Tra Co 236 (V 43)
= 1956 Ker LT 333, Parmeswaran
Pillai v. Jacob Perumal 7
(1955) AIR 1955 Raj 203 (V 42),
Purshotam Singh v. Narain Singh 9

Ataide Lobo, for Appellant; M. S. Us-
gaonkar, for Respondent No. 2.

JUDGMENT:— This appeal filed by the defendants against the judgment dated 8-3-1968 of the Senior Civil Judge at Margao raises the question of limitation, it being the contention of the plaintiffs-respondents that it is barred by time. The rival contention is that the appeal is within time, having been filed within 90 days provided by Article 116 of the Limitation Act of 1963.

2. The suit was filed by the plaintiffs-respondents in the Comarca Court at Margao on 15-3-1960. It was decreed by a judgment dated 8-3-1968 and the appeal was filed on 25-6-1968. Shri M. S. Usgaonkar, the learned counsel for the respondents, submitted that the suit having been filed under the Portuguese Civil Procedure Code, hereinafter called the Portuguese Code, the appeal could be filed in terms of that Code and not in terms of the Civil Procedure Code of India, hereinafter referred to as the Indian Code, which came into force in the Union Territory of Goa, Daman and Diu on 15-6-1966. According to the provisions of the Portuguese Code, it is not in dispute, the appeal has to be filed in the Court which decides the suit. Shri Usgaonkar therefore submitted that the defeated defendants could not have lodged the appeal in this Court.

Another point raised by Shri Usgaonkar is that the Portuguese Code provides a period of 8 days, counted from the date of the judgment of the trial court, for filing an appeal and that since the present appeal was filed beyond that period it is evidently barred by time. Shri A. Lobo, representing the appellant, canvassed that from 15-6-1966, when the Indian Code was extended to the Union Territory, the Comarca Courts ceased to exist, that those Courts were substituted by the Courts of Senior Civil Judges, and that appeals from the judgments of the Senior

Civil Judges have to be filed in the High Court as provided by Section 22 of the Goa, Daman and Diu Civil Courts Act of 1965, hereinafter referred to as the Civil Courts Act. It was further urged by Shri Lobo that since the Limitation Act is a procedural statute it applies to the pending litigation and that since the Limitation Act of 1963 came into force on 1st of January 1964 when the suit culminating in this appeal was pending, it is the period of limitation provided by that Act which shall govern the appeal in hand. He submitted further that since Article 116 provides a period of 90 days for an appeal to the High Court from any decree or order, the instant appeal is well within time.

3. After examination of the respective submissions made by the parties' counsel in the light of the authorities cited at the bar, I have reached the conclusion that the contention raised by Shri Usgaonkar is well founded and so must prevail with the result that the appeal must be dismissed as barred by time.

4. The Civil Courts Act was enforced in this Union Territory simultaneously with the Indian Code which came into force, as mentioned before, on 15-6-1966. Section 35 of the Civil Courts Act provides that any reference in any law in force in the Union Territory to the Court of Comarca or to the Court of Julgado or to the Judge thereof, shall be construed as a reference respectively to the Court of Senior Civil Judge and the Court of the Junior Civil Judge, or to the Judge thereto. In face of this statutory provision, there appears to be no substance in the contention of Shri Lobo that since the Comarca Courts are no longer in existence in this territory the provisions relevant to the institution of the appeals and the period of limitation governing them as mentioned in the Portuguese Code are no longer in operation. In the Portuguese Code any reference to the Comarca Court shall be construed as reference to the Court of Senior Civil Judge. Therefore the point raised by Shri Lobo based on the change in nomenclature of the courts has to be rejected.

5. The next submission of Shri Lobo was founded on Section 22 of the Civil Courts Act. That section is to the effect that in all suits decided by Civil Judge of which the amount or value of the subject matter exceeds ten thousand rupees the appeal from it shall lie direct to the High Court. Shri Lobo pointed out that Section 22 makes no distinction between the suits filed under the Portuguese Code or the Indian Code. He, therefore, wanted this Court to hold that if the value of the suit is more than Rs. 10,000/- then the appeal shall lie to this Court irrespective of the fact whether the suit had been instituted before or after the Indian Code came into force, and he mentioned that

the value of the suit in hand is Rs 8,333.33 (sic). Shri Lobo therefore submitted that this Court is the only Court in which his clients could have filed the appeal.

Shri Usgaonkar urged, on the contrary, that the right of appeal is a substantive right and as such the remedy of appeal shall be governed by the provisions of the Portuguese Code respecting the suits instituted under that Code despite the fact that during the pendency of those suits the Indian Code had come into operation. Here, again, I believe Shri Usgaonkar is on sounder footing. The Supreme Court held in the case of Garikapati Veeraya v. N. Subbiah Chowdhry, AIR 1957 SC 540, that the right of appeal is not a mere matter of procedure but is a substantive right and that the institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit. It was further observed by the Supreme Court that the legal pursuit of remedy, suit, appeal, and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding. The Supreme Court also happened to observe that the right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences, and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal. The vested right of appeal can be taken away only by a specific enactment if it so provides expressly or by necessary intendment and not otherwise.

In the particular case before the Supreme Court the facts were that the suit was instituted on 22-4-1949, when, according to Sections 109 and 110 of the Indian Code, an appeal could be filed in the Federal Court of India provided the value of the subject matter of the suit was Rs. 10,000/- or more. By Article 133 of the Constitution of India, which came into force on 26th of January 1950, the aforementioned value was enhanced to Rs. 20,000/-. The trial court decided the suit on 14th of November 1950 and the High Court of Andhra disposed of the appeal on 4th of March 1955. The High Court dismissed the application for leave to appeal to the Supreme Court on the ground, inter alia, that the value of the property involved in the litigation was only Rs. 11,400/- and so fell short of the amount of Rs. 20,000/- provided in Article 133 of the Indian Constitution. The

Supreme Court did not accept as correct the view taken by the High Court and so granted special leave to appeal under Article 136 of the Constitution. The reasons which weighed with the Supreme Court in adopting that course have already been reproduced above. Since the suit by the respondents of our appeal was instituted in 1960 under the Portuguese Code it carried with it all rights of appeal then in force unless, of course, it can be established that the Indian Code has taken away that right expressly or by necessary intendment. I, therefore, proceed to examine this latter point.

6. It was by Parliament Act, No. 30 of 1965, called the Goa, Daman and Diu (Extension of Code of Civil Procedure and the Arbitration Act) Act of 1965, that the Indian Code was extended to the Union Territory of Goa, Daman and Diu. Act No. 30 of 1965 came into force in this territory on 15th of June 1966 pursuant to Notification published by the Central Government in the official gazette. The relevant part of Section 4 of Act No. 30 of 1965 is in the following terms:—

"4. Repeal and Saving. — (1) So much of any law in force in Goa, Daman and Diu as corresponds to the Code of Civil Procedure, 1908, or the Arbitration Act, 1940, or any part of the said Code or Act, as the case may be, shall stand repealed as from the coming into force of this Act in Goa, Daman and Diu:

Provided that the repeal shall not affect—

(a) the previous operation of any law so repealed or anything duly done or suffered thereunder; or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed, or

(c) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation or liability as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced as if this Act had not been passed."

A plain reading of the part of the section reproduced would clearly indicate that though the Indian Code had replaced that much of law enacted in the Portuguese Code which corresponds to it (the Indian Code) but the repeal did not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed part of the Portuguese Code. The Indian Code also left intact the legal proceeding or remedy in respect of this set of right, privilege, obligation or liability, and such legal proceeding or remedy could be continued or enforced as if the Indian Code had not been passed. It cannot be gainsaid that the right of appeal is a valuable right and it has also a corres-

pending obligation. Consequently if the present appellants did not avail of the right of appeal as provided for in the Portuguese Code they shall not be permitted to avail of the right of appeal mentioned in the Indian Code because the suit was filed in terms of the Portuguese Code and the remedy of appeal provided by the latter Code was not abrogated by Act 30 of 1965.

7. It was held in AIR 1956 Tra-Co 236, Parameswaran Pillai Vasudevan Pillai v. Jacob Perumal, that it is a settled principle of law that the rights of the parties to an action are to be governed by the law in force when the action was commenced and that a change in the law would not affect pending actions, unless there is a clear provision to that effect in the new enactment. The facts of the Travancore-Cochin suit bear a close analogy to those of the suit in hand. That suit was instituted under the Travancore Civil Procedure Code, hereinafter called the Travancore Code, but that Code was replaced by the Indian Code with effect from 1-4-1951 while the litigation was still proceeding. Section 31 of the Travancore Code prescribes certain restrictions respecting interest in suits filed for recovery of money. Section 34 of the Indian Code, which also deals with the subject of interest, does not contain restrictions as severe as those mentioned in Section 31 of the Travancore Code. The question that arose for determination before the High Court was whether the debtor was entitled to the benefits of the provisions of Section 31 of the Travancore Code despite the fact that the Indian Code had come into force. The High Court gave the reply in the affirmative. Sub-section (1) of Section 20 of the Repealing Act II of 1951 (Central) by which the Travancore Code was replaced by the Indian Code is on all fours identical with that part of sub-section (1) of Section 4 of Act No. 30 of 1965 by which the law contained in the Portuguese Code corresponding to the Indian Code was repealed. Hence the Travancore-Cochin authority belies the contention of Shri Lobo that the provisions of the Portuguese Code corresponding to the Indian Code stand repealed even in reference to the suits and proceedings which were pending on 15th of June 1966.

8. The next and the final point urged by Shri Lobo was that the Limitation Act of 1963 being a procedural Act it is the limitation prescribed by that Act which would govern the appeals arising out of judgments and decrees made after that Act had come into force. He therefore contended that it is not the limitation of 8 days prescribed by the Portuguese Code which shall govern the present

appeal but the period of 90 days provided by Section 116 of the Limitation Act. I am not convinced about the tenability of this contention and that for more than one reason. Firstly, Section 32 of the Limitation Act bearing the heading "Repeal" repeals only the Indian Limitation Act of 1908, and no other Act. Therefore the relevant provisions of the Portuguese Code are still on the statute book of this Union Territory. At the same time, Section 29(2) of the Limitation Act clearly saves the special or local laws prescribing the periods of limitation. Heading of Section 29 is "Savings". Sub-section (2) of Section 29 is in the following terms:—

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

I have no doubt in my mind that the Portuguese Code is a local law within the meaning of that expression as used in Section 29(2) and so the periods of limitation provided by that Code are saved. As such the present appeal, which was admittedly filed much beyond 8 days from the date of the judgment, is clearly barred by time. Lastly, it may be mentioned that Article 116 of the Limitation Act relates to appeals filed under the Indian Code while the right to present appeal is given by the Portuguese Code as held above. Hence, the contention urged by Shri Lobo is without any merit and so I reject the same.

9. The question whether the appeal should have been filed in the trial Court or in this Court may be, and probably is, debatable. At page 476 of the Tenth Edition of the Salmond's Jurisprudence it is stated: 'Whether I have a right to recover certain property is a question of substantive law, for the determination and the protection of such rights are among the ends of the administration of justice; but in what courts and within what time I must institute proceedings are questions of procedural law, for they relate to the modes in which the courts fulfil their functions.'

While interpreting Section 6(e) of General Clauses Act of 1897 which almost corresponds with the proviso appended to Section 4 of Parliament Act No. 30 of 1965 (already reproduced above) the Rajasthan High Court observed as under

in the case of Purshotam Singh v. Narain Singh, AIR 1955 Raj 203:—

"Section 6(e) has nothing to do with the forum where the investigation, legal proceeding or remedy has to be pursued. If the repealing Act provides new forum where a legal proceeding coming on from before the repealing Act came into force can be pursued thereafter, the forum must be as provided in the repealing Act, and no party can insist that the forum of the repealed Act must continue."

This Rajasthan authority and the view expressed by Salmond lend weight to the contention of Shri Lobo that after the Indian Code came into force in this Union Territory the forum of appeal shall be the one provided by that Code and not by the Portuguese Code. However, I refrain from expressing a final opinion on this question because the fate of the appeal can be decided on the points previously discussed.

10. No other point was canvassed before me in support of the contention that the appeal is within time.

11. As a result, I hold that the appeal is barred by time and so dismiss the same. However, since the question involved was legal and not altogether free from difficulty I leave the parties to bear their own costs in this Court.

Appeal dismissed.

AIR 1970 GOA, DAMAN & DIU 32 (V 57 C 6)

R. S. BINDRA, A.J.C.

Quarry Workers Co-op. Society Ltd., Applicant v. Comunidade of Curtorim, Respondent.

Civil Revn. Appln. No. 4 of 1969, D/-1-4-1969.

Co-operative Societies — Maharashtra Co-operative Societies Act (24 of 1961), Ss. 45, 91(a), (c) and 2(21) — Transaction between Society and person other than its member — When becomes one under S. 45 — Dispute arising out of such transaction — Jurisdiction of Civil Court, if barred — (Civil P.C. (1908), S. 9) — (Maharashtra Co-operative Societies Rules (1961), R. 44).

A combined reading of Ss. 91(a), (c), 45 and 2(21) implies that if the transaction between a co-operative society and a person other than the member of the society has been entered into under the provisions of S. 45, then only the dispute arising out of such transaction would fall within the purview of S. 91(1) and would preclude the Civil Court from entertaining a suit bearing on that dispute.

(Para 3)

Where merely because on the very day on which the society was registered, the

Registrar intimated the person who was not a member, that the contract shall be signed on behalf of the Society, the contract does not become a transaction under S. 45, when there is nothing to show that the Registrar formed the opinion, after the registration was effected, that it was necessary to regulate or restrict the transaction of the society or that the Registrar after giving an opportunity to the Society issued any directions restricting the transaction. The Registrar might have secured some commitments from the person before registration, in regard to the proposed contract between him and the Society, but unless those commitments find place in some directive issued by the Registrar in terms of R. 44 after the society was registered and before the contract was signed and they were incorporated in the contract, the contract would not be one under S. 45. AIR 1967 Bom. 124, Rel. on (Paras 4, 5)

Cases Referred: Chronological Paras (1967) AIR 1967 Bom 124 (V 54)=

ILR (1966) Bom. 414, Dharamchand Premchand v. Kapergaon Taluka Kapus Ginning & Pressing Society Ltd.

5

J. Cabral, for Applicant; S. K. Kakodkar with M. S. Kantak, for Respondent.

ORDER:— It was on 15-4-1964 that Quarry Workers Co-operative Society Ltd. with head office at S. Jose de Areal, was registered. On the same date the Registrar of the Co-operative Societies communicated the fact of the registration of the society to the Administrator and also apprised him that S/Shri Andre Cardozo and Aleixo Endro would sign the contract on behalf of the society with the Comunidade of Curtorim respecting the lease of some hilly areas owned by Comunidade for the purpose of quarrying granite stones. Pursuant to the Registrar's authority, Andre Cardozo and Aleixo Endro signed the contract (reproduced on pages 15 to 20 of the paper book) with the aforesaid Comunidade on 23rd of August 1964. In terms of the contract the extraction of the granite gravel by the society was to last for a period of one year but that period could be extended, for an equal period, at the request of the society. The society was to pay to the Comunidade in the month of July each year rent equal to 1/4th of the net income made by the society, and in case the society failed to fulfil any of the conditions of the agreement, the Administrative Board of the Comunidade could propose the rescission of the contract.

2. It appears that soon after the first year of the contract had run out differences cropped up between the Comunidade and the society in regard to the rent payment. The society, it is alleged by the Comunidade, offered a rent of Rs. 528.19, whereas the Comunidade insisted

Cases Referred: Chronological Paras

(1964) AIR 1964 Guj 81 (V 51)= ILR (1964) Guj 300, Saraswatiben v. Kantilal	9
(1961) 1961-3 All ER 681=(1961) 1 WLR 1287, Fieldrank Ltd. v. Stein	11
(1958) AIR 1958 SC 321 (V 45)= 1958 SCR 1211, Santosh Kumar v. Bhai Mool Singh	10
(1950) AIR 1950 Mad 226 (V 37)= ILR (1950) Mad 251, Kesavan v. South Indian Bank Ltd.	10
(1938) AIR 1938 Lah 548 (V 25)= ILR (1938) Lah 289, Manohar Lal v. Nanhe Mal	10
(1936) AIR 1936 Lah 584 (V 23)= 165 Ind Cas 166, Shib Karan Das v. Mohammed Sadiq	10
(1936) AIR 1936 Mad 246 (V 23)= 70 Mad LJ 241, Gopala Rao v. Subba Rao	10
(1935) AIR 1935 Mad 43 (V 22)= ILR 58 Mad 116, Sundaram Chettiar v. Valli Ammal	10
(1901) 85 LT 262, Jacobs v. Booth's Distillery Co.	10, 11
(1876) 1 Ex D 262, Lloyd's Banking Co. v. Ogle	11
K. B. Padia, for Applicants; B. K. Gandhi and B. R. Gandhi, for Opponent.	

ORDER:— Civil Revision Application No. 585 of 1968 is filed by the petitioners who were the original defendants Nos. 1 to 5 in a Civil Suit No. 3787 of 1966, filed by the plaintiff-opponent M/s. Mohanraj Rajendrakumar, for recovery of Rs. 1415.68, the price of goods sold by the latter to the former. It was the plaintiff-opponent's say that the deceased Kanjibhai Jethabhai was running a partnership firm under the name and style of M/s. B. Kanjibhai. It was a cloth business done at Bombay. The deceased owed to the opponent the said amount for the price of the goods sold, etc. The defendants Nos. 2 to 5, i.e. the present petitioners were partners by holding out of the said firm M/s. B. Kanjibhai, the defendant No. 1 (petitioner No. 1) and hence they were liable for the suit amount. They had also claimed over and above the said amount Rs. 73.50 by way of interest and Rs. 25/- as notice charges. In all, the suit claim was for Rs. 1514.18.

2. Civil Revision Application No. 586 of 1968 is filed by the same petitioners who were the original defendants Nos. 1 to 5 in a summary Suit No. 3786 of 1966 filed by the plaintiff-opponent M/s. Chimanlal Nathmal, for recovery of Rs. 1,480/- in all. The allegations made by that opponent in that suit were also that the deceased Kanjibhai was running a partnership firm under the name and style of M/s. B. Kanjibhai, which did cloth business at Bombay. The deceased Kanjibhai owed to the opponent Rs. 1,384/- the

price of the goods sold by the latter to the former. The defendants Nos. 2 to 5 were liable for the suit claim as they were partners by holding out of the said firm, the defendant No. 1 (petitioner No. 1). Rs. 70/- were claimed by way of interest and Rs. 25/- as notice charges. Both these suits were filed by different plaintiffs against the same petitioners in the Small Cause Court at Ahmedabad.

3. In those suits, the petitioners filed their appearance and sought for leave to defend. The petitioner No. 2, Bhanubhai had filed affidavit on his behalf as well as on behalf of the alleged firm (petitioner No. 1). Other petitioners had also filed their affidavits and in those affidavits, these petitioners had set out their defence. The two important grounds of the defence were that the business run by the deceased Kanjibhai was a sole proprietor concern and it was not a partnership business. That Kanjibhai had died. The petitioners Nos. 2 to 5 were not the partners of the said firm and they never held out as partners of the said firm. The suit transaction was entered into with the agent of the plaintiff-opponent at Bombay who had full authority to sell the goods of the plaintiff at Bombay. There was no necessity of condition of getting it confirmed with the plaintiff at Ahmedabad; the transaction having been entered into, at Bombay and delivery having been given at Bombay and money had to be paid at Bombay to Shankerlal, the Ahmedabad Court has no jurisdiction to entertain and hear the suit. The heirs of the deceased, besides the defendants Nos. 2, 3 and 4, were other heirs including Induben. The suit is barred on account of non-joinder of parties also. The defendant No. 5 who is the wife of defendant No. 2 is not the heir of the deceased Kanjibhai and the plaintiff had joined her as defendant No. 5 and hence there is a misjoinder of parties. Similar is the position in Civil Revision Application No. 583 of 1968.

4. The plaintiff-opponent had filed the affidavit in support of the summons for judgment. Practically, it was on the basis of averments made in the plaint. After the defendants filed their affidavits, setting their defence and praying for leave to defend, the plaintiff filed a rejoinder affidavit setting out the contentions taken by the different defendants. Thereafter it refers to the prayer made by him in the plaint that the decree be passed against the property of Kanjibhai or the property that may have come into possession of the defendants and the decree be passed against the defendants Nos. 2 to 5.

5. In para 3 of that affidavit filed on behalf of the plaintiff, it is averred that the order which Shankerlal had taken from the said firm was confirmed at Ahmedabad and hence the Court had

jurisdiction to hear and entertain the suit. In the bill that had been sent, a condition is mentioned that it is subject to Ahmedabad jurisdiction. As the contract was F.O.R., the delivery was given at Ahmedabad and money were to be paid at Ahmedabad and hence the Ahmedabad Court had jurisdiction. The letter Ex. 3/3 is written by the defendant No. 2. Ex. 3/4 is a cheque and that cheque is drawn by Mrs. P. B. Desai, that is the defendant No. 5 for B. Kanjibhai as proprietor. She is also the wife of the defendant No. 2. Ex. 3/5 is a telegram written by B. Kanjibhai. Ex. 3/6 is a letter written by Mr. H. K. Desai. All these documents are significant to indicate that that Ahmedabad Court had got jurisdiction. Except the defendant No. 5, other defendants are the heirs of Kanjibhai. As cheque was issued by the defendant No. 5, she has been joined as a party and she has written that cheque for M/s. B. Kanjibhai. She is, therefore, a partner by holding out.

6. On taking into consideration these affidavits, the learned trial Judge, in his order, granting a conditional leave to defend, has observed as under:—

"There are disputes about the jurisdiction and partnership and therefore, there are triable issues even though prohibitory order is issued to the third party not to pay amount to the defendant but there is no reply. Defendant or any of them, therefore, can be granted conditional leave to defend on depositing Rs. 1,514.18 with costs within 8 weeks and in that view of the matter the prohibitory order will stand vacated as soon as the deposit is made". Similar is the position practically in another suit. As common questions arise in both these revision petitions, they are being disposed of by a common judgment. It thus clearly appears from the orders passed by the learned trial Judge himself that the learned trial Judge, on consideration of affidavits filed by the parties, found that there were triable issues. In spite of it, the learned trial Judge has imposed a condition. Leave to defend has been granted on a condition to deposit the suit amount. The suits in question were summary suits filed by the plaintiff-opponent in Small Cause Court Ahmedabad.

6A. The material part of Rule 39 of the Ahmedabad Small Cause Court Rules, runs as under:—

"In a suit filed under Order 37 of the Code of Civil Procedure, if the defendant enters an appearance or files a Vakalatnama, the plaintiff shall on affidavit made by himself, or by any other person who can swear to the facts of his own personal knowledge verifying the cause of action, and the amount claimed, and stating that

in his belief there is no defence to the action, apply by summons for judgment returnable not less than 10 clear days from the date of service to the sitting Judge in Chamber for the amount claimed, together with interest (if any) and costs. The Judge may thereupon, unless the defendant by affidavit or declaration shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, pass a decree for the plaintiff accordingly." This is the material rule which has to be considered by us in these two revision petitions.

7. It is significant to note that the Court has, in both these suits, while making an order of granting conditional leave to defend, observed that there are triable issues regarding jurisdiction of the Court and partnership. The factum of partnership is itself challenged. It is the say of the present petitioners (defendants) that the business run by Kanjibhai or M/s. B. Kanjibhai was the sole proprietary concern of the deceased Kanjibhai. It was not a partnership business. It is their further say that they had nothing to do with that business. They were not the partners. They have further contended that they have not held out as partners; even in the rejoinder affidavit by the plaintiff-opponent, so far as defendants Nos. 2 to 4 are concerned, the plaintiff has not stated as to how the defendants Nos. 2 to 4 held out as partners. So far as defendant No. 5 is concerned, it is stated that she had given a cheque wherein it was stated that it was given as a proprietor and it was given for M/s. B. Kanjibhai. It is not suggested that it was given as a partner. On consideration of the relevant affidavits, it could not be gainsaid that there are triable issues arising in these two suits. The learned trial Judge also found it. In spite of it, he has imposed these conditions. It is significant to note that he has not found that he is not satisfied about a good defence to the action on the merits or the petitioners have not disclosed such facts as may be deemed sufficient to entitle them to defend. Except finding that there are triable issues, he has not made any observations in support of his order suggesting that the defence is not bona fide or the defence is sham or there are special justifiable circumstances for imposing a condition. It is a speaking order. The reasons have been given in the order. The learned trial Judge observes that there are triable issues in regard to jurisdiction and partnership. He does not say that these are merely raisable issues. He, thereafter only refers to the issue of a prohibitory order and non-receipt of the reply from the garnishee. One has to consider whether in these circumstances

this order of imposing the condition can be sustained in law.

8. It appears that rule 143 of the Ahmedabad City Civil Court Rules is not in pari materia with the Rule 39 of the Ahmedabad Small Cause Court Rules. So far as these two revision petitions are concerned, they can be disposed of, without entering into a general question whether there would be any difference in the powers of the Courts, i.e. the Small Cause Courts and the City Civil Courts in regard to imposing of conditions in view of slightly different wordings of the two rules.

9. In the case of *Saraswatiben v. Kantilal*, AIR 1964 Guj 81, Divan J., has observed as under:—

"Where in a summary suit on a negotiable instrument, it was clear on a perusal of the affidavit in reply filed by the defendant that a triable issue did arise on the averments set out in it but the plaintiff failed to file any affidavit-in-rejoinder controverting the statements of the defendant contained in the affidavit in reply.

It was held that it was the duty of the Court to give to the defendant unconditional leave to defend, the reason being that triable issues clearly emerged on a perusal of the affidavit in reply and since no affidavit-in-rejoinder was filed by the plaintiff to controvert the statements contained in the affidavit-in-reply, he must be deemed to have admitted the statements."

10. In the case of *Santosh Kumar v. Bhai Mool Singh*, 1958 SCR 1211 at pp. 1215 and 1216=(AIR 1958 SC 321 at p. 323), the Supreme Court has made the following material observations:—

"It is *Jacobs v. Booth's Distillery Co.*, (1901) 85 L.T. 262. Judgment was delivered in 1901. Their Lordships said that whenever the defence raises a "triable issue", leave must be given, and later cases say that when that is the case it must be given unconditionally, otherwise the leave may be illusory.

The learned Counsel for the plaintiff-respondent relied on *Gopala Rao v. Subba Rao*, AIR 1936 Mad 246, *Manohar Lal v. Nanhe Mal*, AIR 1938 Lah 548, and *Shib Karan Das v. Mohammed Sadiq*, AIR 1936 Lah 584. All that we need say about them is that if the Court is of opinion that the defence is not bona fide, then it can impose conditions and is not tied down to refusing leave to defend. We agree with *Varadachariar J.* in the *Madras* case that the Court has its third course open to it in a suitable case. But it cannot reach the conclusion that the defence is not bona fide arbitrarily. It is as much bound by judicial rules and judicial procedure in reaching a conclusion of this kind as in any other matter. It is unnecessary to

examine the facts of those cases because they are not in appeal before us. We are only concerned with the principle.

It is always undesirable, and indeed impossible, to lay down hard and fast rules in matters that affect discretion. But it is necessary to understand the reason for a special procedure of this kind in order that the discretion may be properly exercised. The object is explained in *Kesavan v. South Indian Bank Ltd.*, ILR 1950 Mad 251=(AIR 1950 Mad 226), and is examined in greater detail in *Sundaram Chettiar v. Valli Ammal*, ILR 58 Mad 116=(AIR 1935 Mad 43), to which we have just referred. Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce. In general, therefore, the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible, defence on those facts."

After referring to the facts of that case, their Lordships further observed as under:—

"This at once raised an issue of fact, the truth and good faith of which could only be tested by going into the evidence and, as we have pointed out, the learned trial Judge held that this defence did raise a triable issue. But he held that it was not enough for the defendants to back up their assertions with an affidavit; they should also have produced writings and documents which they said were in their possession and which they asserted would prove that the cheques and payments referred to in their defence were given in payment of the cheque in suit; and he said—

'In the absence of those documents, the defence of the defendants seems to be vague consisting of indefinite assertions.....'

This is a surprising conclusion. The facts given in the affidavit are clear and precise, the defence could hardly have been clearer. We find it difficult to see how a defence that, on the face of it, is clear becomes vague simply because the evidence by which it is to be proved is not brought on file at the time the defence is put in.

The learned Judge has failed to see that the stage of proof can only come after the defendant has been allowed to enter an appearance and defend the suit, and that the nature of the defence has to be determined at the time when the affidavit is put in. At that stage all that the Court has to determine is whether 'if the

facts alleged by the defendant are duly proved', they will afford a good, or even a plausible answer to the plaintiff's claim. Once the Court is satisfied about that, leave cannot be withheld and no question about imposing conditions can arise; and once leave is granted, the normal procedure of a suit, so far as evidence and proof go, obtains.

The learned High Court Judge is also in error in thinking that even when the defence is a good and valid one, conditions can be imposed. As we have explained, the power to impose conditions is only there to ensure that there will be a speedy trial. If there is reason to believe that the defendant is trying to prolong the litigation and evade a speedy trial, then conditions can be imposed. But that conclusion cannot be reached simply because the defendant does not adduce his evidence even before he is told that he may defend the action."

It is significant to note that in that decision which the Supreme Court had to deal with, the trial Court had stated that the defence was not bona fide but it was on a ground which was not sustainable. In the instant case, as said earlier, the trial Court has found that there are triable issues arising. The trial Court has not found that the defence is not bona fide. The trial Court had not found that the efforts are being made to prevent a speedy trial. On consideration of the relevant affidavit, it cannot be gainsaid that the triable issues do arise and they are in regard to jurisdiction and partnership.

11. The learned Advocate Mr. Gandhi, appearing on behalf of the plaintiff-opponents, invited my attention to a 'Note' in the case of *Fieldrank, Ltd., v. Stein*, 1961-3 All ER 681. At p. 682, Devlin L.J., has observed as under:—

"The broad principle, which is found on (1901) 85 L.T. 262 (to which Supreme Court in the aforesaid decision has made reference) is summarised on page 266 of the Annual Practice (1962 Edn.) in the following terms:

"The principle on which the Court acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition."

If that principle were mandatory, then the concession by counsel for the plaintiffs that there is here a triable issue would mean at once that the appeal ought to be allowed; but counsel for the plaintiffs has drawn our attention to some comments that have been made on (1901) 85 L.T. 262. They will be found at pp. 251 and 267 of the ANNUAL PRACTICE, 1962. It is suggested (see p. 251) that possibly the case, if it is closely examined, does not go as far as it has hitherto been thought to go; and on the top of p. 267,

the learned editors of the ANNUAL PRACTICE have this note:

"The condition of payment into court, or giving security, is nowadays more often imposed than formerly, and not only where the defendant consents but also where there is a good ground in the evidence for believing that the defence set up is a sham defence and the matter 'is prepared very nearly to give judgment for the plaintiff'."

It is worth noting also that in *Lloyd's Banking Co. v. Ogle*, (1876) 1 Ex. D. 262 at p. 264, in a dictum which was said to have been overruled or qualified by (1901) 85 L.T. 262, Bramwell, B., had said that

'..... Those conditions of bringing money into court or giving security should only be applied when there is something suspicious in the defendant's mode of presenting his case.'

I should be very glad to see some relaxation of the strict rule in (1901) 85 L.T. 262. I think that any judge who has sat in chambers in R.S.C. Ord. 14 Summons has had the experience of a case in which, although he cannot say for certain that there is not a triable issue, nevertheless he is left with a real doubt about the defendant's good faith, and would like to protect the plaintiff, especially if there is not grave hardship on the defendant in being made to pay money into court. I should be prepared to accept that there has been a tendency in the last few years to use this condition more often than it has been used in the past, and I think that that is a good tendency; but with great respect to the learned Judge, I do not think that, giving the widest interpretation to his power to impose a condition, it was the right course to take in the circumstances here. There is not merely a triable issue put forward but one which has not been challenged on affidavit by the plaintiffs. There is some doubt (as I have pointed out) whether they can succeed in the form of action which they have elected to adopt on their writ."

It will be significant to note that even in that English decision, it has been observed that a condition can be imposed by the Court if the Court finds that triable issue is really a sham and the defence is not bona fide. In the instant case, as said earlier, the learned trial Judge has merely stated that triable issues regarding jurisdiction and partnership arise. He has not found that the defence is not a bona fide one. He has not found that the defence is not a good defence or not a plausible defence. The learned trial Judge was, therefore, not justified in imposing a condition. It will be a great hardship that will be caused to the petitioners. The order passed by the learned trial Judge in both these

suits cannot, therefore, be sustained in law. These were the cases where unconditional leave to defend ought to have been given. I, therefore, set aside the orders passed in the aforesaid two suits and allow this revision petition.

12. As a consequence of the order passed by the learned trial Judge, he had directed that prohibitory orders passed will stand vacated as soon as the deposit is made. As the order regarding a direction of depositing the amount is being set aside, that consequential order, that prohibitory order will stand vacated, will not survive. Unconditional leave to defend is granted to the petitioners-defendants in both the suits, namely, Summary Suit No. 1387 and Summary Suit No. 1386 of 1966. The Court below will give the necessary directions regarding filing of written statement etc.

13. The plaintiff-opponent in these two revision petitions to pay the costs of the petitioners in the revision petitions. Rule is made absolute in both these revision petitions.

Petitions allowed.

AIR 1970 GUJARAT 37 (V 57 C 6)

N. G. SHELAT AND B. R. SOMPURA, JJ.

Bai Lalita, Appellant v. Shardaben and others, Respondents.

First Appeal No. 4 of 1964, D/- 23-7-1968, against decision of Civil Judge Sr. Dvn., Ahmedabad (Rural) at Narol in Compensation Case No. 70 of 1962.

(A) Land Acquisition Act (1894), Ss. 54, 3(d), 26 and 30 — Civil P. C. (1908), Ss. 2(2) and 96 — Bombay Civil Courts Act (14 of 1869), Ss. 8, 21, 24 and 26 — Dispute as to apportionment of compensation — District Court referring dispute to Civil Judge (S.D.) under S. 3(d) — Since decision of Civil Judge (S.D.) does not fall under Part III of Act of 1894, it cannot be called award and hence is not appealable under S. 54 — It amounts to decree and is appealable under S. 96. AIR 1922 PC 80 & AIR 1933 Bom. 187 & AIR 1929 Mad 223 & AIR 1960 Mys. 139, Foll. — Since decision relates to the value which is below ten thousand rupees, appeal lies to District Court to which Court of Civil Judge (S.D.) is subordinate and not to High Court. AIR 1941 Sind 100 Rel. on. — By reason of transfer of dispute, Civil Judge (S.D.) does not become principal Court such as District Court so that its decision would become appealable only to High Court. AIR 1960 Bom. 42 & AIR 1960 Mys. 292, Rel. on. Even if High Court had authority to decide appeal, usurpation of jurisdiction of District Court to hear appeal

would not be proper.

(Paras 2 to 8 and 10)

(B) Land Acquisition Act (1894), S. 54 — Section refers to award of 'Court' and not that of Land Acquisition Officer.

(Para 9)

Cases Referred: Chronological Paras

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| (1960) AIR 1960 Bom. 42 (V 47)= | |
| ILR (1959) Bom. 1085, Gangadhar Rakhmaji v. Manjulal Gangadhar | 7 |
| (1960) AIR 1960 Mys 139 (V 47), Hanumanthappa v. Koriseti Sivalingappa | 4 |
| (1960) AIR 1960 Mys. 292 (V 47), Mallappa v. Mallava | 7 |
| (1956) AIR 1956 Mys. 28 (V 43)= ILR (1955) Mys. 572, Brahmeswara Devaru v. Rudriah | 9 |
| (1941) AIR 1941 Sind 100 (V 28)= ILR 1941 Karachi 133, Mangatram Gangadas v. Hundomal Hassomal | 5 |
| (1933) AIR 1933 Bom. 187 (V 20)= ILR 57 Bom. 314, Raghunath Das Harjivandas v. Distt. Supdt. of Police, Nasik | 4 |
| (1929) AIR 1929 Mad. 223 (V 16)= 56 Mad. LJ 387, Mahalinga Kudumban v. Theetharappa Mudaliar | 4 |
| (1922) AIR 1922 P.C. 80 (V 9)=24 Bom. LR 963, Ramchandra Rao v. Ramchandra Rao | 4 |

M. M. Patel, for Appellant; J. J. Shah, for Miss S. J. Shah, for Respondent No. 1; G. N. Desai, Govt. Pleader, for Respondent No. 2.

SHELAT J.:— This appeal raises a short, yet an important point as to whether the decision of the Court of the Civil Judge (S. D.) passed under Section 30 of the Land Acquisition Act, is appealable to the High Court under Section 54 of the Act, and if not, whether any such decision (where the amount or subject-matter involved is less than Rs. 10,000) is appealable, and if so, only to the High Court, or to the Court of the District Judge, under whom it is subordinate. The lands bearing S. Nos. 120, 243, 163, 170, 236, 237, 238, 228 and 227 came to be acquired by the Government for the purpose of widening the National Highway No. 8 from Bareja to Ahmedabad. The claim for compensation was made before the Special Land Acquisition Officer at Ahmedabad and the compensation was awarded to the claimants as per the award Ex. 2 produced in the case. Of the various claimants, Nos. 1, 4, 6, 10, 12 and 14 were the landlords, while the others were tenants. There arose a dispute amongst the landlords and tenants, only in regard to the apportionment of the amount of compensation awarded for the lands under acquisition. The Land Acquisition Officer, therefore, referred the dispute for apportionment of the compensation amongst the claimants under Sec-

tion 30 of the Land Acquisition Act, hereinafter to be referred to as 'the Act' to the District Court at Narol. The Compensation Case No. 70/62 on the file of the District Court, Narol, then came to be transferred for disposal in accordance with law to the Court of the Civil Judge (S.D.) at Ahmedabad under Section 3(d) of the Act. The learned Judge found that the claimants who were the tenants in respect of the lands under acquisition were entitled to get 5 annas share in a rupee as against the landlords-claimants getting 11 annas share in a rupee. In the result, he passed an order directing the amount of compensation to be so apportioned. Feeling dissatisfied with that order passed on 24th June, 1963 by Mr. D. B. Naik, Civil Judge (S.D.) Narol, only Bai Lalita, daughter of Chhotalal, the owner of S. Nos. 236, 237 and 238, who was claimant No. 12 before the Court has come in appeal. The respondent No. 1 Shardaben, widow of Manibhai Chhanabhai, the claimant No. 13 before the Court below, claimed compensation on the ground of her being a tenant in respect of those lands.

2. Before this appeal could be heard on merits, a preliminary point was raised by Mr. Shah, the learned advocate for the respondent No. 1, that since this appeal is directed only against a decision of the Court under Section 30 of the Act, as contemplated under the provisions of the Act no appeal is competent before this Court under Section 54 of the Act. According to him, even if such a decision amounts to a decree and is appealable under the provisions of the Civil Procedure Code, the appeal would lie to the District Court, at Narol, it being a Court competent to hear an appeal under Section 96 of the Civil Procedure Code, read with Section 8 of the Bombay Civil Courts Act as applied to this State,—the claim being or even the amount to be apportioned being only Rs. 2722.37 nP. and that way less than Rs. 10,000/-. Now, it is common ground that the learned Civil Judge (S.D.) was competent to hear such references as also references under Section 18 of the Act, in view of the expression 'Court' defined in Section 3(d) of the Act as including the Court of Civil Judge (S.D.) to which the matter under this Act is transferred by the "principal Court of the original jurisdiction in the area." The only provision under which an appeal lies to the High Court against any decision of such a "Court" contemplated in Section 3(d) in the proceedings under this Act, is Section 54 of the Act. It runs thus:—

"54. Subject to the provisions of the Code of Civil Procedure, 1908, applicable to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in

force, an appeal shall only lie in any proceedings under this Act to the High Court from the award, or from any part of the award, of the Court....."

It follows therefrom that an appeal can only lie to the High Court provided it is against an award or from any part of the award of the Court in any proceedings under this Act. One has, therefore, to find out as to whether the order passed in the present case is an award or any part of the award of the Court so as to entitle her to come in appeal before this Court under Section 54 of the Act. The term "award" has not been specifically defined under the Act, but it has been referred to under Section 26 which relates to the form of an award. Section 26 of the Act may well be set out as under:—

"26. (1) Every award under this part shall be in writing signed by the Judge, and shall specify the amount awarded under clause first of sub-section (1) of Section 23, and also the amounts (if any) respectively awarded under each of other clauses of the same sub-section, together with the grounds of awarding each of the said amounts.

(2) Every such award shall be deemed to be a decree and the statement of the grounds of every such award a judgment within the meaning of Section 2, Clause (2), and Section 2, Clause (9), respectively, of the Code of Civil Procedure, 1908." The material words to be noted in sub-section (1) of Section 26 are "every award under this part" and then the amount awarded under any such award by the Court has to be on the basis of various clauses in Section 23(1) of the Act. The final decision becomes the award which shall be deemed to be a decree as contemplated in Section 2(2) of the Civil Procedure Code, and the grounds given for such a decision are taken to be a judgment under Section 2(9) of the Code. "This part" referred to in sub-section (1) of Section 26 covers part III only which relates to Sections 18 to 28 of the Act. The award has thus to be on the basis of a reference made to the Court under Section 18 of the Act. The proceedings then commence in the Court and the decision given on any such reference becomes an award under Section 26 of the Act. Such an award specifies the amount awarded under Section 23 (1), clause (i) as also the amounts, if any, awarded under different clauses of that sub-section. It is only such an award which is contemplated under Section 54 of the Act, and therefore, only a party to that award gets a right to prefer an appeal against any such award or a part of an award, to the High Court under Section 54 of the Act. It is, thus, obvious that since decision under this appeal given by the Court

below does not fall under any of the provisions of Part III of the Act, it cannot be called an award in the proceedings under the Act and that way not falling within Section 54 of the Act. This is clearly a decision of the Court under Section 30 of the Act and it falls not in Part III but in Part IV of the Act. The reference was made for only the apportionment of the amount settled under Section 11 of the Act, and it was only under Section 30 of the Act which provides that when the amount of compensation has been settled under Section 11, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same or any part thereof is payable, the Collector may refer such dispute to the decision of the Court. That being so, any such decision would not come within the purview of Section 54 of the Act inasmuch as it cannot be called an award under Part III of the Act so as to entitle any person affected thereby to claim a right of appeal only to the High Court under Section 54 of the Act. This appeal is, therefore, not competent under Section 54 of the Act.

3. Now it is true that there is no other provision in the Act which permits an appeal against an order or decision of the Court passed under Section 30 of the Act. But we cannot lose sight of the fact, that by reason of Section 53 of the Act, the provisions of the Civil Procedure Code are made applicable to any proceedings before the Court under this Act. As contemplated therein, they apply to all proceedings before the Court under this Act "save in so far as they may be inconsistent with anything contained in this Act." Section 54 of the Act also proceeds by saying that an appeal under Section 54 shall be subject to the provisions of Code of Civil Procedure applicable to appeals from original decrees. Thus the right of appeal against any other order or decision which is not inconsistent with the provisions contained in Section 54 remains under Section 96 of the Civil Procedure Code. That is not taken away and on the contrary one has to avail of the provisions relating to appeal in the Civil Procedure Code, in matters under the Act provided there is a decision or order of the Court not falling under Section 54 of the Act. As stated in Section 30 of the Act, reference is for a decision of the Court and a decision given by that Court determines the rights of the parties in respect of their disputes. It is in the nature of a decree as contemplated in Section 2(2) of the Civil Procedure Code, and thus, in our view, it becomes appealable under Section 96 of the Civil Procedure Code.

4. In this connection, we may refer to some of the decisions to which reference

was made before us. In a case of Ramchandra Rao v. Ramchandra Rao, 24 Bom. LR 963=(AIR 1922 PC 80), it was held as under:—

"The award as constituted by statute is nothing but an award which states the area of the land, the compensation to be allowed and the apportionment among the persons interested in the land of whose claims the Collector has information, meaning thereby people whose interests are not in dispute, but from the moment when the sum has been deposited in Court under S. 31(2) the functions of the award have ceased; and all that is left is a dispute between interested people as to the extent of their interest. Such dispute forms no part of the award.....". It is further observed that "the order determining the apportionment of the compensation is not an award within the meaning of Section 54 of the Land Acquisition Act". This decision came to be considered in the case of Raghunath Das Harjivandas v. District Superintendent of Police, Nasik, AIR 1933 Bom. 187, and it was held that though the order determining the apportionment of the compensation is not an award within the meaning of S. 54 it is certainly a decree or of the nature of a decree and an appeal lies against it. A similar view was taken in the case of Mahalinga Kudumban v. Theetharappa Mudaliar, AIR 1929 Mad 223. There it was clearly laid down that the decision in reference under Section 30 is not an award within the meaning of Section 54, and hence no appeal would lie against it under that section. But the decision is appealable under Section 96, Civil Procedure Code. It was further observed in that case that the decision in reference under Section 30 being one on rights of contending parties, is a decree within Section 2(2) of the Civil Procedure Code and is appealable under Section 96 of the Code. Similarly in Hanumanthappa v. Korisetty Sivalingappa, AIR 1960 Mys 139, it was held that a decision under Section 30 of the Land Acquisition Act is a 'decree' and as such the aggrieved party has a right of appeal. There the contention was that an order passed under Section 30 of the Land Acquisition Act was not a decree and that, therefore, no appeal was competent. In that case, however, no further question arose as to whether the appeal was one maintainable under Section 54 of the Act or under Section 96 of the Civil Procedure Code. In our view, therefore, it is clear that the decision given by the Court below under Section 30 of the Act is in no way an award or part of an award as contemplated under Section 54 of the Act and therefore, it cannot be invoked for the purpose of claiming a right of appeal only to the High Court. It is at the same time clear as observed above, that such a decision

under Section 30 of the Act, amounts to a decree as contemplated under Section 2(2) of the Civil Procedure Code and it becomes appealable under Section 96 of the Civil Procedure Code. Such a right of appeal is not only not taken away by any of the provisions under this Act, but it stands strengthened by the opening words of Section 54 of the Act.

5. That takes us to a further question as to whether an appeal against the decision of the Court below would still lie in the High Court under Section 96 of the Civil Procedure Code. Section 96 of the Civil Procedure Code provides for an appeal from the original decree. It runs thus:—

"96. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court.

x x x x x"

If, therefore, the Court of the Civil Judge (S.D.) passes any such decision which amounts to a decree as contemplated under Section 2(2) of the Civil Procedure Code while exercising his jurisdiction, the proper Court to which an appeal lies against any such decision would be a Court authorised to hear appeal from the decision of that Court. That would require us to turn to the provisions contained in the Bombay Civil Courts Act, 1869 applied to the State of Gujarat, since they govern the same. Section 7 of the Bombay Civil Courts Act says that the District Court shall be the principal Court of original civil jurisdiction in the district, within the meaning of the Code of Civil Procedure. Then comes the important Section 8 which says that except as provided in Sections 16, 17 and 26, the District Court shall be the Court of Appeal from all decrees and orders passed by the subordinate Courts from which an appeal lies under any law for the time being in force. Thus except cases covered by Sections 16, 17 & 26, the appeal would lie to the District Court from any decision of the subordinate Court such as the Courts of the Civil Judge (Junior Division) as also of Civil Judge (Senior Division). Section 16 refers to the powers of the District Judge to refer to any Assistant Judge subordinate to him original suits of which the subject-matter does not amount to fifteen thousand rupees in amount or value, applications or references under Special Acts, and miscellaneous applications. The Assistant Judge shall have jurisdiction to try such suits and to dispose of such applications or references. Then it further provides that where the Assistant Judge's decrees and orders in such cases are appealable, the

appeal shall lie to the District Judge or to the High Court according to the amount or value of the subject-matter does not exceed or exceeds ten thousand rupees. Then comes Section 17. It provides for appellate jurisdiction of an Assistant Judge with which we are not concerned. The other Section 26 referred to in Section 8 provides for appeals from the decision given by a Civil Judge. As provided therein, in all suits decided by a Civil Judge of which the amount or value of the subject-matter exceeds ten thousand rupees, the appeal from his decision shall be direct to the High Court. Thus, in a suit or in a civil proceeding as the case may be, if the amount or value of the subject-matter exceeds ten thousand rupees, the appeal would lie not to the District Court but direct to the High Court even though the Court of Civil Judge is subordinate to the District Judge under Section 24 of the Act. Section 24 of the Act refers to two classes of Civil Judges. The jurisdiction of a Civil Judge (Senior Division) extends to all original suits and proceedings of a civil nature and that of a Civil Judge (Junior Division) extends to all original suits and proceedings of a civil nature wherein the subject-matter does not exceed in amount or value ten thousand rupees. It follows therefrom that all appeals against the decisions given by the Civil Judge (Junior Division) in his District wherein the subject-matter does not exceed in amount or value ten thousand rupees, the appeal would lie to the District Judge and in case where it exceeds ten thousand rupees, the appeal would lie to the High Court. Thus, the District Court is authorised to hear appeals not only from the decisions of the Civil Judge (Junior Division), but also from those of Civil Judge (Senior Division) provided the subject-matter or value in that decision does not exceed ten thousand rupees. It has similarly an authority to hear appeals from decisions of the Assistant Judge provided the subject-matter or value in the decision does not so exceed ten thousand rupees. If that exceeds ten thousand rupees, the appeal would no doubt lie to the High Court. This view finds support from a decision in the case of Mangatram Gangadas v. Hundomal Hassomal, AIR 1941 Sind 100, where it was held that where an order of apportionment is passed by the Assistant Judge in land acquisition proceedings relating to a dispute as to compensation deposited by the Collector under Section 30 and the dispute is referred by the Collector to the Court for its decision, the appeal, if the subject-matter of the order did not exceed Rs. 5000, lies to the District Court and not to the High Court. Now the same jurisdiction to hear references under the

Land Acquisition Act has been also extended to the Court of the Civil Judge (Senior Division) under Section 3(d) of the Act, and therefore its decision also would be governed accordingly for purposes of appeal under Section 96 of the Civil Procedure Code read with the provisions of the Bombay Civil Courts Act. It is thus clear that since the decision under appeal is one under Section 30 of the Land Acquisition Act and as it relates to the value or subject-matter which has been below ten thousand rupees, the appeal against any such decision could lie to the District Judge of the District to which the Court of the Civil Judge (Senior Division) was subordinate as contemplated under Section 24 of the Act.

6. The contention on the other hand was that the term "Court" has been defined under Section 3(d) of the Land Acquisition Act as meaning a principal Civil Court of Original Jurisdiction, unless the appropriate Government has appointed (as it is hereby empowered to do) a special judicial officer within any specified local limits to perform the functions of the Court under this Act. Then come the words "and shall, in relation to any proceedings under this Act, include the Court of a Civil Judge (Senior Division) to which the principal Civil Court may transfer any such proceedings." These words were inserted in the Act by Section 2 of the Bombay Amendment Act (Bombay Act No. XXXV of 1953). On the basis of that clause, it was urged that once any proceeding under this Act has been transferred by the principal Civil Court such as the District Court in the present case, the Court of the Civil Judge (Senior Division) gets jurisdiction of the principal Civil Court of original jurisdiction and, therefore, since the appeal lies against the decision of any such principal Civil Court of original jurisdiction to the High Court, an appeal against the decision of any such Civil Judge (Senior Division) should also lie direct to the High Court. Now, in the first instance, having regard to the provisions contained in the Bombay Civil Courts Act and more particularly by reason of Section 7 of that Act, it is only the District Court which has been made the principal Court of original civil jurisdiction in the District within the meaning of the Code of Civil Procedure. There is no other provision in that Act which makes any such Court of a Civil Judge (Senior Division) a District Court in the District. In fact there is a provision contained in Section 19 of the Act whereby the Government can invest an Assistant Judge with powers of a District Judge in a particular part of a district. Section 19 contemplates that whenever any such powers are invested in an Assistant Judge,

the jurisdiction of the District Judge within those limits becomes pro tanto excluded. In other words, such an Assistant Judge can well exercise the powers of a District Judge in that particular area. Against his decision in those circumstances, even if it relates to an amount or value not exceeding ten thousand rupees, the appeal will lie to the High Court and not to the District Court. There is no such power or authority which is invested by such a definition of the Court under Section 3(d) of the Land Acquisition Act in so far as any Civil Judge (Senior Division) in the District is concerned. He remains subordinate to the District Judge in that District and the District Judge's jurisdiction is not excluded. He cannot, therefore, by reason of this definition be taken as a principal Civil Court of original jurisdiction such as the District Court. All that one can say is that his jurisdiction stands expanded or enlarged, the same being given to that Court for deciding cases arising under the provisions of that Act. That becomes all the more clear if the last words of that clause are taken note of. The Civil Judge (Senior Division) gets his jurisdiction in relation to any proceedings under this Act expanded or enlarged provided those proceedings which have been instituted in the principal Civil Court of the District are transferred to that Court. In other words, what he has to deal with are proceedings under this Act provided they are transferred or referred to him. He does not thereby become the principal court such as the District Court so that the decision given by him in those cases may become appealable only to the High Court. The powers to hear appeals against these decisions are as contemplated under Section 96 of the Civil Procedure Code and they would be with those Courts which are authorised to hear the same. The authority, therefore, to hear any such appeal against the decision of any such Civil Judge (Senior Division) would arise having regard to Section 8 read with Sections 21, 24 and 26 of the Act. Wherever, therefore, the amount or value of the subject-matter decided by him exceeds ten thousand rupees, the appeal from his decision would go direct to the High Court and when the amount or value of the subject-matter in respect of any such decision does not exceed ten thousand rupees, the appeal against that decision can only lie to the District Court, it being a subordinate Court to the District Court in the District. In our view, therefore, the Court of the Civil Judge (Senior Division) does not become the principal Court of Original Jurisdiction in view of the position arising under the Act and he retains the same position as of a Civil Judge (Senior Division) just as

an Assistant Judge to whom cases are referred by the District Judge as contemplated under Sections 16 and 17 of the Bombay Civil Courts Act.

7. In this connection, Mr. Desai, the learned Govt. Pleader, invited a reference to two decisions which by analogy can well support the view we have taken. Both of them arise under the provisions contained in the Hindu Marriage Act. The first case referred to by him is of Gangadhar Rakhmaji v. Manjūlal Gangadhar, AIR 1960 Bom. 42. In that case, a petition for a decree for divorce or judicial separation under the provisions of Hindu Marriage Act, 1955 was filed in the Court of the Civil Judge (S.D.) at Ahmednagar. That was opposed by the opponent. That petition came to be dismissed holding that the allegations on which the petition was founded were not proved. The petitioner had, therefore, filed the appeal against that decision under Section 28 of the Hindu Marriage Act in the Bombay High Court. The point raised before the High Court was as to whether the appeal in that Court was competent. While considering that question they referred to Section 28 and held that where in a petition under the Hindu Marriage Act a decree is passed by the Court of the Civil Judge, Senior Division, of Ahmednagar, which Court was notified by the State Govt. as having jurisdiction in respect of matters dealt with in the Act, the appeal lies to the District Court of Ahmednagar and not to the High Court. Then it was observed that the Court of the Civil Judge, Senior Division, which is notified by the State Government as having jurisdiction in matters dealt with under the Hindu Marriage Act, is a "District Court" within the definition of Sec. 3(b) of the Hindu Marriage Act, but it is not principal Civil Court of original jurisdiction, nor does it exercise its jurisdiction as such principal Civil Court of original jurisdiction. Section 28 of the Hindu Marriage Act leaves the forum of appeal to be determined under the law for the time being in force, which, in the present case, is the Bombay Civil Courts Act. The forum of appeal from the order or decree of the Court of the Civil Judge, Senior Division, under the Bombay Civil Courts Act is the Court of the District Judge of the District. In those circumstances, it was held that the appeal lies to the Court of the District Judge and not to the High Court. This view of the High Court of Bombay came to be followed in the case of Mallappa v. Mallava, AIR 1960 Mys 292. These two decisions cover by analogy the point involved in the appeal before us. In our view, therefore, it is clear that the Court of the Civil Judge (Senior Division) does not become the principal Civil Court of original juris-

isdiction and it does not exercise its jurisdiction as such so that an appeal can directly lie to the High Court. Besides, the present appeal against any such decision under Section 30 of the Act is one not contemplated under Section 54 of the Act but by the provisions contained in the Civil Procedure Code. When this is so, the forum of appeal has to be determined under the law for the time being in force viz., the provisions contained in the Bombay Civil Courts Act. The appeal, therefore, against the decision relating to apportionment of the compensation awarded to the claimants under Sec. 30 of the Act would lie to the District Court in case the amount or value of compensation does not exceed ten thousand rupees and if it exceeds ten thousand rupees, the appeal would lie to the High Court.

8. Since the compensation awarded by the Land Acquisition Officer which required to be apportioned amongst the claimants under the reference under Section 30 of the Act, was Rs. 2728.37 nP. and that way less than Rs. 10,000/-, the appeal against any such decision, therefore, would lie to the District Court and not to the High Court directly as the forum of appeal would be governed not by Section 54 of the Act but by reason of the provisions contained in Section 96 of the Civil Procedure Code read with Sections 8, 21, 24 and 26 of the Bombay Civil Courts Act.

9. An attempt was made to suggest that this being a composite award given by the Land Acquisition Officer, an appeal would lie under Section 54 of the Act. According to him, both the questions viz. of fixing the compensation as also of apportionment arose before the Land Acquisition Officer and therefore his award was of a composite character. We are not concerned with the award of the Land Acquisition Officer under Section 54 of the Act. It refers to award of the 'Court'. Before the Court, the reference was under Section 30 of the Act only as it was only for the apportionment of the amount of compensation amongst the persons who claimed the same as landlords as against the tenants in respect of those lands. There is therefore no question of any composite award inasmuch as there was no reference as to the claim for compensation for the lands under acquisition under Section 18 of the Act. The reference was one made only under Section 30 of the Act. The decision of the Court was thus only under Section 30 of the Act. The case of Brahmeswara Devaru v. Rudriah, AIR 1956 Mys 28, has consequently no application since in that case the reference was both under Sections 18 and 30 of the Act and thus a composite reference—the decision that way falling under Section 54 of the Act.

10. It was lastly urged by Mr. Patel that this Court has ample powers to hear and decide this appeal and that it should do so. Even if the High Court had any authority to decide the appeal, it would not be proper to usurp the jurisdiction of the Court of the District Judge to hear the appeal against any such decision passed by the Civil Judge (Senior Division) in the case. It involves the authority of the Court to hear appeal under Section 96 of the Civil Procedure Code. No Court, howsoever superior it may be, can allow itself to take over any such jurisdiction invested in any other Court in accordance with law. It may well be that parties affected by any such decision may have a further right of revision or appeal, as the case may be, before this Court. Such a request cannot, therefore, be accepted.

11. In the result, therefore, we hold that the appeal is not competent before this Court and the appeal is, therefore, directed to be returned to the appellant for presentation to the proper Court, in the circumstances of this case, we make no order as to costs in this Court.

Order accordingly.

AIR 1970 GUJARAT 43 (V 57 C 7)

SARELA, J.

Suvrnababen, Appellant v. Rashmikant Chinubhai Shah, Respondent.

First Appeal No. 127 of 1968, D/- 11-12-1968, against order of Judge, City Civil Court, 5th Court, Ahmedabad in Hindu Marriage Petn. No. 76 of 1967.

Hindu Marriage Act (1955), S. 12(1)(a) — Wife's petition for nullity on ground of husband's incapacity — Evidence of impotency — Testimony of only petitioner available — Corroboration not essential, if evidence is reliable and there is no collusion — Impotency can be due to psychological inhibition or physical incapacity — However standard of proof required is not different in either case — Wife's evidence must be tested in the light of probabilities and conduct of parties — Husband and wife not alleged to be on bad terms — Wife waiting for seven years since marriage before making such petition — Husband not contesting — All these indicate truth of wife's allegation — Evidence of wife should held be accepted and marriage annulled — (Evidence Act (1872), Ss. 134, 120).

In a proceeding under S. 12(1)(a) of the Hindu Marriage Act, when only the testimony of one of the spouses is available, corroboration is not essential, if that evidence is reliable. Impotency can be due to psychological inhibition or physical in-

capacity. However in either case the standard of proof required is not different. Where the wife applies under S. 12(1)(a) and the husband remains absent but there is no collusion, the wife's evidence must be tested in the light of probabilities and conduct of the parties. When the husband and the wife are not alleged to be on bad terms and the husband alleges to have only asked his wife to have as little sexual intercourse as possible to enable him to carry on his studies and the wife, without taking advantage of the husband's absence from the country, files the petition only on his return after three years and she has waited for seven years since the marriage before seeking the decree under S. 12(1)(a) and the husband does not contest even the appeal, all these indicate the truth of the wife's allegation and accepting the evidence of the wife, the marriage should be annulled.

(Paras 7, 11, 13, 15 and 16)

There is no rule of law requiring that in a petition under S. 12(1)(a) the evidence of the spouse must receive independent corroboration before it can be accepted as sufficient to justify the passing of a decree. S. 134, Evidence Act embodies the principle that sufficiency of evidence is not a matter of number or quantity but of quality. The Hindu Marriage Act does not make a departure from this principle. Therefore the only question the court has to ask itself in dealing with such a petition is whether the evidence before it inspires confidence. The need for corroboration may arise not because the evidence is of an interested person — in a case of this type the party is of necessity interested in the result — but because the evidence of the party is such as does not inspire confidence. If there is no collusion, then the veracity of the witness can be judged by the usual tests such as the probabilities of the story, the conduct of the parties before and during litigation, the manner in which the party has given evidence in the court and such other factors as bear on the honesty, truthfulness and reliability of a witness. If the evidence is reliable and can be safely acted upon there is no impediment in law for the court acting upon it though it is of an interested party.

(Para 7)

The essential ingredient of impotency is the incapacity for accomplishing the act of sexual intercourse and in the context it means not partial or imperfect but a normal and complete coitus. This incapacity may arise either from a structural defect in the genital organs which is incurable and renders complete sexual intercourse impracticable or from some incurable mental or moral disability vis-a-vis the other spouse resulting in inability to consummate the marriage. Whether impotency is due to psychologi-

cal inhibition or physical disability it does not make any difference in principle on the question of the standard of proof required. (Para 11)

When the wife is not able to give the name of the doctor under whose treatment her husband was and she does not also produce any private correspondence with her husband and she explains this stating that she did know who the doctor was and that she did not preserve correspondence, there is no reason for not accepting that explanation. But even if that explanation is not convincing that is not sufficient to get over such probabilities of the case. Thus, her evidence should be accepted on the facts and circumstances of the case and the marriage should be annulled. AIR 1957 SC 614 & AIR 1943 Nag 185 (SB) & AIR 1931 Lah 245 & AIR 1957 Mad 243, Expl. and Foll.; (1967) 8 Guj LR 966, Expl. and Dist.

(Paras 14, 15 and 16)

Cases Referred: Chronological Paras

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|---|--------|
| (1967) 8 Guj LR 966=ILR (1967) Guj 681, Ganeshji v. Kastuben | 11, 12 |
| (1957) AIR 1957 SC 614 (V 44)= 1957 Cri LJ 1000, Vadivelu Thevar v. State of Madras | 7 |
| (1957) AIR 1957 Mad 243 (V 44)= T. Rangaswamy v. T. Aravindam-mal | 10 |
| (1943) AIR 1943 Nag 185 (V 30)= ILR (1943) Nag 474 (SB), Kishore Sahu v. Snehaprabha Sahu | 5, 8 |
| (1931) AIR 1931 Lah 245 (V 18)= 32 Pun LR 159, Wilson v. Wilson | 9 |
| A. M. Mehta, for Appellant. | |

JUDGMENT:— The appellant is the wife of the respondent. Her petition for nullity of her marriage with the respondent on the ground set out in Clause (a) of sub-section (1) of Section 12 of the Hindu Marriage Act, 1955 (hereinafter called as the Act) namely that the respondent was impotent at the time of marriage and continued to be so until the institution of the proceedings has been dismissed by the Judge of the City Civil Court, Ahmedabad. She has come in appeal.

2. According to the averments in the petition, which averments have not been controverted by the respondent by pleadings as he has chosen to remain absent, the marriage between the appellant and the respondent took place on 8th May, 1960 and the appellant went to reside with the respondent a month after that date. The appellant avers that after she went to reside with the respondent to fulfil the physical obligations of marriage, the respondent avoided to do so on the ground that he was not keeping well. The appellant states that believing in that explanation she did not press him immediately, but later on she found that the respondent was not able to physically consummate marriage and the respondent also admit-

ted his inability to do so and stated that he was taking medical treatment. Therefore, the appellant waited. She goes on to aver in the plaint that in August 1963 the respondent left for America and came back on 16-7-1967 and when he came on 16-7-1967 the appellant went to him again but she found that there was no improvement in the physical condition and in fact the respondent did not sleep with her and slept at another place. Therefore, the appellant gave a notice and then the suit is filed.

3. Before referring to the evidence led in the case on behalf of the appellant it would be convenient to refer to the exchange of notices between the parties. The appellant first sent a notice on 20-7-1967 and in that notice she set out in detail the very case which has been set out in the plaint. To that notice the respondent sent a reply on 27-7-1967 denying therein that he was not physically in a position to consummate marriage or that he did not have any physical relation with her or that he had put forward an excuse of ill-health. He, however, appeared to concede in para 2 of that reply that the physical relations with his wife were little for he stated in that para—

"In truth as I was studying and so that there should not be any disturbance in my studies and I should be able to carry on the studies well I had informed (you) to keep as little physical relations as possible and you have misconstrued this suggestion."

To that reply the appellant sent a rejoinder on 10-8-1967 reaffirming her case but offering to live with him as his wife if he got himself examined by a doctor of his choice to whom both of them may go after taking a previous appointment and if the doctor certified that he was not impotent but was potent. A copy of this last rejoinder which has been produced in the proceedings by the appellant has not been exhibited by the learned trial Judge on the ground that the acknowledgment receipt of that letter was not produced. But the fact is that such a letter has been averred to in the petition and also deposed to by the appellant as having been sent and the letter appears to have been addressed at the address to which the previous notice was sent and was received by the respondent. There is, therefore, no reason for not believing the petitioner that such a letter was sent. If she is believed on that point it would not be unreasonable to hold that the letter reached the respondent.

4. Now the evidence in the case is the deposition of the appellant and the copies of the correspondence just referred to. In the deposition the appellant set out on oath the case she had set out in the petition. She added that all these years that she lived with the respondent, he had no

sexual intercourse with her and that was because he had no manly power and whenever he attempted to have sexual intercourse with her, he failed. She also stated that the petition was not filed in collusion with any one. In answer to questions put separately by the learned Judge she stated again that she had no sexual intercourse with her husband at all and that was because he was impotent and incompetent to have sexual intercourse with her and that this condition continued till the petition was made. This was the evidence. The respondent though served did not appear. He was served while he was staying in India and, therefore, his absence cannot be explained on the ground that he being out of India, it was not possible for him to plead or to attend.

5. The learned trial Judge did not consider this evidence sufficient to prove the facts which the law requires to be proved to entitle a party to get a decree for nullity on the ground of impotency. The facts required to be proved are:

(i) that the respondent was impotent at the time of the marriage;

(ii) that the respondent continued to be so until the institution of the proceeding.

On both these facts the material evidence was the deposition of the appellant. Now there are two possible grounds on which that deposition could be disbelieved or not acted upon. One is that the appellant was in collusion with the respondent and the other that the evidence is not reliable. The learned Judge does not state that the appellant is in collusion with the respondent. In fact if the reply of the respondent to the appellant's notice is any indication there was absence of collusion. Collusion cannot be inferred merely from the fact that the respondent does not appear or from the fact that the case is unusual. As pointed out by their Lordships of the Nagpur High Court in *Kishore Sahu v. Snehrabha Sahu*, AIR 1943 Nag 185 (SB):

"We see no more reason (once the petitioner's evidence is accepted) to suspect collusion than the learned District Judge did. The suspicion, if it is to be acted upon, must in our opinion, be founded on something more tangible than a vague uneasiness that an unusual case may not be true."

In the present case there are no circumstances giving rise to any suspicion of collusion. As I have pointed out that the learned Judge himself does not say that there was collusion in fact or that he suspected collusion. The principle on which he proceeded to evaluate the evidence and find it insufficient is set out by him in these words:—

"Before a Court holds that a husband is impotent, it will look for reliable evi-

dence. It is equally well settled that it is not safe in such matters to pass a decree on the interested testimony of one of the spouses".

At another place also the learned Judge states it to be a well settled principle that in such matters the Court would be justified in looking for independent evidence or evidence corroborating the say of the interested party. The learned Judge has, therefore, considered corroboration necessary and looked for corroboration. That corroboration in his opinion was wanting. The learned Judge noted that if the respondent had been present it would have been possible for the court to direct him to appear before a medical expert for medical examination. But that could not be done because the respondent chose to remain absent. Therefore, to satisfy himself in the light of the principle he had referred to, the learned Judge called upon the appellant's learned advocate to get the appellant examined by a medical expert to adduce the negative evidence that the marriage was not consummated. The learned advocate took time but did not adduce that evidence. The learned Judge says in his judgment that if such negative evidence had been available he would have felt safe in passing a decree on the ground that the opponent was impotent on the date of marriage and continued to be so at the date of the institution of the petition. In the circumstances and having regard to the inability of the appellant to tell the learned Judge, whose treatment her husband was taking and her inability to produce any correspondence with her husband previous to the notice, the learned Judge could not persuade himself to accept the appellant's evidence as sufficient to discharge the burden which admittedly lay on her to prove the two facts earlier set out to succeed in the petition.

6. Mr. A. H. Mehta, the learned advocate of the appellant argued that the learned Judge was in error in proceeding on the footing that a decree cannot be passed on the interested testimony of one of the spouses. Mr. Mehta has also taken exception to the learned Judge requiring evidence of the appellant's virginity to be adduced, but has at the same time endeavoured to adduce that evidence before this court. I propose to refer to it later. Mr. Mehta also submitted that the learned Judge has failed to draw legitimate inferences from the facts on record and has also not considered the fact that the respondent has chosen not to appear.

7. There is considerable substance in the submission of Mr. Mehta that there is no rule of law requiring that in a petition of this nature the evidence of the spouse must receive independent corroboration before it can be accepted as sufficient to justify the passing of a decree

for nullity of marriage. Before referring to the authorities to which he invited my attention it would be appropriate to deal with the matter on principle. Section 134 of the Evidence Act which provides that no particular number of witnesses shall in any case be required for proof of any fact embodies therein the principle that sufficiency of evidence is not a matter of number or quantity but of quality. In Sarkar's Evidence Act the author in his commentary under that section refers to certain English laws requiring quantitative proof in certain cases. Our legislature has not made any such provision in respect of the proof of any fact in any particular case. This is referred to by the Supreme Court in *Vadivelu Thevar v. State of Madras*, AIR 1957 SC 614, where after pointing out to this part of the commentary of Sarkar that there have been a number of statutes in England forbidding convictions on the testimony of a single witness, their Lordships go on to say:—

"The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognised in S. 134 quoted above. The section enshrines the well recognized maxim that 'Evidence has to be weighed and not counted'. Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon."

No doubt these observations are made with reference to a criminal case but they have a general application. The Hindu Marriage Act does not make a departure from this principle. It does not lay down in respect of cases falling under it any standard of proof other than that arising from the Evidence Act. It does not lay down any minimum standard of proof. If so the only question the court has to ask itself is whether the evidence before it inspires confidence. The need for corroboration may arise not because the evidence is of an interested person — in a case of this type the party is of necessity interested in the result — but because the evidence of the party is such as does not inspire confidence. It may not inspire confidence for the reason that there is in fact or there is a reasonable suspicion of a collusion or for the reason that the witness does not strike the court as a witness of truth having regard to all the circumstances in the case. If there is no collusion, then the veracity or the reliability of the witness can be judged by the usual tests such as the probabilities of the story, the conduct of the parties before and during litigation, the manner in which the party gave evidence in court and such other factors as bear on the honesty, truthfulness and reliability of a witness. If the evidence is reliable and can be

safely acted upon there is no impediment in law for the court acting upon it though it is of an interested party.

8. In AIR 1943 Nag 185 (SB) (supra) to which Mr. Mehta invited my attention the petition was by the husband against the wife for nullity of marriage on the ground of impotency of the wife. The contention was that every attempt on his part to consummate the marriage immediately reduced his wife to a state of hysteria — she would bite and kick and cry bitterly and, therefore, short of using force and being brutal and virtually raping her, it was impossible to obtain consummation. The petitioner deposed to these facts and that was substantially the only evidence in support of the petition. The wife who appeared denied these allegations. Her complaint was that her husband's approach 'lacked the spiritual and more gentle element; he was altogether too possessive and caveman'. Their Lordships had to choose between these versions. After referring to the fact that in cases where the only evidence is the evidence of the parties, the courts have to be careful because the danger of collusion is so great, they proceeded to examine the question whether corroboration is necessary to the evidence of the parties and said, "It is clear, therefore, the rules of evidence are no different in these cases than elsewhere and that there is no minimum standard of proof necessary. The uncorroborated testimony of the petitioner is sufficient if it can be believed. The only question is whether it can be believed". In that case they believed the petitioner and a decree was given.

9. The next decision to which Mr. Mehta invited my attention in support of his submission is *Wilson v. Wilson*, AIR 1931 Lah 245. There the husband was the petitioner and he asked for nullity of marriage on the ground of the impotency of the wife who was the respondent. His case was that on each occasion when he attempted sexual intercourse with her she pushed him away, jumped out of bed and became hysterical. Therefore the impotency alleged was vis-a-vis the petitioner. The respondent did not appear in person but filed a written statement through counsel and admitted that the marriage had never been consummated owing to an uncontrollable repugnance on her part to sexual intercourse with the petitioner. The petitioner was found on medical examination to be virile potents but the respondent refused to submit herself to medical examination. The proof of the petitioner's case substantially rested on the testimony of the petitioner. The learned District Judge before whom the petition was filed was not prepared on that evidence to hold that the respondent was impotent quoad her, the petitioner, as proof of this rested on the uncorrobo-

rated testimony of the petitioner. He therefore dismissed the petition. Their Lordships said:

"The learned District Judge was favourably impressed by this evidence and the absence of corroboration should not therefore have made him hesitate in granting the petitioner a decree. In case of the nature of the present one corroboration can only be obtained from the evidence of the other party to the marriage who, while a competent witness (S. 120, Evidence Act), is not a compellable one except under certain circumstances, vide S. 51, Divorce Act."

10. The next decision to which Mr. Mehta invited my attention was of the Madras High Court in *T. Rangaswami v. T. Aravindammal*, AIR 1957 Mad 243. There again the husband filed the petition against the wife for nullity of marriage on the ground of impotency of the wife. It seems the petition alleged organic impotency. The wife appeared and contested denying that she was impotent either on the date of the marriage or on the date of the petition. One of the points raised before the learned Judge was the question of corroboration and on that point the learned Judge observed:—

"There is no minimum standard of proof necessary. Even uncorroborated testimony of the petitioner is sufficient if it can be believed. In cases of this nature, corroboration can only be obtained from the evidence of the other party to the marriage. Under S. 180, Evidence Act, the other party to the marriage is a competent witness".

11. These decisions lay down that the rules of evidence in cases of this type are no different than in other cases and that there is no minimum standard of proof necessary. The uncorroborated testimony of the petitioner would be sufficient if it inspires confidence and is believed. The learned trial Judge in taking the view that corroboration must be had in view of the interested nature of the testimony of the petitioning spouse, appears to have been guided by some observations made by my brother Shelat J. in *Ganeshji v. Kastuben*, (1967) 8 Guj LR 966. I shall refer to these observations presently but before I do so it will be convenient to refer to two aspects of impotency in so far as they may have a bearing on the availability of corroborative evidence. The essential ingredient of impotency is the incapacity for accomplishing the act of sexual intercourse and in the context it means not partial or imperfect, but a normal and complete coitus. This incapacity may arise either from a structural defect in the organs of generation which is incurable and renders complete sexual intercourse impracticable or from some incurable mental or moral disability vis-

a-vis the other spouse resulting in inability to consummate marriage. Two of the cases cited by Mr. Mehta viz. the Nagpur and the Lahore cases relate to impotency of the second type that is impotency arising from psychological inhibition. The Madras case was not of the same character for the petition in that case was dismissed on the ground that the medical evidence proved that the respondent was suffering neither from organic nor atonic impotency permanent or temporary. The petition in that case was therefore founded presumably on an allegation of impotency arising from a structural defect. In the case with which we are now concerned there is no allegation of any impotency arising from psychological inhibition but the allegation is that the respondent is physically incapable of sexual intercourse. Does this make any difference in principle on the question of standard of proof required in the two types of cases? It should not. In both the types of cases the party coming to the court by way of petition for nullity of marriage on the ground of impotency is interested in the result of the petition and, therefore, the evidence of such a party is interested evidence. It is true that in the second type of cases, that is cases of psychological inhibition, the impotency arising from that fact would be within the exclusive knowledge of these spouses and it would be difficult to test it by medical evidence. However, such a difficulty of a medical test can arise even in the first type of cases if the respondent chooses to remain absent in the proceeding and chooses not to contest the same. It will then be difficult for the court to direct him to submit to medical examination. Therefore, the necessity for corroboration in respect of the first type of cases cannot be founded on any such consideration. None of the decisions cited by Mr. Mehta is founded on any such distinction between the two types of cases.

12. The case of (1967) 8 Guj LR 966, *Ganeshji v. Kastuben* (supra) which has been relied on by the learned trial Judge was a case where the husband had sought by petition nullity of marriage on the ground that the wife was physically impotent, that her genital organs were structurally of such character that complete and normal intercourse was not possible. In support of the petition the only evidence was of the husband and that of a friend of his to whom the husband had spoken about his getting no satisfaction whatever from his wife in respect of sexual relations. As against that there was considerable medical evidence adduced on behalf of the wife to show that although at the time of marriage a structural defect in the vagina of the wife existed making a normal and

complete intercourse impossible, that structural defect has been removed by operation and after the operation no defect had remained and normal and complete intercourse was possible. No less than four doctors were examined. Three of them were gynaecologists. In this state of evidence it was argued on behalf of the petitioner that his evidence should be preferred to this medical evidence because he is personally in the know of the fact whether he is able to have a normal and complete intercourse and therefore when he states that he is not able to do so, there is no reason to doubt him. It was with reference to that argument that my learned brother stated.

"As already stated hereabove, the evidence of the parties in such a proceeding, much though at first sight may appear to be the only proper evidence, is always difficult to act upon by reason of their being interested in the result of the proceeding, and more so when no other testing evidence or circumstances are possible to be had for verifying the truthfulness of such persons in the case. Therefore, something more such as the expert medical evidence on examination of the spouse whose potency is challenged, would be essential and the court, in normal circumstances should attempt to obtain the same in deciding such cases. The court can direct the spouse whose potency is at question to submit to such examination by some doctor who has been an expert in that sphere, and have his report and even evidence before the Court."

These observations must be read in the light of the facts of the case and the arguments advanced with reference to which these observations are made. What is laid down is that to inspire confidence in the petitioner's evidence, there should in normal circumstances be medical evidence to show that the other spouse is impotent. Therefore, medical evidence is to be looked for in respect of the impotency if it is available. Reading the observations in the light of the facts of the case it cannot be said that the decision lays down that it is not possible or prudent in such matters to pass a decree on the interested testimony of petitioning spouse.

13. Ultimately, therefore, the question is whether on the facts and circumstances of the case the appellant's interested testimony should be believed. The learned Judge does not say she does not strike him as a witness of truth, or that on any particular material point she has given false answers or that her demeanour in the witness box has not been that of a straightforward witness. Her evidence then must be tested in the light of probabilities and conduct of parties. There is no allegation that the parties were not on good terms. The appellant states in her

deposition that the behaviour of her husband towards her was good. The fact that before her husband left for America she had lived with him for three years — a fact not disputed in respondent's reply to appellant's notice — lends support to her statement. In the exchange of notices that took place before the petition there is no suggestion by either side of any ill-feeling or bad relations. Respondent's reply dated 27-7-1967 does not suggest any good reason why she should make such a serious allegation against him or want to end her marriage with him except that he had suggested to her to have as little sexual intercourse as possible so that he can carry on his studies well. This half-hearted admission by a young husband in relation to a young wife between whom there are no bad relations supports the appellant's contention that there was absence of physical intercourse and if that is so the probability is that the reason for such absence was not that the husband wanted to prosecute his studies but that the husband was not physically capable of it. The appellant has not attempted to obtain a decree by taking advantage of her husband's absence from India. She waited all the three years he was away and it was when he was again in India that she approached the court. The fact that she waited for seven years since marriage suggests in the circumstances of the case that she came to court only when she found that consummation of marriage was not possible. The respondent was served with summons of the suit when he was in India but he did not choose to appear before the court and contest. This conduct on his part if it did not arise from a desire to collude with the appellant could reasonably give rise to the inference that he had not much of a defence. Even in this appeal although he has been served he has not thought it necessary to contest. It is true that he is now again in America but that would not prevent him from issuing instructions to an attorney or advocate to appear and contest. If the explanation of the respondent in his reply dated 27-7-1967 was well founded, he could have easily offered to get himself examined by a competent medical practitioner. Not only he did not do so, by remaining absent he prevented the court from issuing directions for his examination. All these facts bearing on the conduct of the parties and the probabilities of the appellant's story are indicative of the truth of the appellant's version.

14. The learned trial Judge gives three reasons why he found it unsafe to accept the appellant's version. They are: (i) that the appellant could not give the name of the doctor under whose treatment her husband was; (ii) that the appellant did not produce any private

not apply to appeals against orders passed in execution proceedings. It is the executing court alone which executes the decree and not the appellate court.

10. We are fortified in our view by a large number of authorities of almost all the High Courts in India including the Madras, Assam, Andhra Pradesh, Bombay, Orissa, Allahabad, Calcutta, and Lahore High Courts. We would now take up the decision relied on by the appellant reported in, AIR 1929 Pat 565 (FB) (supra). In that case one of the Judges P. R. Das, J. dissented from the majority view and clearly held that the provisions of O. 22, R. 12 do not apply to appeals against orders passed in execution proceedings. In this connection the learned Judge observed as follows:—

"In my judgment O. 22, R. 12 does no more than recognize the well established principle that the procedure provided in the Code in regard to suits does not apply to applications for execution of the decree.

x x x x x
x x x x x

There is no room for the application of the procedure as to abatement to execution proceedings, since it is clear both from the Code itself and from the provisions of Limitation Act that the legislature contemplated that there might be a succession of applications for execution. When a decree-holder dies, the execution proceedings come to an end; but it is open to the legal representative of the decree-holder to commence fresh execution proceedings against the judgment-debtor. So also a decree-holder has the right to proceed against the legal representative of a deceased judgment-debtor in a fresh execution proceeding. But there is no provision for a succession of appeals in execution matters.

x x x x x
x x x x x

In my judgment, as no distinction has been drawn in the Code between appeals in execution matters and appeals generally, and as the provision of R. 11 is without qualification or exception, Rr. 3, 4 and 8 apply to appeals in execution matters; and I must answer the reference accordingly."

The majority judgment observed as follows:—

"In my opinion, R. 11 is controlled by R. 12 and Rr. 3, 4 and 8 do not apply to appeals against orders passed in the course of proceedings in execution of a decree or order. An appeal is merely a continuation of the proceedings in the trial court, and the limitation imposed by R. 12 must in my opinion, apply not only to proceedings in the trial court but also to the continuation of the same proceedings in the appellate court."

x x x x x

"It is true that no distinction is made in the Civil P. C. between appeals against orders passed in the course of execution proceedings and other appeals, but the effect of R. 12, which comes immediately after R. 11, is to exclude the operation of R. 11 from appeals against orders passed in proceedings relating to execution of a decree or order."

It appears that the later authorities of the various High Courts in India express dissent from the Patna view and adopt more or less the reasoning given by P. R. Das J. in his dissenting judgment in the Patna Case, AIR 1929 Pat 565 (FB) (supra).

11. Apart from this it seems to us that the force of the Patna authority is considerably weakened by two important circumstances. To begin with the majority view in the Patna case relied upon an earlier decision of the Lahore High Court in AIR 1923 Lah 560. This decision (which was a single Bench decision) was expressly dissented from by a Division Bench decision of the Lahore High Court in AIR 1936 Lah 1022 and was overruled later by a Full Bench decision of the same Court in AIR 1947 Lah 13 where the Full Bench observed as follows:—

"It was held in Cheda Lal v. Aijaz Hussain, ILR 1937 Lah 80 = (AIR 1936 Lah 1022) by a Division Bench that appeals from orders in execution proceedings are not proceedings in execution within the meaning of R. 12 of O. 22, Civil P. C. and are, therefore, not excluded from the rules relating to abatement contained in that order. The case relied upon by Mr. Kapur, namely, AIR 1923 Lah 560 and ILR 9 Pat 372 = (AIR 1929 Pat 565 (FB)) were examined and expressly dissented from by the Division Bench which decided Cheda Lal v. Aijaz Hussain. I find myself in respectful agreement with the view taken in the latter case".

Secondly the majority judgment of the Patna High Court was greatly influenced by the fact that no decided case taking a contrary view was brought to their Lordships' notice. In this connection their Lordships in the Patna case observed as follows:—

"No decided case has been brought to my notice, and I am not aware of any in which it has been held that Rr. 3 and 4 and O. 22 apply to appeals in proceedings relating to execution of a decree". On the other hand it would appear that there was an earlier Division Bench decision of the Calcutta High Court in Baksh Ali v. Sarat Chandra, AIR 1919 Cal 1053 which had clearly taken the view that the provisions of Rules 3, 4 and 8 applied to appeals against orders passed in execution proceedings and the exemption con-

tained in Order 22, Rule 12 did not apply to such appeals. For these reasons, therefore, the force of the Patna authority has been considerably weakened and we are not in a position to agree with the view taken by the majority judgment of the Patna High Court.

12. In *Changa Mal v. Chaubey Ram, Dulare Lal*, AIR 1933 All 388 which also is a Division Bench decision, Sulaiman, C. J. (who was one of the most eminent Judges that our country has produced) took the view that Order 22, Rule 12 did not apply to appeals and in arriving at this conclusion the learned Chief Justice observed as follows:—

"Fresh applications for execution, unless the principle of *res judicata* applies, can be made from time to time so long as limitation has not expired. It is therefore, obvious why there need be no abatement of the suit in an execution proceeding. But an appeal stands on quite a different footing. Successive appeals cannot be filed if one has already abated. It seems to us that Rule 12 does not contemplate that if an appeal has been preferred from an order in execution, then also Rr. 3, 4 & 8 would never apply. If this were the correct view, the result would be that the death of the appellants or of the respondents would in no way result in the abatement of the appeal at all".

To the same effect are the decisions in AIR 1941 Oudh 16; AIR 1950 EP 302; AIR 1960 Orissa 14; AIR 1955 Cal 281; AIR 1947 Bom 480; AIR 1956 Assam 9; AIR 1962 Andh Pra 308 and AIR 1932 Mad 574. Most of these decisions dissented from the solitary view expressed by the majority judgment in the Full Bench of the Patna High Court, AIR 1929 Pat 565 (FB) (Supra) and almost all these authorities have given some of the reasons which we have given above in holding that O. 22, R. 12 does not apply to appeals.

13. Lastly reliance was placed by the counsel for the appellants on a decision of the Supreme Court in *State of Punjab v. Nathu Ram*, AIR 1962 SC 89 in support of the proposition that the provisions of Order 22, Rule 4 do not apply to execution appeals. On a perusal of this decision it appears that it does not support the appellants at all. What their Lordships decided in that case was that O. 22, Rule 4 did not provide for abatement of appeals against a co-respondent of the deceased respondents and there could be no question of abatement of appeals against them. In this connection their Lordships observed as follows:—

"It is not disputed that in view of O. 22, R. 4 of the Civil P. C. the appeal abated against Labhu Ram deceased, when no application for bringing on record his legal representatives had been made within the time limited by law. The Code

does not provide for the abatement of the appeal against the other respondents. Courts have held that in certain circumstances, the appeals against the co-respondents would also abate as a result of the abatement of the appeal against the deceased respondent".

It would thus appear that their Lordships laid down, on an interpretation of O. 22, R. 4, that the Code did not provide for abatement of an appeal against the heir of a deceased co-respondent whether it is an appeal against a decree passed in a suit or an appeal in execution proceedings. Their Lordships have not at all decided the question as to the applicability of Order 22, Rule 12 which did not arise in that case. This decision therefore, does not help the appellants.

14. On a consideration, therefore, of the circumstances the scheme of the Civil P. C. the nature of the provisions of Order 22 and the authorities discussed above, we are clearly of the opinion that the provisions of Order 22, Rule 12 do not apply to appeals and therefore, the provisions regarding the abatement contained in Rules 3, 4 and 8 fully apply to appeals. In this view of the matter it is manifest that the appeals having abated as a whole because the deceased respondents were necessary parties, the appeals should be dismissed on this ground alone.

15. Even assuming, however, that the appeals do not abate, we do not find any force in the appeals even on merits. The only point canvassed before us was that the decree passed by the trial court was not executable as it was purely of a declaratory nature. The question as to whether or not a decree is executable or inexecutable would naturally depend upon the terms and recitals of the decree itself. In the present case it would appear that under the award which was embodied in the decree each party was asked to fulfil certain obligations and to do certain acts in order to manage the Ziarat. It is therefore, obvious that where any of the parties commit a breach of the terms of the decree the decree-holder can seek relief by getting the decree enforced through execution. The terms of the decree appear to us to be of a clearly executable nature and are not at all declaratory in character. We, therefore, hold that the District Judge was right in deciding that the decree was an executable one and therefore, the objection of the appellant was rightly overruled. For these reasons we find no merit in these appeals which are dismissed with costs.

16. J. N. BHAT J.:— I agree.
Appeals dismissed.

AIR 1970 JAMMU & KASHMIR 19
(V 57 C 5)

JASWANT SINGH J.

Janak Singh, Applicant v. Mst. Raji, Respondent.

Civil Revn. No. 18 of 1968, D/- 13-11-1968 against order of Sub. Judge, Rajouri, D/- 26-7-1967.

Evidence Act (1872), Section 115 — Objection to jurisdiction — Waiver — Wife's petition under Sections 10 and 13 of Hindu Marriage Act — Ex parte decree passed — That decree set aside in appeal and case remanded — Husband before trial Court contesting petition on merits — Objection as to territorial jurisdiction of Court also raised — Such objection not raised in appeal against ex parte decree — Husband neither waived such objection nor submitted to jurisdiction of Court — (Hindu Marriage Act (1955), Ss. 10, 13 and 19) — (Civil P. C. (1908), S. 21).

Where an ex parte decreed passed in a petition filed by a wife under Sections 10 and 13 of the Hindu Marriage Act is set aside in appeal and the case is remanded and the husband, before the trial Court, contests the petition on merits, raising also an objection as to the territorial jurisdiction of the Court, by not raising such objection in the appeal against the ex parte decree, the husband has neither waived such objection nor submitted to the jurisdiction of the Court. (Para 8)

It is true that the objection as to the territorial jurisdiction of a Court does not stand on the same footing as an objection to the inherent lack of competence of a Court to try a case and an objection to the territorial jurisdiction cannot be allowed unless it has been taken at an earliest opportunity and unless there has been a consequent failure of justice. When an ex parte decree passed in a wife's petition under Sections 10 and 13 of the Hindu Marriage Act is set aside in appeal and the case is remanded and the husband contests the petition before the trial Court on merits raising also an objection as to the territorial jurisdiction of the Court, the husband cannot be said to have waived the objection as to the jurisdiction of the trial Court merely on the ground that he had not raised it in the appeal against the ex parte decree. He was then merely concerned with having the ex parte decree set aside. (Para 5)

Further, where an inferior Court has no jurisdiction from the beginning, a party by taking a step in a cause does not waive his right to object to the jurisdiction of the Court. When the wife filed her petition under Sections 10 and 13 of the Hindu Marriage Act, the trial Court could have assumed jurisdiction to try it only if any

one of the ingredients of Section 19 of the Hindu Marriage Act had been satisfied and failure on the part of the husband to raise an objection to the jurisdiction could not turn the trial Court into a legally constituted one if otherwise it did not possess the requisite jurisdiction. (Para 6)

It cannot also be said that the husband should be deemed to have waived the objection as to jurisdiction as he resisted the petition on merits as well. (Para 7)

Thus, the husband in such a case has neither waived such objection nor submitted to the jurisdiction of the Court. AIR 1966 SC 436, Foll.; AIR 1948 Mad 203, Dist.; AIR 1960 Raj 208, Explaining AIR 1954 Raj 135 and AIR 1923 Mad 351 and AIR 1954 Ajmer 25 and AIR 1962 Andh Pra 58, Ref. (Para 8)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 436 (V 53) =
(1966) 1 SCR 478, Bahrein Petroleum Co. Ltd., v. P. J. Pappu 7, 8
(1962) AIR 1962 Andh Pra 58 (V 49) = 1961 Andh LT 752, Yeleswarapu Ramachandra Rao v. State of Madras (Now A. P.) 4
(1960) AIR 1960 Raj 208 (V 47), Premier Automobiles Ltd. v. Laxmi Motors Co. 4
(1954) AIR 1954 Ajmer 25 (V 41), Chainsukh Chaturbhuj v. Firm Deepchand Prakash Chand 4
(1954) AIR 1954 Raj 135 (V 41) = ILR (1954) 4 Raj 262, Raman Lal v. Ramgopal 3
(1948) AIR 1948 Mad 203 (V 35) = 1947-2 Mad LJ 279, Subramania v. Annaswamy Iyer 3
(1923) AIR 1923 Mad 351 (V 10) = 44 Mad LJ 238, Uthuman Ammal v. Naina Mohamed Rowther 3
D. D. Thakur, for Applicant; J. L. Sehgal, for Respondent.

ORDER:— This is an application to revise the order dated 26th July, 1967 passed by the Sub Judge, Rajouri, overruling the objection raised by the applicant with respect to the jurisdiction of the Court to entertain and try the respondent's application under Ss. 10 and 13 of the Hindu Marriage Act, 1955.

2. The facts out of which the present revision application has arisen are:

3. Mst. Raji, the respondent herein, filed an application in the Court of Sub Judge Rajouri, on 4th January, 1966 for dissolution of her marriage with Janak Singh, the applicant, herein or in the alternative for judicial separation. Janak Singh not having appeared in answer to the summons issued to him by the Court, the case was set ex parte against him. The trial Court after recording the statements of two witnesses produced by Mst. Raji passed an ex parte decree in her favour for dissolution of her marriage with Janak Singh on the 19th March,

1966. Against the ex parte decree obtained by Mst Raji, Janak Singh went up in appeal before the District Judge, Poonch, who by his judgment dated 3rd August 1966 set aside the ex parte decree and remanded the case to the Sub Judge, Rajouri, for fresh proceedings in accordance with law.

On remand Janak Singh filed his objections with respect to the aforesaid application under the Hindu Marriage Act preferred by Mst. Raji. In the course of his objections Janak Singh besides raising various defences regarding the merits of the application also took an objection with respect to the territorial jurisdiction of the Court. After allowing the parties an opportunity to adduce their evidence in support of their respective contentions, the learned trial Court proceeded to decide the objection regarding the jurisdiction of the Court and relying on the rulings reported in AIR 1954 Raj 135; AIR 1948 Mad 203 and AIR 1923 Madras 351, it came to the conclusion that the objection with regard to the jurisdiction of the Court not having been raised in the memorandum of appeal filed by Janak Singh against the ex parte decree obtained by Mst. Raji, it was not open to him to agitate the matter afterwards. It is against this order, that the applicant has come up in revision to this Court.

4. Shri D. D. Thakur, appearing in support of the revision application has submitted that the mere fact that objection with regard to the jurisdiction of the Court was not raised in the memorandum of the appeal filed against the ex parte decree is not sufficient to hold that there was waiver regarding jurisdiction on the part of the applicant especially when in the objections filed by him before the trial Court in regard to the application under Sections 10/13 of the Hindu Marriage Act, not only was the case contested on merits but specific objection with regard to territorial jurisdiction of the Court was also raised. He has in support of his contention drawn my attention to an authority reported in AIR 1954 Ajmer, 25 wherein it has been held:—

“Where the defendant applies for setting aside an ‘ex parte’ decree passed against him and gets it set aside there is no submission to the jurisdiction of the Court and he can raise the objection to the territorial jurisdiction of the Court at the trial”.

He has also drawn my attention to another ruling of the Andhra Pradesh High Court reported in AIR 1962 Andh Pra 58 wherein it has been laid down:—

“If the Court has no jurisdiction, consent of the parties cannot confer any. If it is not a validly constituted tribunal or Court, acquiescence in the proceedings will not turn it into a lawful tribunal. In

other words, if it is illegal at its inception it will remain so till the end. Hence, the failure to take objection at the earlier stage of a proceeding does not estop the party from taking that objection at a later stage”.

Shri Janak Lal Sehgal, learned counsel for the respondent has, on the other hand, contended that the applicant had not raised any objection with regard to the jurisdiction of the trial Court in the memorandum of appeal filed by him against the ex parte decree before District Judge, Poonch, that he had submitted to the jurisdiction of the Court, and that the case having been resisted on merits the only inference that can be deduced from the conduct of the applicant is that he had waived the objection with regard to the jurisdiction of the Court. He has mainly relied on two authorities viz. AIR 1954 Raj 135 and AIR 1948 Mad 203. The purport of the ruling reported in AIR 1954 Raj 135 was explained in AIR 1960 Raj 208, and it was remarked therein that the learned Judges who decided Ram Lal's case, AIR 1954 Raj 135 = ILR (1954) 4 Raj 262 had a particular case before them and wide observations were made with respect to particular facts before them.

It was further held that the case is no authority for the proposition that if the plea of jurisdiction is raised along with other defences, the defendant is deprived of his right to agitate the question even in the trial Court. What that case may be said to have decided is that if a defendant disputing the jurisdiction of the Court leads evidence on all other points and takes full part in the conduct of the trial on the merits, he cannot be heard later to say that the Court had no jurisdiction. The facts of the other authority cited by the learned counsel for the respondent are not on all fours with the facts of the present case and are clearly distinguishable.

5. The only question that falls for decision in this revision is whether the conduct of the applicant can be construed as a waiver on his part of the objection as to the territorial jurisdiction of the trial Court or whether it can be said that he had submitted to the jurisdiction of the Court.

On the material before me it cannot be held that there was in the present case a submission on the part of the applicant to the jurisdiction of the Sub Judge's Court at Rajouri or abandonment by him of the objection as to jurisdiction. It is true that the objection as to the territorial or local jurisdiction of a Court does not stand on the same footing as an objection to the inherent lack of competence of a Court to the trial of a case and that an objection relating to the territorial jurisdiction cannot be allowed unless the objection has been taken at an earliest opportunity and

unless there has been a consequent failure of justice, but in the instant case, the applicant before me cannot be said to have waived the objection to the jurisdiction of the trial Court merely on the ground that he had not raised it in the memorandum of appeal filed by him before the District Judge, Poonch, against the ex parte decree passed against him. He was merely concerned with having the ex parte decree passed against him set aside by the District Judge, Poonch. He could have raised the objection as to jurisdiction at the trial of the main application under Sections 10/13 of the Hindu Marriage Act.

6. It is also well settled that where inferior Court has no jurisdiction from the beginning, a party by taking a step in a cause does not waive his right to object to the jurisdiction of the Court. In the instant case the trial Court could have assumed jurisdiction to try the matter only if any one of the ingredients of Section 19 of the Hindu Marriage Act had been satisfied and failure on the part of the applicant to raise an objection to the jurisdiction could not turn the Court of the Sub Judge at Rajouri into a legally constituted Court if otherwise it did not possess the requisite jurisdiction.

7. The other contention of the learned counsel for the respondent that the applicant should be deemed to have waived the objection as to jurisdiction of the trial Court as he resisted the application under Sections 10-13 of the Hindu Marriage Act on merits as well, is also devoid of substance. In *Bahrein Petroleum Co. Ltd. v. P. J. Pappu*, AIR 1966 SC 436, it was held that objecting to the jurisdiction and also pleading to the merits cannot be construed as waiver or abandonment of the objection as to jurisdiction. It was further held in this ruling that where the suit has not yet been tried on merits and only preliminary issue as to the jurisdiction has been tried, the defendant is not precluded from raising the objection as to the place of suing if the trial Court has not given verdict on merits at the time when the objection is taken in the appellate or the revisional Court.

8. Keeping in view the principles deducible from the rulings discussed above, specially the one reported in AIR 1966 SC 436, I am of the opinion that the applicant before me did not waive his objection as to the jurisdiction of the Court at Rajouri or submit to the jurisdiction of the Court. He had in his defence clearly protested to the jurisdiction of the Court. The fact that he also pleaded on merits cannot be construed as meaning that he had waived the objection regarding the jurisdiction of the Court.

9. For the foregoing reasons, the order made by the trial Court overrul-

ing the objection as to the jurisdiction of the Court cannot be sustained and is hereby set aside. The learned trial Court shall now frame a specific issue as to the jurisdiction of the Court in terms of Section 19 of the Hindu Marriage Act, allow the parties an opportunity of adducing evidence in regard to the issue and decide whether on proved facts the case of Mst. Raji fell within the ambit of that section. If the Court on the materials placed before it finds that the marriage between the parties had been solemnised within the local limits of its ordinary original civil jurisdiction or that the parties reside or had resided together within its said jurisdiction as envisaged by the said provision of the Hindu Marriage Act, it will proceed to hear the application on merits. Otherwise, it would return the application to the respondent for presentation to the proper Court.

10. The learned counsel for the parties shall cause their clients to appear before the trial Court at Rajouri on the 28th November, 1968.

Petition allowed.

AIR 1970 JAMMU & KASHMIR 21 (V 57 C 6)

S. M. FAZL ALI C. J. AND
M. JALAL-UD-DIN J.

H. Khaliq Dar, Applicant v. State and another, Opposite Party.

Criminal Ref. No. 33 of 1969, D/- 13-8-1969 from order of S. J. Srinagar, D/- 7-9-1968.

Criminal P. C. (1898), Ss. 145 (4) First Proviso, (9) and 540 — Summoning of witnesses — Power of Magistrate is discretionary — Provisions of sub-sections (4), (9) of S. 145 and S. 540 — Interpretation — Provisions are mutually exclusive — AIR 1961 Punj 187 & AIR 1958 Ori 79 and AIR 1966 Ori 170 & AIR 1959 All 763, Dissented from.

Sub-section (4) of S. 145 does not bar either the summoning or the consideration of the evidence of witnesses summoned under sub-s. (9) of S. 145 or under S. 540 of the Criminal P. C. The first proviso to sub-section (4), sub-s. (9) of S. 145 and S. 540 contemplate three separate categories of cases which are mutually exclusive. (Paras 1, 7)

It may not be possible for a party to obtain the affidavits of some persons either because they do not want to be identified with a party to the dispute or because they are public servants; at the same time such persons may be very competent to speak about possession. A party may in such a case request the Magistrate to ask such a person to swear an affidavit, but the Magistrate has no power to compel

HM/IM/D726/69/DVT/P

such a person to do so. The only other alternative, therefore, for the party is to request the Magistrate to summon such a person and examine him as a witness; and this can be done only under sub-section (9) of S. 145. Of course the Magistrate is not bound to comply with the request of the party, but he has to exercise his discretion judiciously, not arbitrarily. Once the Magistrate is satisfied that a case for examining a witness is made out by any of the parties before him, he has the power to summon any witness at any stage even at the argument stage.

(Para 8)

It is well settled that the Courts must adopt a harmonious rule of interpretation so as to bring about reconciliation between apparent inconsistencies appearing in the provisions of the same statute. It is also equally well settled that whenever the legislature makes a particular provision it must be presumed that there is a certain object behind doing so and the legislature never intends to make provisions which are useless and redundant. Having regard to these golden principles of interpretation it is clear that the first proviso to S. 145 (4) and sub-section (9) refer to two different categories of cases for which provision has been made by the legislature. The first proviso covers the case only of such witnesses who have filed affidavits before the Court. There may, however, be some witnesses whose evidence may be very material but who have not given affidavits for one reason or the other. It is to meet this contingency that sub-section (9) has been engrafted which gives discretion to the Magistrate to summon any witness on the application of either party at any stage of the proceedings. AIR 1961 Punj 187 & AIR 1958 Ori 79 & AIR 1966 Ori 170 & AIR 1959 All 763, Dissented from. Case law discussed.

(Para 1)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Mys 16 (V 56) =
1968 Cri LJ 71, Vijay Rao v.
Laxman Rao 6
- (1966) AIR 1966 Ori 170 (V 53) =
1966 Cri LJ 935, Raghunath v.
Purnachandra 5
- (1965) AIR 1965 Pat 25 (V 52) =
1965 (1) Cri LJ 69, Sheo Kumar
v. Tribhuwan Rai 6
- (1964) AIR 1964 Mad 263 (V 51) =
1964 (1) Cri LJ 674, Challamuthu
Padayachi v. Rajavel 6
- (1961) AIR 1961 Madh Pra 302 (V 48)
= 1961 (2) Cri LJ 642, Kanhaiya-
lal v. Devi Singh 6
- (1961) AIR 1961 Punj 187 (V 48) =
1961 (1) Cri LJ 708, Jodh Singh v.
Bhagmbar Das 1, 2
- (1960) AIR 1960 Raj 15 (V 47) =
1960 Cri LJ 116, Bahori v. Ghure
Balwant 6

(1959) AIR 1959 All 763 (V 46) =
1959 Cri LJ 1384, Bhagwat v.

State

1, 3

(1958) AIR 1958 Ori 79 (V 45) =
1958 Cri LJ 650, Keshab v. Some-

nath Behera 4

R. N. Vaishnavi, for Applicant; J. L.
Chowdhury and Asst. Ad. General, for the
State.

ALI C. J.:— This reference raises a substantial question of law regarding the interpretation of sub-section (9) read with sub-section (4) of Section 145 of the Criminal P. C. — a point on which there appears to be a serious divergence of judicial opinion in India. The reference arises out of proceedings drawn under Section 145 with respect to the land in dispute between the parties. It appears that while the proceedings were going on in the Court of the trial Magistrate, the applicant moved an application before the Magistrate for summoning two witnesses namely the Dy. Registrar High Court who was at the time of the dispute the Munsiff Sub-Registrar Srinagar and the Tehsildar of the Nazool Department both of whom had refused to appear in the Court without getting a regular summons from the Court. The learned trial Magistrate rejected the prayer of the applicant on the ground that the applicant had taken a long time to complete the proceedings and had taken several adjournments for arguments. In other words the learned Magistrate rejected the application without considering the same on its merits. Thereafter an application in revision was made to the Sessions Judge Srinagar for making a reference to this Court. This application was resisted by the non-applicants on the ground that the Magistrate had no jurisdiction to summon the witnesses prayed for by the applicant under Section 145 (9) and even if these witnesses could have been summoned their evidence could not be considered by the Court under Section 145 (4) of the Criminal P. C. It was further contended before the Sessions Judge as also before us that as the witnesses sought to be summoned had not given any affidavits, they were debarred from giving evidence in the proceedings. Reliance was placed by the petitioners on a decision reported in Bhagwat v. State, AIR 1959 All 763 and Jodh Singh v. Bhagambar Das, AIR 1961 Punj 187. It appears however, that the Patna, Rajasthan, Madras and M. P. High Courts have taken a contrary view. Before, considering the authorities on the subject, we would like to analyze the relevant provisions of the Criminal P. C. in order to find out the real purpose, scope and ambit of sub-sections (4) and (9) of Section 145 of the Criminal P. C. Section 145 (4) and first proviso runs thus:

"The Magistrate shall then, without
reference to the merits or the claims of

any of such parties to a right to possess the subject of dispute, peruse the statements, documents and affidavits if any, so put in, hear the parties and conclude the inquiry, as far as may be practicable, within a period of two months from the date of the appearance of the parties before him and, if possible, decide the question whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject:

Provided that the Magistrate may, if he so thinks fit, summon and examine any person whose affidavit has been put in as to the facts contained therein".

It is true that in the main body of Section 145 (4) the Court has been given the power to consider and peruse the statements, documents and affidavits and there is no specific reference to the evidence of the witnesses. Nevertheless the proviso quoted above gives a clear discretion to the Magistrate to summon and examine any person whose affidavit has been put in as to the facts contained therein. Thus by virtue of the first proviso (Supra) the evidence of a deponent can also be considered by the Magistrate in proceedings under Section 145 even though this power is not expressly given to the Magistrate under Section 145 (4) of the Cri. P. C. It is therefore, obvious that even though Section 145 (4) relates merely to perusal of statements, documents and affidavits, yet by virtue of the proviso an implied power is contained in sub-section (4) to consider the evidence of the deponent if examined and recorded—otherwise the first proviso would become absolutely redundant and useless and the very object of engrafting this proviso would be frustrated. Similarly Section 145 (9) runs as under:—

"The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing".

This proviso also invests the Magistrate with a discretion at any stage of the proceedings, to issue a summons to any witness directing him to attend or to produce any document or thing. Such a discretion has to be exercised only on the application of either party and if the Magistrate is satisfied that a fit case for summoning a witness is made out. On a parity of reasoning given above, sub-section (4) would impliedly give power to the Magistrate to consider the evidence of a witness summoned by the Magistrate under sub-section (9) of the Cri. P. C. otherwise this provision would become useless and redundant. This mere fact that there is no reference to the evidence to be summoned either in the first proviso or sub-section (9) of S. 145 does not neces-

sarily lead to the inference that the evidence referred to in these provisions has to be excluded from consideration.

It is well settled that the Courts must adopt a harmonious rule of interpretation so as to bring about reconciliation between apparent inconsistencies appearing in the provisions of the same statute. It is also equally well settled that whenever the legislature makes a particular provision it must be presumed that there is a certain object behind doing so and the legislature never intends to make provisions which are useless and redundant. Having regard to these golden principles of interpretation it seems to us that the first proviso to Section 145 (4) and sub-section (9) refer to two different categories of cases for which provision has been made by the legislature. The first proviso covers the case only of such witnesses who have filed affidavits before the Court. In other words the deponents of the affidavits have been put within the framework of the proviso and the Magistrate has been given a discretion to summon them if he thinks fit in order to explain the affidavits given by them. There may, however, be some witnesses whose evidence may be very material but who have not given affidavits for one reason or the other. It is to meet this contingency that sub-section (9) has been engrafted which gives discretion to the Magistrate to summon any witness on the application of either party at any stage of the proceedings. In other words while the first proviso is confined to the deponents, sub-section (9) is more or less general in character and gives the right to any of the parties to request the Court to summon a witness who cannot be produced by the party at its own instance, e.g., an official witness who can appear only through a summons. In order to ensure the attendance of such a witness the assistance of the Court has to be taken and that is what sub-section (9) provides for. Reference has also been made to another provision in the Criminal P. C. namely Section 540 which runs thus:

"Any Court may, at any stage of any inquiry, trial or other proceeding under this code, summon any person as a witness, or examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined; and the Court shall summon and examine or recall and examine any such person if his evidence appears to it essential to the just decision of the case."

It is not disputed by the counsel appearing for either of the parties nor in any of the authorities cited before us that if the Court summons a witness under this section his evidence would be considered by the Court, although there is no specific power contained in S. 145 (4) for considering the evidence of this type,

this also supports our view that the power contained in sub-section (4) cannot be strictly limited to the language used therein but has to be construed in a broad and general sense. In other words, where the Criminal P. C. provides for examination of any witness under given circumstances, then there is an implied power to consider the evidence of that witness. Section 540 applies to cases where a witness is examined by the Court and the witness so examined is usually known as the Court witness. The requirement of law in cases contemplated by Section 540 is that the Court must consider the evidence of the witnesses concerned to be essential for a just decision of the case. Thus it would appear that the first proviso to sub-section (4), sub-section (9) of S. 145 and S. 540 contemplate three separate categories of cases which are mutually exclusive. The first proviso to Section 145 refers to cases of deponents whose affidavits have been filed. Sub-section (9) refers to the power of the Magistrate which is to be exercised on the application of any of the parties and Section 540 confers power on the Magistrate to examine a witness at his own in order to understand the facts of the case. Since the Criminal P. C. has made these three separate provisions, it can safely be presumed that where the witnesses have to be summoned under these provisions, there is an implied power also to consider their evidence. If this harmonious interpretation be put to the provisions (Supra), we feel no difficulty in taking the view that the Magistrate can consider the evidence of any witness whom he summons on the application of the parties under Section 145 (9).

2. We shall now deal with the authorities. In AIR 1961 Punj 187 (Supra) a Division Bench no doubt held that in view of the amended provisions of Section 145 (4) no evidence taken by the Magistrate under Section 145 (9) could be considered. Their Lordships observed as follows:

"The object of the changes made by the amending Act obviously appears to be to shorten the proceedings under Section 145 by providing that the evidence to be adduced by the parties may be given by affidavits and that the delay in getting the witnesses summoned and examined orally may be eliminated. For the purpose of elucidating the facts stated in the affidavits put in, power is reserved to the Court to examine such of the persons orally as he may deem necessary, out of the persons whose affidavits have been put in sub-section (9) which was not touched by the amended Act runs as under:—

"The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing

him to attend or to produce any document or thing".

In the context of the provisions of sub-sections (1) and (4) as they existed prior to the amendment, sub-section (9) provided a procedure by which, at the instance of either of the parties, the Magistrate could issue a summons for the attendance of the witness 'to attend or to produce any document or thing'. In view of the amendment made in sub-sections (1) and (4), however, the question of the examination of witnesses at the instance of the parties, does not arise, because it has been directed that evidence by the parties shall be adduced by means of affidavits".

Their Lordships appear to have been led away by the fact that as, by virtue of the amendment, the language of sub-section (4) is changed so as to simplify the procedure under Section 145 and sub-section (9) has remained untouched, therefore, there is an apparent inconsistency between sub-section (9) and sub-section (4) of S. 145. Their Lordships opined that as there is no provision for consideration of the evidence summoned under S. 145, the same cannot be considered. With very great respect we would observe that their Lordships have put a very narrow interpretation on the provisions of the two sub-sections. Their Lordships have not considered the various aspects to which we have adverted above. Secondly their Lordships do not appear to have considered the intention of the legislature in leaving the provisions of sub-section (9) which stood before the amendment untouched after the amendment. It is well settled that the legislature must be presumed to know the provisions of a particular Act which it is amending and if it has deliberately left a particular provision untouched or unamended, then there is a particular object behind this. In the present case there can be no doubt that the legislature clearly intended to provide for a contingency where a witness could be summoned by the Court if his evidence was material and if it was not possible for him to give an affidavit. The fact that sub-section (9) was deliberately left untouched clearly shows that sub-section (4) must implicitly contain the power to consider such evidence. For these reasons we express our respectful dissent from the judgment of the Punjab High Court, AIR 1961 Punj 187 (Supra).

3. A view almost similar to that of the Punjab High Court has been taken by a single judge of the Allhabad High Court in AIR 1959 All 763 (Supra). In that case, however, the learned Judge held that sub-section (9) did not confer any right upon a party to examine a witness and that this sub-section was confined only to the examination of evidence which was permitted by sub-section (4) and laid down the procedure for examining such

a witness. With very great respect we find ourselves unable to agree with this interpretation of law which introduces an element of inconsistency in proviso to sub-section (4) and sub-section (9) but also imports a limitation into sub-section (9) of Section 145 which is not there.

4. There is another case which practically follows the Allahabad view. In *Keshab v. Somenath Behera*, AIR 1958 Orissa 79 it was held that the first proviso to Section 145 (4) entitles only those witnesses to be summoned who have given their affidavits. It, however, appears that the attention of the learned C. J. was not drawn to Section 145 (9) nor was this point raised and argued before him. For these reasons this decision does not appear to be of any assistance to us in deciding the point.

5. A similar view was taken in *Rughunath v. Purna Chandra*, AIR 1966 Orissa 170 where also the ambit and the purport of S. 145 (9) was not considered.

6. On the other hand the view taken by us in this case is amply supported by a Division Bench decision of the Patna High Court in *Sheo Kumar v. Tribhuwan Rai*, AIR 1965 Patna 25. In that case their Lordship while dissenting from the Punjab Judgment (Supra) observed as follows:

"With the greatest respect, I am unable to agree. There is nothing in the language of the proviso to sub-section (4) or in that of sub-section (9) to indicate that the former confers a right upon a party to examine a witness orally. It will be noticed that the expression 'if he thinks fit' occurs in both the sub-sections and this expression shows that the discretion lies with the Magistrate. Further, the proviso to sub-section (4) does not speak of the application of a party, which fact indicates that the Magistrate may examine a person who has sworn an affidavit either of his own motion or at the request of a party, whereas sub-section (9) enables the Magistrate to summon a witness at the request of a party at any stage of the proceedings. It will be noticed that the proviso to sub-section (4) contains the provision to summon and examine any person and therefore, a separate provision like the one in sub-section (9) is not required for exercising the power given by the proviso. The view taken in the aforesaid decision can be justified only if sub-section (9) is completely ignored. This sub-section was in its present form before the legislature when extensive amendments were made in 1955 in Sections 145 and 146.

The retention of sub-section (9) in its old form cannot therefore, be due to mere oversight. It is true that the amendments aimed at expeditious disposal of a proceeding under Section 145 nevertheless sub-section (9) was retained. The newly

added proviso to sub-section (4) certainly empowers the magistrate to summon and examine any person whose affidavit has been put in; but at the same time the legislature also empowered the Magistrate, under sub-section (9) to summon any witness at any stage of the proceeding on the application of either party. Neither in sub-section (9) nor in the proviso to sub-section (4) a party has been given any right to examine a witness; in either case the discretion lies with the Magistrate and he can summon a person under either of these provisions only if he thinks fit to do so.

In my opinion the legislature deliberately allowed sub-section (9) to continue for meeting certain contingencies. It may not be possible for a party to obtain the affidavits of some persons either because they do not want to be identified with a party to the dispute or because they are public servants, at the same time such persons may be very competent to speak about possession. What remedy has a party in such a contingency? A party may, of course, request the Magistrate to ask such a person to swear and affidavit, but the Magistrate has no power to compel such a person to do so. The only other alternative, therefore, for the party is to request the Magistrate to summon such a person and examine him as a witness; and this can be done only under sub-s. (9). Of course the Magistrate is not bound to comply with the request of the party, but he has to exercise his discretion judiciously, not arbitrarily".

The same view appears to have been taken by the Madras High Court in AIR 1964 Mad 263, M. P. High Court in AIR 1961 Madh Pra 302, Mysore High Court in AIR 1968 Mys 16 and the Rajasthan High Court in AIR 1960 Raj 15.

7. On a consideration, therefore, of the authorities mentioned above we prefer to follow the Patna view which has been followed by the Madras, Mysore, M. P. and Rajasthan High Courts and which in our opinion is fully in consonance with the language employed in sub-sections (4) and (9) of S. 145. We, therefore, hold that sub-section (4) does not bar either the summoning or the consideration of the witnesses summoned under sub-s. (9) of S. 145 or under S. 540 of the Cr. P. C.

8. In ultimate analysis the question is left entirely to the discretion of the learned Magistrate. Once the learned Magistrate is satisfied that a case for examining a witness is made out by any of the parties before him, he has the power to summon any witness at any stage even at the argument stage.

9. In the instant case the learned Magistrate has rejected the application of the petitioner without considering it on merits. In fact the Magistrate has completely over-looked the fact that the two

official witnesses namely the Dy. Registrar High Court (now Sub-Judge Shopian) and the Tehsildar Nazool being Government servants could not be compelled to give affidavits in favour of the petitioner, nor could they have appeared before the Court without regular summons from it. In these circumstances we accept this reference to this extent that the matter is remitted to the trial Court who will now consider the application of the applicant for summoning the two witnesses mentioned above on its merits and if he thinks fit in the interest of justice to summon the witnesses he will certainly give an opportunity to the applicant to record the statements of the witnesses after issuing regular summons to them. The reference is disposed of accordingly.

10. MIAN JALALUDDIN J.: I agree.
Reference answered accordingly.

AIR 1970 JAMMU & KASHMIR 26
(V 57 C 7)

FULL BENCH

S. M. FAZL ALI, C. J., J. N. BHAT
AND ANANT SINGH JJ.

Autar Singh, Petitioner v. Sohan Lal, Respondent.

Civil Revn. No. 80 of 1968, D/- 10-6-1969, against the Order of Dist. J., Jammu, D/- 28-8-1965.

Houses and Rents — Jammu and Kashmir Houses and Shops Rent Control Act (14 of 2009), Section 8 — Fixation of fair rent by consent of parties — Second application for the same relief is barred — Previous order operates as estoppel by conduct — Plea that estoppel could not lie against a statute is not available — Principles as to availability of plea of estoppel against statute, stated. AIR 1956 Punj 95, Dissented from — (Evidence Act (1872), Sec. 115 — Estoppel against statute — Exceptions to the bar of, stated).

The tenant applied before the Rent Controller for fixation of fair rent for the shop in his occupation under Section 8 of the Jammu & Kashmir Houses and Shops Rent Control Act. The parties arrived at a compromise and agreed on a rent of Rs. 25 per month and the Rent Controller fixed that amount as fair rent for the premises. After paying rent for sometime at that rate, the tenant filed another application for the same relief. The landlord contended that the second application was barred by principle of res judicata and secondly that the tenant was estopped from asking the Rent Controller to reassess the rent. The tenant argued that since the order was passed on agreement of the parties and the Court

did not consider the various factors mentioned in the section for fixation of fair rent, there was no estoppel against the express provisions of the statute.

Held, (1) that though the section prescribed the mode and set out a detailed standard for fixing fair rent taking into account various factors, there was no provision either expressly or impliedly prohibiting the parties from fixing fair rent by agreement, nor did these provisions prevent the Controller from giving effect to such an agreement. Therefore, the doctrine of estoppel could not be called into aid in the case. Further, by their conduct, the parties dissuaded the Court from discharging its statutory obligations in following the procedure laid down in sub-clauses (a) to (f) of S. 8. And, the Court could have considered various circumstances mentioned in sub-clauses (a) to (g) of S. 8 only if the parties had produced relevant evidence, which they did not. They only asked the Court to fix the agreed rent as the fair rent. Such a conduct on the part of the parties clearly operated as an estoppel. (Paras 5 to 7)

(2) that the provision, if at all, was meant purely for the benefit of the tenant in order to protect him from greedy landlords who, taking advantage of the helpless position of tenants, charge exorbitant rents. The various sub-clauses of Section 8 are inserted in order to achieve this statutory end. No question of public interest is at all involved in making these provisions. In that view and in the absence of express prohibition against fixation of fair rent by consent of parties, the bar of doctrine of estoppel against statutes would not apply to the case. (Para 6)

In cases where there is a statutory provision for the benefit of a party, the same can be waived and the parties can contract out of the statute by entering into a compromise only in the following circumstances: (1) Where there is no express prohibition or clear inhibition forbidding the contract so that a breach of the statutory provisions may amount to a patent illegality. In such cases no amount of agreement can be used to neutralize the effect of an express provision engrafted by the statute. (2) Where the statutory provision is purely personal to the party concerned and meant for his benefit and is not in public interest it follows that where there is a statutory provision which is not for the personal benefit or protection of a party alone but is also in public interest, the parties cannot be allowed to contravene such a statutory provision. (Para 12)

and (3) that as the tenant by agreeing to a particular rent to be fixed as fair rent did not choose to adduce any evidence before the Controller nor allowed the landlord to adduce any such evidence, in

the eye of law, the order fixing fair rent must be deemed to have taken into consideration the factors mentioned in Section 8 and it was on this ground also a valid order. AIR 1959 SC 689 & (1906) 2 KB 119 at 126, Dist.; AIR 1967 SC 591 & AIR 1958 Bom 1 & AIR 1933 PC 167 & 8 CP 350 & AIR 1960 Punj 514 & AIR 1963 J & K 59 & AIR 1966 J & K 22 & AIR 1962 All 147 (FB), Foll.; AIR 1956 Punj 95, Diss. (Para 13)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 591 (V 54) =
 (1964) 2 SCR 310, P. Venkata Subba Rao v. Jagannadha Rao 5
 (1966) AIR 1966 J & K 22 (V 53) =
 1964 Kash LJ 176, Prabh Dyal v. Mohan Lal 8
 (1963) AIR 1963 J & K 59 (V 50) =
 (1963) Kash LJ 133, Abdul Gani Malik v. Mala Habib 8
 (1962) AIR 1962 All 147 (V 49) =
 ILR (1962) 1 All 113 (FB), Daulat Ram v. Triloki Nath 9
 (1960) AIR 1960 Punj 514 (V 47) =
 62 Pun LR 888, Vas Dev Sharma v. Milkhi Ram 8
 (1959) AIR 1959 SC 689 (V 46) =
 (1959) Supp (2) SCR 217, Waman Shrinivas v. Ratilal Bhagwan-das & Co. 4, 6
 (1958) AIR 1958 Bom 1 (V 45) =
 ILR (1957) Bom 688, Popatlal v. Kalidas 6
 (1956) AIR 1956 Punj 95 (V 43) =
 ILR (1956) Punj 211, Niranjan Singh v. Shri Bhagwan Ram 10
 (1933) AIR 1933 PC 167 (V 20) =
 ILR 56 Mad 737, Ambu Nair v. Kelu Nair 7
 (1906) 1906-2 KB 119, Mayor Aldermen and Citizens of Norwich v. Norwich Electric Tramways Co. 11
 (1884) 111 US 597 = 28 L Ed 534, Gibbs and Sterrett Manufacturing Co. v. Brucker 6
 8 CP 350, Smith v. Baker 7

S. P. Gupta, for Petitioner; Amar Chand, for Respondent.

ALI C. J.:— This is a revision application against an order passed by the District Judge Jammu in a Rent Control matter. The facts giving rise to the present revision may be summarised as follows.

2. The petitioner Autar Singh was a lessee of a shop in Bazar Babrian Jammu from one Sohan Lal at a fixed rent of Rs. 9 per month. Subsequently on being persuaded by the landlord, the petitioner executed a rent deed in his favour enhancing the rent to Rs. 35 per month. The petitioner then applied to the Rent Controller Jammu on 23-10-1962 for fixation of fair rent. In this proceeding, however, the parties arrived at a compromise and an agreed rent of Rs. 25 per month was fixed as fair rent for the premises. There-

after the petitioner continued paying rent at the agreed rate. On 30-10-1964 the petitioner made another application to the Rent Controller for refixation of fair rent. This application was resisted by the landlord firstly on the ground that the application was barred by the principle of *res judicata* and secondly on the ground that having agreed to pay a particular rent the petitioner was estopped from asking the Controller to reassess the rent. The petitioner, however, contended before the Controller that as the previous order was passed on the basis of the agreement of the parties and the Court did not go into the various factors mentioned in Section 8 (1) of the Act, there was no estoppel against the express provisions of the statute. The Rent Controller, however, overruled the plea of the petitioner and held that the rent already fixed could not be disturbed. The petitioner then went up in appeal to the District Judge who upheld the order of the Rent Controller and dismissed the appeal.

3. The civil revision application was in the first instance heard by a Division Bench, which referred it to a Full Bench in view of a substantial question of law of great public importance being involved in the case.

4. The point that has been canvassed before us is as to whether or not the order of the Rent Controller dated 6-11-1962 by which an agreed rent was fixed by the Controller would operate as an estoppel against the petitioner in the instant case. The learned counsel for the petitioner submitted that Section 8 (a) provides in express terms that the Court should take into consideration several factors before fixing rent and even if the parties agreed to an order being passed, that will not prevent the Court from complying with the requirements of the law. It was further argued that at any rate even if the petitioner had given his tacit consent to the previous order there could be no estoppel against statute. In support of this contention the learned counsel for the petitioner relied upon a decision of the Supreme Court in AIR 1959 SC 689 and submitted that this decision overrules some of the cases relied upon by the learned District Judge.

Before, however, we go into this question it will be necessary to examine the scope and ambit of Section 8 of the Houses and Shops Rent Control Act. Section 8 runs as under:—

"In any of the following cases the Controller shall, on application by any landlord or tenant, fix the fair rent as set forth hereunder:—

(a) Where the provisions of Sch. A apply and there is no cause for the alteration of the rate of fair rent as determined according to the schedule for any of the reasons mentioned in the following

clauses, in accordance with the provisions of Sch. A.

(b) Where during the currency of fair rent payable for any house or shop there has been an increase in the Municipal taxes, rates or cesses in respect of the house or shop by adding to it the amount of such increase as is payable by the landlord by agreement with the tenant over and above what is payable by the landlord himself under the local Municipal law.

(c) Where during the currency of a fair rent payable for any house or shop the landlord has made some addition, alteration or improvement in the house or shop, not being tenantable repairs necessary or useful for such house or shop, by adding to such fair rent payable in one year ten per centum of the amount reasonably spent by the landlord in making the said addition, alteration or improvements, the added amount being divided amongst instalments for payment of rent of the year as would be just and convenient.

Provided that when the house or shop is in occupation of a tenant at the time of the said addition, alteration or improvement, the additional rent shall not be recoverable from such tenant, unless such addition, alteration or improvement has been made at the written request of the tenant.

(d) Where during the currency of fair rent the landlord has supplied any furniture for use of the tenant in the house or shop by adding to such fair rent payable in one year ten per centum of the price of the said furniture as on the day they are supplied, the added amount being divided amongst instalments for payment of rent of the year as would be just and convenient.

(e) Excepting the case covered by Cl. (f) where the provisions of Sch. A for determining the fair rent do not apply, either because the house or shop or the whole of the house or shop was not let during the 12 months prior to 1st Baisakh, 1998, or for some other reasons, or where any house or shop has been let rent free or at normal rent, or for some consideration other than money rent, or in addition to money rent, by fixing the fair rent at a rate in accordance with Sch. A, taking the rent which would have been reasonably payable for the house or the shop if let as 'Basic rent' under the said schedule.

(f) Where any house or shop has been wholly or substantially constructed after the last day of Chet 2005, by fixing the fair rent payable for one year at a rate not less than 4 per centum and not more than six per centum of the reasonable cost of construction added to the reasonable price of the land, included in the house or the shop, as on the day of the commencement of such construction, taking into ac-

count the prevailing rate of rent in the locality for similar accommodation, with similar advantages and amenities and the comparative advantages or disadvantages of accommodation in the house or shop.

Provided that where the house or shop in respect of which fair rent is to be fixed form a part of the construction, the fair rent shall be fixed at a rate which is fairly proportionate to the total fair rent of the entire construction.

(g) Where no provisions of this Act for fixing fair rent apply to any premises, by determining the fair rent at a rate which is fair and reasonable.

(2) If, in fixing the fair rent, the Controller is required by this Act to determine the rent at which the premises were let during the 12 months prior to 1st Baisakh, 1998, but it is not reasonably practicable to obtain sufficient evidence for determining the said rent, he shall determine approximately the rent, at which in reasonable probability the house or shop was let on the date and the rent so determined shall be deemed to be the rent at which the premises were let during 12 months prior to 1st Baisakh 1998 and for the said purpose he may have regard to the fair rents of similar houses or shops in the neighbourhood, and may make presumptions either against the landlord or the tenant who, in his opinion, is in a position to produce relevant evidence but is refraining from doing it".

5. The section no doubt prescribes a particular mode and sets out a detailed standard for fixing fair rent of a house or shop taking into consideration various factors, for instance, the price of the land included in the house, the date of construction etc. There is, however, no provision which either impliedly or expressly prohibits the parties from fixing a fair rent by agreement, nor do these provisions prevent the Controller from giving effect to such an agreement. In these circumstances it seems to us that the doctrine of estoppel against Statute cannot be called into aid in the instant case. Furthermore, what has happened in the present case is that the parties by agreeing to a compromise and asking the Court to fix fair rent in terms of their agreement dissuaded it from discharging its statutory obligations in following the procedure laid down in sub-cl. (a) to (f) of S. 8 (Supra). Not only this, but it is manifest that the Court could have considered various circumstances mentioned in sub-clauses (a) to (g) of S. 8 only if the parties had produced relevant evidence before it. Where the parties did not lead any evidence on any of the factors mentioned in Sec. 8, but asked the Court to pass an order in terms of their agreement, such a conduct of the parties clearly operates as an estoppel.

In *P. Venkata Subba Rao v. Jagannadha Rao*, AIR 1967 SC 591 their Lordships of the Supreme Court held that a decree based on a compromise creates estoppel by conduct. In this connection their Lordships while describing the nature of a compromise decree observed as follows:—

"The compromise decree was not a decision by the Court. It was the acceptance by the Court of something to which the parties had agreed. It has been said that a compromise decree merely sets the seal of the Court on the agreement of the parties. The Court did not decide anything. Nor can it be said that a decision of the Court was implicit in it".

* * * * *

"The decree might have created an estoppel by conduct between the parties". (See p. 595).

6. Their Lordships of the Supreme Court in that case pointed out that even though the principle of *res judicata* could not be attracted because the law was amended after the previous order, yet their Lordships recognized that a decree might create an estoppel by conduct between the parties. In our opinion once the agreement merged into the order of the Court, it was not an agreement simpliciter, but an agreement to which was super-added the command of the Court. Thus it was not a case where the parties by a bilateral agreement sought to contract out of the statutory provisions of the Act as happened in AIR 1959 SC 689 (Supra). In that case it appears that under the agreement of lease the landlord had permitted the tenant to sublet the premises but the statute, namely, the Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947) expressly prohibited any sub-letting by the tenant. Their Lordships held that in view of the express prohibition the agreement stood overruled and it was not open to the tenant to sublet the premises. Their Lordships further held that since the prohibition contained in the Act was not only meant for the protection of the landlord or the tenant but was in public interest the principle of Waiver of Statutory rights could not be called into operation. In this connection their Lordships observed as follows in that case:—

"There is thus a manifest distinction between this case where the plaintiff asked the Court to afford him a remedy against one who by contravening Section 15 of the Act has made himself liable to eviction and those cases where the Court was called upon to assist the plaintiff in enforcing an agreement the object of which was to do an illegal act. The respondent is only seeking to enforce his right under the statute and the appellant cannot be permitted to assert in a Court of justice any right founded upon or growing out

of an illegal transaction: *Gibbs and Sterrett Manufacturing Co. v. Brucker*, (1884) 111 US 597, 601 = 28 Law Ed 534, 535. In our opinion Section 15 of the Act is based on public policy and it has been held that if public policy demands it even an equal participant in the illegality is allowed relief by way of restitution or rescission, though not on the contract".

x x x x x x

"Assuming that to be so, and proceeding on the facts found in this case the plea of waiver cannot be raised because as a result of giving effect to that plea the Court would be enforcing an illegal agreement and thus contravene the statutory provisions of Section 15 based on public policy and produce the very result which the statute prohibits and makes illegal".

x x x x x x

"In the instant case the question is not merely of waiver of statutory rights enacted for the benefit of an individual but whether the Court would aid the appellant in enforcing a term of the agreement which Section 15 of the Act declares to be illegal".

This case is clearly distinguishable from the facts of the present case. To begin with, the first distinction lies in the fact that in the present case the statutory provision as quoted above does not constitute an express prohibition against fixation of fair rent by consent of the parties. Secondly the provision, if at all, is meant purely for the benefit of the tenant in order to protect him from greedy landlords who taking advantage of the helpless position of tenants charge exorbitant rents. The various sub-clauses of Sec. 8 are inserted in order to achieve this statutory end. No question of public interest is at all involved in making these provisions. Finally in the present case the agreement of the parties had merged into an order of the Court which by the conduct of the parties had been dissuaded from performing its statutory obligations. Thus the order fixing an agreed rent would operate as a clear estoppel by conduct against the petitioner.

We are fortified in our view by a decision of the Bombay High Court in *Popatlal v. Kalidas*, AIR 1958 Bom 1 where in similar circumstances fixation of fair rent by consent of the parties was upheld. In that case their Lordships observed as follows:—

"Standard rent cannot be a constant figure. Standard rent depends upon circumstances, and as circumstances change, the standard rent would also vary. There can be no immutability about it. Besides the tenant having once given the Court to understand to the satisfaction of the Court, that he considered the rent proposed by the landlord during trial or appeal to be a just and reasonable standard

rent which was acceptable to him and having invited the Court to decide the question accordingly and incorporate the decision in its decree, it would not be open to him to say subsequently, as between the same parties and in respect of the same premises, that the previous decision of the Court would not bind him." (See page 4 of the Reports).

7. These observations apply precisely to the facts of the instant case. In fact if we allow the petitioner to reagitate the question of rent after having agreed to get the same fixed by the Court, it will run against the well-known principle that a person cannot be allowed to approbate and reprobate at the same time. In *Ambu Nair v. Kelu Nair*, AIR 1933 PC 167 at p. 169 their Lordships of the Privy Council while citing an earlier case observed as follows:—

"It is a well accepted principle that a party cannot both approbate and reprobate. He cannot, to use the words of Honeyman, J. in *Smith v. Baker*, 8 C. P. 350, 'at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage'."

8. In *Vas Dev Sharma v. Milkhi Ram*, AIR 1960 Punj 514 Grover, J., took almost the same view in similar circumstances and held that where in a decree for ejectment the tenant agreed to vacate and admitted the fact that the landlord was entitled to possession, a consent decree could be validly passed even if there was no evidence to show the existence of personal necessity. Grover, J., pointed out that in such cases the conduct of the tenant in agreeing to be evicted amounted to a clear admission of the facts pleaded by the landlord. The same view has been taken by one of us (Bhat, J.) in 1963 Kash LJ 133 = (AIR 1963 J & K 59). In that case Bhat, J. pointed out that where the tenant agrees to vacate the premises the Court had no option but to pass a decree for eviction. Indeed if the Court refuses to pass a decree for eviction a most anomalous situation would arise. For instance A, a landlord brings a suit for eviction against B, his tenant on the ground of personal necessity. Before A gives his evidence, B enters into a compromise with him agreeing to vacate the premises. In such cases it cannot be argued with any show of force that a decree should not be passed unless the statutory provisions of personal necessity are satisfied. The tenant may say 'I walk out today; let the landlord do what he likes'. Thus the Court cannot force the tenant to remain in the premises. In such cases a compro-

mise decree can always be passed, because the provision is purely for the benefit of the tenant and if the tenant is ready to waive the benefit there can be no objection to the Court in passing a compromise decree. The same view was taken in a later decision of this Court in 1964 Kash LJ 176 = (AIR 1966 J & K 22).

9. A Full Bench of the Allahabad High Court took the same view as we have taken in the present case, in an application for fixation of fair rent. In *Daulat Ram v. Triloki Nath*, AIR 1962 All 147 at p. 149 their Lordships observed as follows:—

The second part of the question is whether there could be a valid and enforceable agreement of fixation of rent in respect of any accommodation before an allotment order is passed in respect of the said accommodation under the provision of the U. P. (Temporary) Control of Rent and Eviction Act.

x x x x x x
"We have examined the language of Sec. 7 of the U. P. (Temporary) Control of Rent and Eviction Act and we have found in it no prohibition to an agreement for fixation of rent between landlord and a person who may later become a tenant under the provisions of that section, being arrived at prior to the order of allotment".

x x x x x x
"In fact neither in the U. P. (Temporary) Control of Rent and Eviction Act, nor in the rules framed under that Act, nor in any orders made by the District Magistrate of Mathura under the provisions of that Act which have been brought to our notice, is there any prohibition against an agreement for fixation of rent between any landlord and his tenant. The only provision about agreement for fixation of rent between a landlord and a tenant in the U. P. (Temporary) Control of Rent and Eviction Act is contained in Section 5 (1) and that only lays down that if there is an agreement, the rent shall be payable in accordance with that agreement".

10. As against these authorities, the only case taking a contrary view cited before us was that of a single judge of the Punjab High Court in *Niranjan Singh v. Shri Bhagwan Ram*, AIR 1956 Punj 95. For the reasons that we have already given we respectfully express our dissent from the view taken by Bhandari, J. in the case.

11. Reliance was also placed on *Mayor Aldermen and Citizens of Norwich v. Norwich Electric Tramways Co.*, (1906) 2 KB 119 at page 126 where Vaughan-Williams L. J. observed as follows:—

"It appears to me therefore, that the legislature having in the interests of the public provided that disputes of the kind mentioned in the section shall be determined by an expert nominated by the

Board of Trade, the contention that there was a waiver of that provision so as to give jurisdiction to the High Court is not open to the plaintiffs. The same considerations appear to me to apply to the argument that there was something in the nature of an estoppel, which indeed was not very seriously pressed upon us". The decision of the King's Bench Division is clearly distinguishable on the ground that there the Court held that the statutory provision was not merely for the benefit of the party but was in public interest. In other words the King's Bench Division has taken the same view as the Supreme Court in the case (Supra).

12. Thus after a careful consideration of the authorities the following propositions emerge:—

In cases where there is a statutory provision for the benefit of a party, the same can be waived and the parties can contract out of the statute by entering into a compromise only in the following circumstances:—

- (1) Where there is no express prohibition or clear inhibition forbidding the contract so that a breach of the statutory provisions may amount to a patent illegality. In such cases no amount of agreement can be used to neutralize the effect of an express provision engrafted by the Statute.
- (2) Where the statutory provision is purely personal to the party concerned and meant for his benefit and is not in public interest it follows that where there is a statutory provision which is not for the personal benefit or protection of a party alone but is also in public interest, the parties cannot be allowed to contravene such a statutory provision. We are fortified in our view by the following observations made in Volume 92 of Corpus Juris Secundum at pp. 1066-68:—
"The doctrine of waiver extends to rights and privileges of any character, and, since the word 'waiver' covers every conceivable right, it is the general rule that a person may waive any matter which affects his property, and any alienable right or privilege of which he is the owner or which belongs to him or to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by Constitution, provided such rights and privileges rest in the individual, are intended for his sole benefit, do not infringe on the rights of others and further provided the waiver of the right or privilege is not forbidden by law, and does not contravene public policy, and the principle is recog-

nized that everyone has a right to waive, and agree to waive, the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, if it can be dispensed with and relinquished without infringement on any public right, and without detriment to the community at large. Whether the right relinquished is of great or little value does not affect the capacity of its owner to relinquish it".

We respectfully agree with the observations made above and which in our opinion correctly lays down the law of waiver on the subject.

13. Lastly we are of the view that as the petitioner by agreeing to a particular rent to be fixed as fair rent did not choose to adduce any evidence before the Controller nor allowed the respondent to adduce any such evidence, in the eye of law, the order fixing fair rent must be deemed to have taken into consideration the factors mentioned in Section 8 and it was on this ground also a valid order.

14. For the reasons given above, we hold that the learned District Judge took the right view in thinking that the tenant was estopped from reagitating the question of fixation of fair rent. The application is therefore, dismissed with costs.

15. J. N. BHAT J.:— I agree.

16. ANANT SINGH J.:— I agree.
Petition dismissed.

AIR 1970 JAMMU & KASHMIR 31
(V 57 C 8)

JASWANT SINGH J.

Anant Ram and another, Petitioners v. Chairman, Panchayati Adalat, Tehsil, Hira Nagar and others, Opposite Party.

Writ Petn. No. 167 of 1968, D/- 13-3-1969.

Penal Code (1860), S. 430 — Offence under, read with Jammu and Kashmir Village Panchayat Act (23 of 1958), S. 72 — Imposition of recurring fine is illegal — Proper course in case of continuing breach is to issue notice to accused for days during which breach continued, afford opportunity to defend himself and in case offence is proved, punish him according to law: (1900) ILR 27 Cal 565 and (1910) ILR 37 Cal 671 & AIR 1924 Nag 66 & AIR 1925 Pat 322 & AIR 1926 Lah 248 & AIR 1965 Punj 232, Rel. on.

(Para 7)

Cases Referred: Chronological Paras
(1965) AIR 1965 Punj 232 (V 52) =
67 Pun LR 134, Jai Singh Pyara
Singh v. Gram Panchayat Singhan-
wala

(1926) AIR 1926 Lah 248 (V 13) =
27 Cri LJ 465, Aisha v. Emperor

GM/IM/D38/69/RSK/D

(1925) AIR 1925 Pat 322 (V 12) =
 25 Cri LJ 1357, Pancham Sao v.
 Emperor 7
 (1924) AIR 1924 Nag 66 (V 11) =
 24 Cri LJ 318, Baburao v.
 Nagpur Municipal Committee 7
 (1910) ILR 37 Cal 671 = 11 Cri LJ
 540, Nilmani Ghatak v. Emperor 7
 (1900) ILR 27 Cal 565, Ram Krishna
 Biswas v. Mohendra Nath 7
 R. N. Bhalgotra, for Petitioners; V. S.
 Malhotra, for Opposite Party.

ORDER: This is a petition for issue of a writ of certiorari quashing the order of the Panchayati Adalat, Bhaya, Tehsil, Hiranagar dated 10-8-1966.

2. The facts material for the purpose of this petition are:

On 9-8-1964 one Ram Chand filed a complaint before the Panchayati Adalat, Bhaya, alleging therein that Anant Ram and Mulk Raj, petitioner and respondent No. 3 respectively herein, had committed an offence punishable under Section 430, R. P. C. by obstructing the water channel which irrigated his land. On receipt of the complaint, the accused were summoned by the said Panchayati Adalat and after protracted proceedings the Panchayati Adalat, vide its order dated 5-12-1965, acquitted Mulk Raj but convicted Anant Ram under the aforesaid section of the Ranbir Penal Code and sentenced him to a fine of Rs. 25. Against this order the petitioner went up in appeal to the Sessions Judge, Kathua, who vide his order dated 30-5-1966 upheld the conviction and sentence and dismissed the appeal. As the petitioner did not remove the obstruction a notice again appears to have been issued to him by the Panchayati Adalat to remove the obstruction, and on his refusing to do so, the Panchayati Adalat, vide its order dated 10-8-1966, imposed on him a recurring fine of Rs. 2 per diem till he removed the obstruction. It is this order which the petitioner has challenged by means of this writ petition.

3. Notice with regard to this petition was issued to the respondents who have appeared through Shri V. S. Malhotra.

4. The respondents have contested the petition inter-alia on the grounds that the petition is not maintainable as another alternative remedy is open to the petitioner and the impugned order is warranted by the provisions of the Jammu and Kashmir Village Panchayat Act, 1958, hereinafter referred to as the Act.

5. Appearing for the petitioner, Shri Bhalgotra has contended before me that the order of the Panchayati Adalat imposing a recurring fine on the petitioner is not warranted by any provision of law. Shri Malhotra, has on the other hand contended that the impugned order can be

passed under Sections 46, 121 and 125 of the Act.

6. I have gone through the aforesaid provisions of law relied upon by Shri Malhotra and I am of the opinion that though under Section 72 of the Act, the Panchayati Adalat can convict a person for an offence contrary to Section 430, R. P. C. to wit when he commits mischief by doing an act which causes or which he knows to be likely to cause a diminution of the supply of water for agricultural purposes i.e., when he mischievously cuts off another person's water supply for cultivation, the order of the nature made on 10-8-1966 imposing continuing fine could not be passed as the same cannot be traced to any provision of law.

7. It is now well settled that the imposition of continuing fine cannot be prospective but can only follow on proof that the offence has been committed. A sentence of daily fine for offence which may be committed in future is illegal. It is in fact imposition of fine in anticipation of commission of an offence which cannot be done. Reference in this connection may be usefully made to (1900) ILR 27 Cal 565, where it was held as follows:—

"An order for payment of a daily fine is illegal inasmuch as it is in adjudication in respect of an offence which has not been committed when such order is passed".
 Again in (1910) ILR 37 Cal 671, it was held:—

"A sentence of daily fine in anticipation of a continuing offence which may be committed after the date of the proceeding in which it was passed, is illegal".
 Again in AIR 1924 Nag 66 it was held as follows:—

"Since no person can be punished for a thing he has not done but may possibly do in the future or is even likely to do in future, a daily fine until the accused complies with the order passed against him is illegal".

Then again in AIR 1925 Pat 322, it was observed:—

"It is not permissible in law to impose a daily fine in anticipation of a commission of an offence".

Reference in this connection may also be usefully made to another decision reported in AIR 1926 Lah 248. The position that the Panchayati Adalat cannot impose a recurring fine would also be clear from a decision of the Punjab High Court in *Jai Singh Pyara Singh v. Gram Panchayat Singhanwala*, AIR 1965 Punj 232, wherein it has been held as follows:—

"The imposition of recurring fine on an offender on his first conviction for the breach of the provisions of Section 21 of the Punjab Gram Panchayat Act is illegal as it tantamounts to imposing fine for an offence not yet committed, which cannot be done. In a case of this type the course

The elements which are usually considered relevant to find out the intention of parties namely the proportion of the amount advanced to the value of the security, the rate of interest payable on the sum advanced, the absence of a provision for making improvements and the proportion of the 'rent' or 'pura-pad' to the income reserved for appropriation towards interest taken with the fact that the tarwad on the date of execution of document was in dire need of money to discharge debts only indicate that a reading of the document in a reasonable manner will show that the document was not intended as a lease but a mortgage with possession.

(Para 15)

Therefore, on construction of the document, held, that it was a mortgage and not a kanom under the Kerala Land Reforms Act (1 of 1964).

(Para 16)

Nomenclature of a document is not conclusive of its nature, merely because a marupat was executed on the same date in favour of the executant of "kanyadharam", it could not be said that the transaction was a lease. The execution of a counter-part is a very common feature in Malabar areas even in the case of possessory mortgage and hence its existence. It is normally not an indication either way. 1961 Ker LT 1033, Foll.

(Para 10)

(B) Tenancy Laws — Kerala Land Reforms Act, 1963 (1 of 1964), S. 12(1) — Section only removes the trammels imposed by provisions of Evidence Act especially Ss. 91 and 92 in interpretation of documents — In cases to which S. 12(1) will not apply, a document has to be interpreted subject to Ss. 91 and 92 — (Evidence Act (1872), Ss. 91, 92).

(Para 8)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 876 (V 54) =

(1967) 1 SCR 314, C. Lakshmi v.

M. K. Narayani 7, 9

(1961) 1961 Ker LT 1033 = ILR

(1961) 2 Ker 589, Hussain Thangal v. Ali 10

(1961) (1961) 1 WLR 170 = 1960-3

All ER 672, Davies v. Elsby Brothers Ltd. 14

(1958) AIR 1958 SC 941 (V 45) =

1959 SCJ 121, Ramdhanpuri v. Bankey Bihari 2

(1942) (1942) 2 All ER 674, Booker v. Palmer 3

(1907) ILR 30 Mad 300 = 17 Mad

LJ 189, Gopalan Nair v. Kunhan Menon 11

(1881) ILR 3 Mad 382 (FB); Nellaya

Variyathsilapani v. Vadakipat

Manakal Ashtamurti Nambudri 11

K. Kuttikrishna Menon and A. P.

Chandrasekharan, for Appellant; A. Achuthan Nambiar and T. P. Kelu Nambiar,

for Respondent No. 1.

1970 Ker./2 II G—26

KRISHNAMOORTHY IYER, J. :— The second appeal filed by the 4th defendant arises out of a suit instituted by the plaintiff for redemption of Ext. A1 dated 2-2-1936 executed by the karanavan and the three senior anandiravans of the Valia Pathirikot tarwad in favour of the first defendant and for recovery of possession of the plaint properties. Ext. A2 is the marupat of the same date executed by the first defendant in favour of the executants of Ext. A-1. The plaintiff is the Court auction-purchaser of the rights of Valia Pathirikot tarwad under Ext. A-3, sale certificate in O. S. 513 of 1929 on the file of the Munsiff's Court, Payyoli. The suit was instituted in 1953 when the Malabar Tenancy Act was in force. In view of the repeal of the said enactment it is not necessary to state the contentions of the parties based on the same. The suit was decreed by the trial court after overruling the contention of the defendants that Ext. A-1 is a kanom under Act 4 of 1961. Trial Court took the view that Ext. A-1 evidences a mortgage. The appeal filed by defendants 3 and 4 was disposed of by the lower appellate Court after coming into force of Kerala Land Reforms Act, 1963 (Act 1 of 1964). The appellate Judge also took the view that the transaction evidenced by Ext. A1 is not a kanom under Act I of 1964 but only a mortgage. The decree of the trial court allowing recovery of possession was therefore confirmed.

2. The main question to be considered in the second appeal is whether the transaction evidenced by Ext. A-1 is a kanom defined in the Kerala Land Reforms Act, 1963 (Act I of 1964) or whether it is a mortgage entitling the plaintiff to recover possession of the plaint properties. The answer to this question depends upon the interpretation of Ext. A1. The guiding rule in such cases is furnished by their Lordships of the Supreme Court in Ramdhan Puri v. Bankey Bihari, AIR 1958 SC 941 in the following words:

"The point to be first decided is whether the transaction is a lease as contended by the contesting respondents. The only guiding rule that can be extracted from the cases on the subject is that the intention of the parties must be looked into and that 'once you get a debt with security of land for its redemption, then the arrangement is a mortgage by whatever name it is called' (See Ghosh on Mortgages, Vth Edition, Volume I, page 102)."

3. As Lord Greene, M. R., said in Booker v. Palmer, (1942) 2 All ER 674 at p. 677:

"There is one golden rule which is of very general application, namely, that the law does not impute intention to enter

into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind."

4. The definition of 'kanom' contained in Section 2(22) of Act 1 of 1964 in so far as it is applicable to the area of Malabar where the plaint items are situate reads thus:

"'Kanom' means the transfer for consideration, in money or in kind or in both, by a landlord of an interest in specific immovable property to another person for the latter's enjoyment, whether described in the document evidencing the transaction as kanam or kanapattam, the incidents of which transfer includes—

(a) a right in the transferee to hold the said property liable for the consideration paid by him or due to him;

(b) the liability of the transferor to pay the transferee interest on such consideration unless otherwise agreed to by the parties; and

(c) payment of michavaram or customary dues, or renewal on the expiry of any specified period

Explanation:— For the purposes of this clause, where there has been no stipulation in the document evidencing the transaction for renewal on the expiry of any specified period, but there has been a renewal or payment of renewal fees, it shall be deemed that there has been a provision for such renewal in the document;"

5. In interpreting Ext. A1 the learned appellate Judge relying on Section 12(1) of Act 1 of 1964, has made use of the oral evidence adduced in the case to prove the intention of the parties to Ext. A1. The submission on behalf of the appellant was that the said provision cannot apply and the finding of the learned Judge is therefore vitiated.

6. Section 12, sub-section (1) of Act 1 of 1964 reads thus:

"Notwithstanding anything in the Indian Evidence Act, 1872 (Central Act 1 of 1872), or in any other law for the time being in force, any person interested in any land may prove that a transaction purporting to be a mortgage, otti, Karipanayam, Panayam or nerpanayam, of that land is in substance a transaction by way of kanam, Kanamkuzhikanam, kuzhikanam, verumpattam or other lease, under which the transferee is entitled to fixity of tenure in accordance with the provisions of Section 13 and to the other rights of a tenant under this Act."

7. It was contended by the appellants' learned counsel that the above provision is not applicable to prove that a document styled a kanom is a mortgage and relied on the decision in *Lekshmi v. Narayani*, AIR 1967 SC 876 where their Lordships of the Supreme Court considered

the applicability of Section 12(1) of Act 1 of 1964 to prove that a transaction styled kanom-kuzhikanom is a usufructuary mortgage and the importance to be given to the nomenclature kanom-kuzhikanom in a document. Their Lordships on the first aspect observed:

"If the document purports to be a mortgage, Section 12 of the Act allows the parties to prove that it is, in substance, a kanam-kuzhikanam or other lease. But if the document purports to be or is, on its true construction, a kanam-kuzhikanam or other lease, S. 12 has no application and full effect must be given to the document according to its tenor." and on the latter said:

"On the question whether a transaction is a kanam-kuzhikanam or a usufructuary mortgage, the name given to it by the parties is a relevant, though not always a decisive consideration. If the parties described the transaction to be a kanam-kuzhikanam it is a valuable indication that they intended it to be such and not a usufructuary mortgage."

8. Section 12(1) of Act 1 of 1964 only removes the trammels imposed by the provisions of the Indian Evidence Act, 1872 especially Sections 91 and 92 thereof in the interpretation of documents. In those cases to which S. 12(1) of Act 1 of 1964 will not apply, a document has to be interpreted subject to Sections 91 and 92 of the Indian Evidence Act.

It is unnecessary for us to decide about the applicability of Section 12(1) of Act 1 of 1964 to the instant case in view of the stand taken by the learned counsel for the respondent, that he does not want to rely on any evidence coming within the ambit of Section 12 of Act 1 of 1964 to prove that Ext. A1 is only a mortgage. It is well settled that Section 92 of the Indian Evidence Act forbids the admission or consideration of evidence to prove the intentions of the parties and the nature of the transaction will have to be decided "on a consideration of the contents of the documents themselves with such extrinsic evidence of the surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts." According to the learned counsel for the respondent Ext. A1 furnishes intrinsic evidence that it is a mortgage and for that purpose it is not necessary to rely on any extraneous evidence. We shall therefore decide the nature of the transaction evidenced by Ext. A-1 from its terms.

9. Ext. A-1 is described as a "kanyadharam". Though its nomenclature may not be conclusive, yet it is a valuable indication in interpreting Ext. A-1 which

cannot be overlooked. Ext. A1 also contains the elements required by Section 2, sub-section (22) clauses (a) and (b) of Act 1 of 1964. Clause (c) of sub-section (22) of Section 2 of the Act is also satisfied as Ext. A1 contains a provision for payment of *micavaram*. But even then as indicated by their Lordships of the Supreme Court in AIR 1967 SC 876 already quoted it is necessary to decide whether Ext. A1 involves a transfer of a right to enjoy the property or is a transfer of an interest in the property for securing the payment of a debt.

10. It is necessary at this stage to dispose of a contention raised by the counsel for the appellant that because of the execution of the *marupat* Ext. A2, the transaction is a lease. It is not possible to accept this contention because as was pointed out by Raman Nayar, J. in *Hussain Thangal v. Ali*, 1961 Ker LT 1033 at p. 1045 the execution of a counterpart is a very common feature in Malabar areas even in the case of possessory mortgage and hence its existence is normally not an indication either way. We shall therefore examine the terms of Ext. A1. Ext. A1 is in favour of a junior member of *Valia Pathirikot tarwad*. The consideration for Ext. A1 is Rs. 1100/- and it is stated therein that the sum of Rs. 1098 is for discharging two mortgage debts of the years 1926 and 1934 charged upon the properties included in Ext. A1, and also to pay off the balance of the decree amount in O. S. 203 of 1923 on the file of the Panyoli Munsiff's Court for which the properties comprised in Ext. A1 were attached and proclaimed to be sold in court auction on 3-2-1936. Ext. A1 was executed on the previous day, namely 2-2-1936. It is thus clear that the purpose of the execution of Ext. A1 is to raise money for discharging the debts of the *tarwad*. At the time of the execution of Ext. A1 the properties therein were outstanding under a *kanom* of the year 1929 granted by the first executant of Ext. A1 to two junior members of *Valia Pathirikot tarwad*.

The *marupat* executed by the lessees is Ext. A1. It shows that the properties were given on *kanom* for enjoyment for a period of 6 years on receipt of a *kanom amount* of Rs. 2 and Rs. 48 '*kozhumanushyam*' and the *pattom* payable was 1500 *edangazhies* of paddy per annum. The 1st defendant has been directed under Ext. A1 to pay the *kanom* amount of Rs. 2 to the lessees under Ext. A4 and recover possession of the properties from them. The sum of Rs. 2/- also has been given credit in Ext. A-1. Ext. A-1 is for a term of 12 years and the 1st defendant is directed to pay every year 50 *edangazhies* of paddy towards '*pattom* or *purapad*' to the transferor, after appropriating 1450

edangazhies of paddy towards interest on the sum of Rs. 1100/- advanced under Ext. A1 and for payment of revenue. The executants also undertook in Ext. A1 to hand over to the 1st defendant the receipt for the discharge of the decree debt and also the two mortgage deeds with the endorsements of discharge. There is no provision in Ext. A1 authorising the executants to redeem the property or authorising the 1st defendant to demand the sum advanced and in default to realise the same by the sale of the plaintiff properties after the expiry of the term. As in Ext. A4, no *manushyam* was paid to the executants of Ext. A1.

11. There are a number of decisions of this Court and the Madras High Court which take the view that a *kanom* in Malabar has got the incidents of a usufructuary mortgage and a lease. In a case in *Nellaya Variyathsilapani v. Vadakipat Manakal Ashtamurti Nambudri*, (1881) II.R 3 Mad 382 which arose before the Transfer of Property Act came into force, a Full Bench of the Madras High Court in considering the question whether a *kanom* is to be regarded as a lease or a mortgage for the purpose of limitation said:

"the object for which the tenure was created must be regarded. In some cases it must be a mere lease, a sum being advanced as security for the rent or for proper cultivation to be repaid on the expiry of the term. In other cases, and most frequently, it is created as a lease by way of mortgage to secure a loan advanced to the *jenm* (proprietor)."

Even after the passing of the Transfer of Property Act, there are decisions of the Madras High Court that a *kanom* partakes of the nature of a usufructuary mortgage and lease and that it is an anomalous mortgage under Section 98 of the Transfer of Property Act.

In *Gopalan Nair v. Kunhan Menon* (1907) ILR 30 Mad 300 Benson, J., pointed out that where the document on the face of its recitals purports to evidence a *kanom* demise it is an anomalous mortgage within the meaning of Section 98 of the Transfer of Property Act, "with certain well known incidents attached to it by the customary law of Malabar."

These decisions therefore establish the principle that even though a document is styled as a *kanom* it has to be considered and treated as a mortgage in some cases and has to be construed and treated as a lease in other cases. Section 21 of the Malabar Tenancy Act, 1929 as amended by Act 33 of 1951, Act 7 of 1954 and Act 22 of 1956 conferred fixity of tenure on certain classes of tenants including *kanamdar*. But the second proviso to the section stated that in the case

of a kanamdar whose kanartham exceeds in South Malabar sixty per cent of the value of the jenmi's rights in the holding, and in other places forty per cent of the value of such rights, the kanamdar shall not have fixity of tenure. This provision was introduced for the first time by the Amendment Act 33 of 1951. The reason for the proviso stated above is discussed by Sri C. Govindan Nair in his Commentary on the Malabar Tenancy Act, 1929 thus:

"That there is a well-marked distinction between the kanom tenure of North and South Malabar has been recognised by all concerned. They are different in their genesis, growth and development. In South Malabar the kanom is a cultivating lease, the kanartham is small compared with the extent of the holding, the rent reserved is a substantial amount, the transaction is regarded as the creation of a tenure between a landlord and a tenant and the renewal thereof is the rule. In North Malabar, kanoms are really mortgages, the kanartham is heavy, little or no rent is payable, as the interest quite covers the value of the produce, the transaction is regarded as one between a lender and borrower without any notion of tenancy or tenure attached to it and the adherence to the 'twelve years' term and the exaction of renewal fees every twelve years is the exception and not the rule. Dewan Bahadur (then Sir) Krishnan Nair, therefore, excluded kanams of North Malabar altogether from the scope of his Bill. The Raghavayya Committee considered it to be a wrong way of dealing with the situation as there were similar kanoms in the nature of mortgages in South Malabar also. According to the Committee, the logical method was to exclude from the scope of legislation all kanoms which are essentially mortgages, whether in North or South Malabar. The Committee, therefore, recommended the exclusion of all kanoms wherein the kanartham exceeded 60 per cent of the junmam value of the holding both in North and South Malabar on the basis that the proportion of 60 per cent indicated a real security under Section 66 of the Transfer of Property Act. The Legislative Council considered that some discrimination was necessary and hence varied the percentage in the two districts."

12. The above is a sufficient answer to the contention of the learned counsel for the appellant that "Since the parties labelled Ext. A1 as 'Kanayadharom' after the commencement of the Malabar Tenancy Act, 1929 it is conclusive to show that the parties intended the same only as a tenure as even under the Amendment Act of 1951 documents called kanoms are considered as mortgages depending upon its terms. Ext. A1 is from North Malabar

and the kanartham is heavy and the rent payable is very little."

13. A kanom and a mortgage with possession have therefore many features in common and the only way by which a conclusion can be reached is to find out the object for which the transaction was entered into, namely whether it is the transfer of a right to enjoy the property or it is only a transfer of interest in property for securing the repayment of debt.

14. It is therefore necessary to examine the elements of the transaction embodied in Ext. A-1 to find out whether the parties intended the creation of a lease or debtor and creditor relationship. In interpreting Ext. A1 it will be profitable to bear in mind the rule in *Davies v. Elsby Brothers Ltd.*, (1961) 1 WLR 170 at p. 176 stated thus:

"It is a general principle of English law, not merely applicable to cases of misnomer, that the intention which the framer of the document has in mind when he brings it into existence is not material. In that we differ from many Continental systems. In English law as a general principle the question is not what the writer of the document intended or meant but what a reasonable man reading the document would understand it to mean."

15. The elements which are usually considered relevant to find out the intention of parties namely the proportion of the amount advanced to the value of the security, the rate of interest payable on the sum advanced, the absence of a provision for making improvements and the proportion of the 'rent' or 'purapad' to the income reserved for appropriation towards interest taken with the fact that the tarwad on the date of Ext. A1 was in dire need of money to discharge debts only indicate that a reading of the document in a reasonable manner will show that Ext. A1 was not intended as a lease but a mortgage with possession. On the date of the execution of Ext. A1 the interest on the amount advanced thereunder would work out at about 12 per cent per annum. The michavarom or pattom payable to the transferors being only 50 edangazhies of paddy per annum represents a very insignificant portion of the amount directed to be appropriated towards interest. To add to this, the usual provisions, one would find in a kanom intended as a transfer of property for enjoyment, for payment of customary dues and renewal fees are absent. Apart from the above the following recitals in Ext. A1 prominently bring out that Ext. A-1 is only a mortgage. (Here follow the recitals in Malayalam) — Ed.) The above recitals show that the jenmom right of the tarwad in the properties have been secur-

ed for the kanartham by way of mortgage. The clause "(recital in Malayalam)" is very significant and will be a conclusive pointer to the intention of the parties to Ext. A1 to create a mortgage. Though several decisions were placed before us enumerating the different factors to be taken into account in the matter of interpretation of documents they can only be an aid and the decision of this case should depend solely on the interpretation of Ext. A1. It is not therefore necessary to discuss those decisions.

16. We are therefore of the view, that Ext. A1 is a mortgage and not a kanom under Act 1 of 1964. In view of our finding that Ext. A1 is a mortgage it is not possible to contend that Ext. A1 is a lease under Act 1 of 1964 even though it may not be kanom within the meaning of the Act.

17. No other point was raised before us. In confirmation of the judgment and decree of the Court below we dismiss the second appeal but we make no order as to costs.

Appeal dismissed.

AIR 1970 KERALA 21 (V 57 C 5)

FULL BENCH

P. T. RAMAN NAYAR, K. K. MATHEW AND V. P. GOPALAN NAMBIYAR, JJ.

George A. Leslie and others, Petitioners v. State of Kerala and others, Respondents.

O. P. No. 1586 of 1965, D/- 9-1-1969.

(A) Government Land Assignment Regulation (3 of 1997 ME) Reg. 3, Rules 26A and 26B — Grant of land — Rights of grantee — Government in 1099 ME holding that on payment of timber value of reserved trees at flat rate of Rs. 35/- per acre of wooded area grantee would acquire full rights to reserved trees—Payment of instalments to be made within four years from date of decision and consequential notification — Paragraph in notification not specifying point of time from which instalment payment should commence as regards grantee before 1099 — Grantee, held could not choose his own time for paying instalments and payments made in 1964 were invalid. O. P. No. 337 of 1957 (Ker) and A. S. No. 550 of 1962 (Ker) Overruled.

(Para 13)

(B) Constitution of India, Art. 226 — Grant of waste lands — Whether the grantee has acquired rights in the reserved trees — Whether contract was formed between Government and grantee — Can be considered in a suit instituted for that purpose — Court exercising jurisdiction under Art. 226 is not proper forum for

deciding that matter. Case law discussed. (Para 14)

(C) Government Land Assignment Regulation (3 of 1097 ME) S. 7 (1) (f) — "Kuttikanom" — It is neither fee nor tax — It is Government's share of value of reserved trees — It can vary with market value of timber.

Kuttikanom is neither a fee nor tax. A tax or fee is levied in the exercise of sovereign power. In the context Kuttikanom means the Government's share of the value of the reserved trees. The grant in the circumstances did not convey the title to the reserved trees. All it did was to grant a concession to the grantee to appropriate the trees other than the royal trees enumerated in it for consumption within the limits of the grant. The fact that Kuttikanom was a nominal payment in ancient days when the value of timber was little, should not make one forget its essential character. If Kuttikanom in the context means the Government's share of the value of the trees, the value of that share must necessarily vary with the market value of timber. (Para 17)

Further, if Government have no power to fix the value of the reserved trees from time to time, under section 7 (1) clause (f) of Regulation III of 1097 by framing rules so far as grants made before 1097 are concerned, the Government have power as owner of the trees to fix their value or the government's share in it. If the value fixed is high and does not represent the Government's share, it will be open to the aggrieved person to file a suit for appropriate relief.

(Para 17)

(D) Evidence Act (1872), S. 115—Plea of estoppel.

In order to found a plea of estoppel, there must be proof that a party suffered detriment by acting upon the representation of the other party. (Para 20)

Cases Referred: Chronological Paras

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| (1969) AIR 1969 Ker 81 (V 56) = | |
| 1968 Ker LJ 619 (FB), V. Punnen | |
| Thomas v. State of Kerala | 14 |
| (1968) AIR 1968 SC 718 (V 55) = | |
| (1968) 2 SCR 366, Union of India | |
| v. Anglo Afghan Agencies | 20 |
| (1964) AIR 1964 Kerala 272 (V 51) = | |
| 1964 Ker LJ 316, Dr. (Mrs.) | |
| Rajam Authi v. State of Kerala | 14 |
| (1962) A. S. No. 550 of 1962 (Ker) | 18 |
| (1959) AIR 1959 SC 490 (V 46) = | |
| (1959) Supp (1) SCR 787, C. K. | |
| Achutan v. State of Kerala | 14 |
| (1959) AIR 1959 Ker 239 (V 46) = | |
| 1959 Ker LT 125, Achuthan v. | |
| State of Kerala | 14 |
| (1957) O. P. No. 337 of 1957 (Ker) | 6, 18 |
| K. V. Surianarayana Iyer and V. O. | |
| Markose, for Petitioners; Govt. Pleader, | |
| for Respondents. | |

MATHEW, J.: Linwood and Shendurni Estates in Kulathupuzha Village, Pathanapuram Taluk, belonged at the relevant time to a partnership. The firm appointed the 2nd petitioner as its agent to manage the estates. The aforesaid estates formed part of a bigger estate known as Herford Estate, covering an area of 374.83 acres. The land comprised in that estate belonged to the erstwhile Government of Travancore and was assigned under the Rules for the sale of Waste Land on the Travancore Hills dated 24th April 1965 to three persons by Ext. P-1 dated 29-12-1877.

2. The question of the right of the grantees in respect of trees other than the royal trees enumerated in Ext. P-1, hereinafter called the reserved trees, in this and similar grants was raised by the planters, and the Government of Travancore in their proceedings R. O. C. No. 161/1921/Rev. dt. 28-9-1923 corresponding to 12-3-1099 M. E. held that on payment of timber value of the reserved trees at a flat rate of Rs. 35/- per acre of wooded area, a grantee would acquire full rights to the reserved trees.

3. On 2nd February, 1894, Rules 26A and 26B were added to the Rules framed under Regulation III of 1097 (Government Land Assignment Regulation). Rule 26A provided that in regard to reserved trees, the grantee shall pay their value at such rate per acre of the wooded area of the grant, as may from time to time be fixed by Government, and on such payment, the absolute right over all reserved trees in the grant will vest in the grantee. The Government issued a notification on the same date, which reads:

"Under Rule 26A of the Rules for the sale of Government Lands on the Travancore Hills for coffee or tea cultivation dated the 25th February 1923, as amended by Notification Dis. No. 173 of 1924, it is hereby notified, with the sanction of His Highness the Maharaja, that in the case of grants that may be made under the said Rules during a period of four years commencing from 1099 and ending with 1102 M. E. (inclusive) the rate at which the value of reserved trees on the grants is payable, is fixed at Bh. Rs. 35/- per acre of the wooded area of each grant.

2. The grantees of all estates assigned before 1099 may, on payment of the said rate of Bh. Rs. 35 per acre of the wooded area, and subject to the other conditions laid down in Rules 26A and 26B relating to assignment of lands on the Travancore Hills for coffee or tea cultivation, acquire full rights over all the reserved trees in their grants; provided that no grantee shall be allowed to acquire any such right in respect of any

portion only of his grant. Payment may, at the option of the grantee, be made in five equal annual instalments, but no rights will vest in him till full payment is made. Grantees unwilling to pay for, and purchase full rights over, reserved trees, will have the rights secured to them by their title deed and by the Rules applicable to their grants T. G. G. dt. 19-2-1924, Pt. IV, L. R., Dept., P. 306." (Govt. Notifn. Dis. No. 173-1-24/Rev. dated 2nd February 1924).

4. The 2nd petitioner stating that the effect of the notification was that on payment at the rate of Rs. 35/- per acre of wooded area, the title to the reserved trees would vest in the firm, sent a letter (Ext. P-2) on 8-12-1962 to the 3rd respondent praying for permission to cut and remove the reserved trees in 99.65 acres in Linwood estates, that is, 46.56 acres in Sy. No. 931/2/1 and 53.09 acres in Sy. No. 931/1 in Kulathupuzha Village on payment at the said rate. As there was no response to this letter, the 2nd petitioner made an application to the 3rd respondent (Ext. P-4) on 5-3-1963 repeating the prayer. The consent of the partners to the permission sought by the 2nd petitioner was given under Ext. P-5. Thereafter, the Forest Department made a proposal to the 2nd petitioner by its letter (Ext. P-6) dt. 25-3-1964 whether the 2nd petitioner was willing to give a written undertaking to abide by the decision of the Government as regards the rate payable for the tree growth. The 2nd petitioner agreed to pay at the rate to be fixed by Government (Ext. P-7). The 3rd respondent then sent Ext. P-8 letter to the 2nd petitioner on 29-8-1964 stating that at the rate of Rs. 100/- per acre of the wooded area a sum of Rupees 10164.85 was payable and directing the 2nd petitioner to pay the same and produce the stamp papers for executing an agreement (Ext. P-8). Accordingly, the 2nd petitioner remitted the amount in the State Bank of Travancore, Punalur, and sent the chalan receipt to the 3rd respondent on 10-9-1964. The 3rd respondent by his letter to the 2nd petitioner (Ext. P-10) dated 29-10-1964 stated that a complete enumeration of the tree growth had been made and that on valuation, the amount payable by the 2nd petitioner would come to Rs. 1,40,700 and directing the 2nd petitioner to produce sureties undertaking to abide by the final decision of Government "in regard to the revised rate to be fixed in case the revised rate exceeds Rupees 100 per acre." The 2nd petitioner then represented to the 3rd respondent (Ext. P-11) that the amount already remitted would be more than what is legally due and requesting him to pass the necessary orders permitting the 2nd

petitioner to remove the tree growth. The 2nd respondent, in reply, informed the 2nd petitioner that adequate security has to be provided to cover the difference between the value of the timber at seigniorage rate and the provisional value of Rs. 100 per acre (Ext. P-13). Thereafter by G. O. No. 185/Rev. dt. 12-3-1965 and by notification S. R. O. No. 117/65 published in the Kerala Gazette No. 12 dated 23rd March 1965, Government replaced Rules 26A and 26B by Rule 26 (1) to (7). The new rule provided that when the Government lands are granted, the grantee should, instead of paying a flat rate timber value for the wooded area in the grant, pay the value of all the trees in the grant at the average market rate for each species or at the current seigniorage rate, whichever is higher, as fixed by the Chief Conservator or such other officer as may be authorised by him. The Government by Ext. P-14 directed a calculation of the amount due from the 2nd petitioner on this basis and realisation of the balance amount from it. The 2nd petitioner by Ext. P-16 letter denied its liability to pay any amount in excess of Rs. 35 per acre of wooded area and prayed for refund of the excess amount paid. The Government by Ext. P-17 dated 15-5-1965 directed that if the 2nd petitioner will not pay the amount as directed, action will be taken in the light of the notification G. O. (P) 185/Rev. dated 12-3-1965, viz., the Chief Conservator of Forests or any officer authorised by him in this behalf will enter the estates and cut and remove the trees.

5. The petitioners pray for issue of a writ of certiorari or other appropriate writ, or order quashing the proceedings of Government evidenced by Ext. P-14 as also their proceedings No. 6812/F3/65/AD dt. 22-3-1965, for the issue of a writ of mandamus or other appropriate writ, or order, directing the respondents to grant the required permission and free pass to enable the 2nd petitioner or its nominee to cut and remove the tree growth in the wooded area in 99.65 acres in the Kulathupuzha Village, and for a direction to the respondents to refund a sum of Rupees 7016.60, the amount paid in excess of the rate of Rs. 35/- per acre of wooded area.

6. When the writ petition came up for hearing before a single Judge, as he felt considerable doubt about the correctness of the decision of the Division Bench in O. P. No. 337 of 1957, (Ker) he referred the case to a Division Bench. The Division Bench has placed the case before a Full Bench and that is how the matter comes before us.

7. It was submitted for the petitioners that the grantees acquired full right in the reserved trees comprised in Ext. P-1 granted by the terms of the grant, that

their only obligation if they cut and carry the timber of the reserved trees outside the limits of the grant, is to pay kuttikanom or customs duty or both, as the case may be, that 'kuttikanom' is a nominal fee, or tax, levied in the exercise of the sovereign power of the State, and cannot be so enhanced as to represent the market value of the timber.

8. Looking at the terms of Ext. P-1, we are not satisfied that the title to the reserved trees passed to the grantees. The grant under Ext. P-1 was for the purpose of coffee cultivation. The purpose of the grant is relevant to show whether under the grant the reserved trees standing on the property were intended to be conveyed to the grantees. We are not concerned in this case with the title to the reserved trees which grew up after the grant. The petitioners have no case that any of the reserved trees in the estates was planted or grew up after the grant, and that such a tree would stand on a different footing from the trees which stood on the property on the date of the grant. So, we are not called upon to consider any such case.

9. Ext. P-1 is a grant made under the Travancore Regulation II of 1040 and the Rules for the sale of Waste Land on the Travancore Hills dated 24th April 1865. It conferred a heritable and transferable interest in the grantees of the land comprised in it. Clause 5 in Ext. P-1, which is identical with clause 5 in Form A of the Rules for the sale of Waste Land on the Travancore Hills, is the relevant provision for deciding this question. It provides:

"Grantees can appropriate to their own use within the limits of the grant all timber except the following and such as may hereinafter be reserved, namely, Teak, Gole Teak, Blackwood, Ebony, Karomthaly, Sandalwood; should they carry any timber without the limits of the grant, it will be subject to the payment of kuttikanom or customs duty or both, as the case may be, in the same way as timber ordinarily felled".

10. We think that if title to the reserved trees passed to the grantees, a provision of this nature would have been quite unnecessary. There was no purpose in stating that the grantees will be free to appropriate the reserved trees for consumption within the limits of the grant, if title to the trees passed to the grantees; the provision is a clear indication that the grantees were allowed to cut and appropriate the reserved trees for consumption within the limits of the grant as a matter of concession. That the title to the reserved trees did not pass to the grantees in this or similar grants is also made clear in R. O. C. No. 161/1921/Rev.

dated 28-9-1923. That order shows that Rs. 35/- per acre of the wooded area was fixed by Government as the value of the reserved trees and that if a grantee were to pay at that rate, he would acquire the full rights in the trees. The understanding of the parties and Government that it was as value of the reserved trees that Rs. 35/- was fixed is clearly reflected in R. O. C. No. 161/1921/Rev. dated 28-9-1923. That reads:

"His Highness' Government have given their careful consideration to the whole question and they feel that it is desirable, both in the interests of the planters and of the Government, to set at rest the vexed question of timber rights on grants made for the cultivation of coffee or tea by conferring on the grantees absolute right over all the reserved trees within the limits of their grants, (except the five kinds of trees designated 'Royal trees' and described hereunder) after recovering the value of such trees at a flat or average rate per acre. The Royal trees are:— Teak, Ebony, Blackwood, Karunthaly and Sandalwood. Government fixes this rate at Bh. Rs. 35 per acre and the value of reserved trees will be recovered at this rate, not on the entire area of each grant, but only on that portion of it which is ascertained on inspection to be 'wooded'. The idea of Government was to make this flat rate valuation applicable only to all grants made under the Old Waste Land Rules of 1865 and under the subsequently amended Rules up to July 1916, because under the amendment to Rule 26 of the Rules dated the 5th July 1916, the grantees were free to use on their grants timber of the reserved species for any purpose other than for buildings, free of payment. This position was intimated to the planters but as they nevertheless desire to secure full rights over reserved trees even on grants made subsequent to July 1916 by paying for them at the flat rate, Government have no objection to extend the flat rate of Bh. Rs. 35/- per acre to those grants as well, and they direct accordingly. This will make the flat rate universally applicable to all past grants made under all rules for the cultivation of coffee or tea, without any exception. The value of reserved trees on each individual grants as fixed at the above rate will be payable in five equal annual instalments commencing from the current Malayalam year 1099. It is however open to any individual grantee either to pay up the whole amount due in a lump or in a smaller number of instalments than five as he chooses. The purchase of the tree-growth under the above arrangement should be made in respect of entire tree-growth on each grant or title deed area and no grantee will be permitted to purchase at

a time such rights on a portion of any title-deed area.

2. If any individual grantee demurs to purchase rights over the reserved trees on his grant under the above arrangement, he will be left alone with his limited rights over such trees and such grants will be governed by the conditions in the existing title-deeds to him.

xx xx xx"

11. That the 2nd petitioner was under no misapprehension as to the right of the grantees under Ext. P-1 in regard to the reserved trees is clear from Ext. P-2 letter sent by it to the 3rd respondent. The letter states:

"As per the Notification No. Dis. 173 of 1094/Rev. dt. 2-2-1924, the grantees of all estates assigned before 1099 on payment of Rs. 35/- per acre of wooded area acquire right over tree growth. We therefore request permission for the removal of the growth from the wooded area in Sy. No. 924/1 on payment of Rs. 35/- per acre. We are willing to pay Thadivila for the entire area of 108.90 acres granted under Title Deed No. 245 (in Sy. No. 924/1 of Kulathupuzha Village) and after final assessment of the wooded area we shall apply for refund of Thadivila paid for balance area."

12. Reference was made by counsel for the petitioners to the Travancore Patom Proclamation of 1040, which conferred full rights in the land on tenants of pandarapattom land and the subsequent proclamations and notifications by which they acquired the full title to the trees in the land. They have no application to the land or trees comprised in Ext. P-1 grant.

13. The petitioners contend alternatively that if Ext. P-1 did not convey the title to the reserved trees to the grantees, the firm acquired full rights in the reserved trees by the 2nd petitioner depositing the value of the trees at Rupees 35/- per acre of the wooded area in 1964 in pursuance of the Notification of Government dated 2-2-1924 incorporating the provisions of R. O. C. No. 161/1921/Rev. dated 28-9-1923. The Waste Lands Regulation II of 1040 was repealed by Government Land Assignment Regulation (Regulation III of 1097). Section 7 of Regulation III of 1097 provided for rule-making power of Government. Section 7 (1) clause (f) read:

"Our Government may make rules:

xx xx xx

(f) prescribing the rates at which the land may be assigned and the rates at which tree-growth may be valued." Government purporting to act under the clause passed Rules 26A and 26B. The notification dated 2-2-1924 was made under Rule 26A. The contention that the

firm acquired title to the reserved trees by depositing at the rate of Rs. 35/- per acre of the wooded area is based upon second paragraph of the notification dated 2-2-1924. The contention was that as no time limit was specified so far as grants made before 1099 M. E. were concerned, it was open to the firm to deposit the amount calculated in terms of the notification and acquire full rights over the reserved trees. Ext. P-4 would make it clear that the 2nd petitioner deposited the amount with a view to take advantage of the provisions in the notification, but we are not satisfied that the deposit has been made within the time required. If we look at the proceedings of Government in R. O. C. No. 161/1921/Rev. dated 28-9-1923, which preceded the notification, it will be clear that the Government did not make any distinction between grants made before and after 1099, as regards the period within which the deposit should be made. In both the cases, they said that the deposit should be made in five equal annual instalments commencing from the current Malayalam year 1099. So far as grants made before 1099 were concerned, the notification did not specify the time within which the five equal annual instalments should be paid. That this was an inadvertent omission in the notification would perhaps be clear from the terms of the subsequent Government Order dated 19-11-1928, fixing the rate at Rs. 50/-. But assuming that the terms of the notification dated 2-2-1924 are alone relevant, we think that the reasonable reading of the second paragraph of the notification is that the deposit must be made in five equal annual instalments commencing from the date of the notification or within a reasonable time of it. We do not think that the deposit made by the 2nd petitioner in the year 1964 would satisfy the requirement of paragraph 2 of the notification. A grantee before 1099 cannot choose his own time for paying the instalments, merely because the paragraph did not specify the point of time from which the instalment payment should commence.

14. We have great doubts whether Rule 26A and Rule 26B or Rule 26 (1) to (7) which replaced them, could have been passed by virtue of the rule-making power under section 7 of Regulation III of 1097 as that Regulation dealt with only future assignment of Government lands. Although the Waste Lands Regulation (Regulation II of 1040) has been repealed by Government Land Assignment Regulation (Regulation III of 1097), and although that Regulation was concerned with assignment of Government lands, as it dealt with only future assignment, we are not sure that a rule regarding the incidents of grants made before the date of that

Regulation could have been made under it. Even assuming that Rules 26A and 26B have been validly framed under Section 7 of Regulation III of 1097, and would apply to grants made before 1099, as already indicated, we do not think that the petitioners have satisfied the requirements of paragraph 2 of the notification, as they have not deposited the amount within the time. The result cannot be otherwise even if we assume that Rule 26A and the notification dated 2-2-1924 have no statutory backing. The notification would then amount to an offer by Government that if any grantee before 1099 were to make the deposit within the time, he would acquire the full rights in respect of the reserved trees comprised in the grant. The question whether there has been an acceptance of the offer by the firm or its agent in terms of the offer would pertain to the formation of a contract and could only be considered in a suit instituted for that purpose. A court exercising jurisdiction under Art. 226 of the Constitution is not the proper forum for deciding the matter. The 2nd petitioner had agreed on 1-4-1964 under Ext. P-7 to pay at a rate per acre of the wooded area as may be fixed by Government. He cannot be allowed to urge in this proceeding that the agreement is not binding on him. Exts. P-10 and P-13 put it beyond doubt that the rate fixed, namely, Rs. 100/- per acre was provisional. So, the further question whether after the deposit the Government were right in demanding further payments by the 2nd petitioner for the firm to acquire full rights in the reserved trees is one which relates to the terms and conditions of a contract, if one was formed, and the breach thereof and the remedy for that also must be sought in a suit. (See in this connection, the decisions reported in *Achuthan v. State of Kerala*, 1959 Ker LT 125 = (AIR 1959 Ker 239), *C. K. Achutan v. State of Kerala*, AIR 1959 SC 490, *Dr. (Mrs) Rajam Authi v. State of Kerala*, AIR 1964 Kerala 272 and *V. Punnen Thomas v. State of Kerala*, 1968 Ker LJ 619 = (AIR 1969 Ker 81) (FB).

15. We do not think that there is any substance in the contention that the firm was bound to pay only kuttikanom or customs duty or both as the case may be when reserved trees are felled and taken out of the limits of the grant, that 'Kuttikanom' is only a tax or fee, and the fee or tax cannot be so enhanced as to represent the market value of the trees themselves.

16. In the Malayalam and English Dictionary by Rev. H. Gundert D. Ph. page 278, 'kuttikanom' is defined as meaning "the price of timber; fee claimable by the owner for every tree cut down by the renter". In "The Manual

of Malabar Law" by Kadaloor Ramchandra Iyer, Chapter VII, page 44, it is stated:

"Kuttikkanom is a mortgage of forests by which the landlord assigns on mortgage a tract of forest land, receiving a stipulated fee for every tree felled by the mortgagee, the entire number of the trees to be cut down and the period within which they are to be felled being expressly fixed in the karar entered into between the parties. . . ."

In the Glossary attached to the Land Revenue Manual (1916) Vol. IV, at p. 883, the word 'Kuttikkanom' is said to mean "a fee paid to the Sirkar for felling trees other than royalties and tax-paying trees". In the Glossary of Administrative terms, English-Malayalam, by the Official Language Committee, at page 302, 'seigniorage' is defined as meaning—(Malayalam Script omitted—Ed.)

17. We do not think that "kuttikkanom" is either a fee or tax. A tax or fee is levied in the exercise of sovereign power. We think that in the context "kuttikkanom" means the Government's share of the value of the reserved trees. We have already said that Ext. P-1 grant did not convey the title to the reserved trees. All it did was, to grant a concession to the grantees to appropriate the trees other than the royal trees enumerated in it, for consumption within the limits of the grant. The fact that Kuttikkanom was a nominal payment in ancient days when the value of timber was little, should not make us forget its essential character. If Kuttikkanom in the context means the Government's share of the value of the trees, the value of that share must necessarily vary with the market value of timber. If the petitioners think that the demand under Ext. P-14 does not represent the Government's share of the value of the reserved trees, or is in any way excessive, it will be open to them to file a suit to have that question considered and decided. We do not think it meet in this proceeding to decide that question. We are of the view that if Government have no power to fix the value of the reserved trees from time to time, under section 7 (1) clause (f) of Regulation III of 1097 by framing rules so far as grants made before 1097 are concerned, the Government have power as owner of the trees to fix their value or the government's share in it and as already indicated if the petitioners think that the value fixed is high and does not represent the Government's share, it will be open to them to file a suit for appropriate relief.

18. The petitioners' counsel referred to the decision of the Division Bench in O. P. No. 337 of 1957 (Ker) and said that the decision should govern this case. The

ground on which that case was decided is that the notification of Government dated 2-2-1924 did not specify the time within which the deposit should be made so far as grants made before 1099 are concerned, and so it was open to the petitioner there, to make the deposit at any time before the notification was repealed and claim ownership of the trees in question there. The proceeding of the Government in R. O. C. No. 161/1921/Rev. dated 28-9-1923, which preceded the notification, was not brought to the attention of their Lordships when the case was argued; and when it was brought to their notice during the arguments on the review petition filed by the State, their Lordships said that there was nothing to show that the notification should be read along with the Government Order, and therefore, there was no time limit for depositing the amount. With respect, we are unable to reach that conclusion and we have indicated our reasons for it. If the notification did not form part of the Government Order, then, as we said, the reasonable construction of the notification would be that the amount must be deposited in five equal annual instalments commencing from the date of the notification or at any rate, within reasonable time of that date. The decision of the Division Bench in A. S. No. 550 of 1962 (Ker) only followed the decision in O. P. No. 337 of 1957 (Ker) without any fresh reasoning.

19. We do not think that any question of retrospective operation of R. 26 (1) to (7) arises in this case as Government was only regulating the value of the reserved trees, the title to which remained with them on the date when the rule was passed.

20. It was argued for the petitioners that since the 2nd petitioner deposited the amount on faith of the notification dated 2-2-1924, the Government were estopped from contending that the petitioners did not acquire the title to the reserved trees and so the Government were precluded from demanding from the 2nd petitioner any further amount by changing the rules. In support of the contention, reliance was placed on the ruling of the Supreme Court in Union of India v. Anglo Afghan Agencies AIR 1968 SC 718. We do not think that the firm or the 2nd petitioner acted upon the representation contained in the notification of Government dated 2-2-1924 or that any detriment was suffered by them by acting upon the representation. In Ext. P-7 dated 1-4-1964, the 2nd petitioner had agreed that if and when the Government happen lawfully to enhance the rate, it would be liable and would pay at such enhanced rate. So, when it deposited the amount on 9-9-1964, it was fully aware of the liability to pay the en-

hanced rate. In order to found a plea of estoppel, there must be proof that the firm or the 2nd petitioner suffered detriment by acting upon the representation. There is no such plea or proof for it.

21. Counsel for the petitioners submitted that the direction in Ext. P-17 that action in the light of notification G. O. (P) 185/Rev. dated 12-3-1965 will be taken, namely, that the Chief Conservator of Forests or any officer authorised by him in this behalf will be at liberty to enter the estates and cut and remove the reserved trees is unwarranted. If the direction is unwarranted, this is a matter to be agitated in a suit, because it is only as proprietor of the trees that the Government are asserting the right. Besides, there is no specific prayer in the writ petition to quash the provision in G. O. (P) 185/Rev. dated 12th March 1965, which sanctions this procedure.

We dismiss the petition but in the circumstances without any order as to costs.
Petition dismissed.

AIR 1970 KERALA 27 (V 57 C 6) FULL BENCH

K. K. MATHEW, T. S. KRISHNA-MOORTHY IYER AND V. BALAKRISHNA ERADI, JJ.

K. Prabhakaran Nair, Petitioner v. State of Kerala and others, Respondents.

O. P. No. 549 of 1964, D/- 31-3-1969.

(A) Constitution of India, Art. 226 — Orders of High Court on administrative side — Writ jurisdiction can be invoked to question such orders. AIR 1957 Trav-Co. 176 Overruled. AIR 1952 Pat. 309 (FB) Diss.

It is well settled that the High Court acting in its judicial capacity cannot be said to be an authority subject to the jurisdiction of the High Court itself under Article 226 of the Constitution for the issue of a writ of certiorari. But this principle has application only to orders passed by Courts in exercise of judicial functions. There is nothing in the wording of Article 226 of the Constitution which warrants the imposition of a limitation that the jurisdiction of the High Court under the said Article cannot be invoked for the purpose of calling in question orders passed by the Chief Justice or by High Court itself on the administrative side. AIR 1956 SC 285 & AIR 1965 SC 961 Rel. on. AIR 1945 PC 83 Ref. AIR 1957 Trav-Co 176. Overruled. AIR 1952 Pat 309 (FB), Diss. (Paras 5, 6)

The result of adopting a contrary view would lead to the anomalous position that while all other Civil servants who may

feel aggrieved by orders passed against them by other heads of Departments of Government, can in appropriate cases challenge such orders before the High Court under Article 226, the benefit of such opportunity is denied to the personnel belonging to the staff of the High Court and the subordinate Courts, and they will be left without the benefit of the efficacious and comparatively cheap remedy provided for by Article 226 even if the ground of challenge against the order be a violation of Article 311 of the Constitution or of the statutory rules framed under Article 309. (Para 7)

(B) Civil Services — Travancore Service Regulations — Whether provisions of the Regulation are only in the nature of executive directions (Quaere).

(Para 8)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 961 (V 52) =

1965-2 SCR 53, Jyoti Prokash

Mitter v. H. K. Bose C. J., Calcutta

7

(1957) AIR 1957 Trav-Co 176 (V 44) = 1955 Ker LT 813, Saina Bhai v. State

6

(1956) AIR 1956 SC 285 (V 43) = 1955-2 SCR 1331, Pradyat Kumar Bose v. Chief Justice of Calcutta High Court

6, 7

(1952) AIR 1952 Pat 309 (V 39) = ILR 30 Pat 405 (FB), In re, Babul Chandra

6

(1945) AIR 1945 PC 83 (V 32) = 1945-2 Mad LJ 314, Goonesinha v. De Kretser

5

(1883) 11 QBD 479 = 52 LJMC 121, Reg v. Justices of the Central Criminal Court

5

T. N. Subramania Iyer and K. S. Pari-poornan, for Petitioner; Govt. Pleader, for Respondents (Nos. 1 and 2); V. Sankara Menon and K. K. Kurup, for Respondents (Nos. 7 and 8).

KRISHNAMOORTHY IYER, J.: The petitioner in the original petition apart from seeking to quash Ext. P3 passed by the second respondent rejecting the petitioner's representation Ext. P2 which questioned the promotion of the persons referred to therein as Sheristadar, District Court in the Travancore-Cochin area, has also prayed for being promoted as Sheristadar, District Court in the Travancore-Cochin area earlier than respondents 3 to 8 in view of his alleged preferential claim based upon law qualification. The petitioner entered service in the Judicial Department of the erstwhile Travancore State on 25-12-1118. He passed the Travancore Account Test in 1119 M. E., graduated in 1959 and took the B. L. Degree in April 1962. By seniority he was appointed Sheristadar of the Sub-Court in the Travancore-Cochin area in March 1963. The petitioner's case is that ac-

cording to the rule in force in the Travancore State and subsequently in the Travancore-Cochin State and also followed in the State of Kerala with reference to the Travancore-Cochin personnel the minimum qualification prescribed for the post of the Sheristadar District Court in the Travancore Cochin area is Account Test and B. L. degree. According to him, even after the formation of the Kerala State only persons who have passed the account test and taken the B. L. Degree were promoted as Sheristadar of District Court in the Travancore-Cochin area and that this was the practice till 20-12-1962.

2. When there was no law graduation the second respondent promoted temporarily four persons who did not possess law qualifications but who were seniors to the petitioner and their appointments were regularised on 20-12-1962. The petitioner therefore filed Ext. P2 on 31-5-1963 to review the order of 20-12-1962 and promote him as Sheristadar in the District Court in the Travancore-Cochin area. Ext. P2 was rejected by Ext. P3 on the sole ground that "the rule which prescribed the law qualification as the minimum qualification for appointment to the post of Sheristadar, District Court, in the Travancore-Cochin area, is no longer in force and hence the petitioner cannot challenge the appointment made by the High Court. No counter-affidavit has been filed on behalf of the first respondent. But on behalf of the second respondent the Registrar of the High Court has filed a counter.

3. No doubt the petitioner has founded his petition under Article 226 of the Constitution on the ground that the provision fixing the qualification for the post of the Sheristadar, District Court, in the erstwhile Travancore State is in the Travancore Civil Court's Guide which came into force on 1-1-1120 (16-8-1944). The relevant rules are Rules 314 and 320 (iv) in Chapter I, Part II of the Guide. Even in the counter-affidavit filed by the second respondent the ground justifying the rejection of Ext. P2 is based on R. 3 of the Travancore-Cochin Civil Rules of Practice, 1956. It is admitted that during the period from 1955 to 20-12-1962 the High Court has been promoting only law graduates as District Court Sheristadars in the Travancore-Cochin area. The reason given by the second respondent is that Rule 3 of the Travancore-Cochin Civil Rules of Practice, 1956 was overlooked.

4. In the course of the discussion at the Bar a doubt arose whether the prescription of the qualification for the post of the Sheristadar, District Court, in the Travancore State was by the Travancore High Court or by the Travancore Gov-

ernment and only embodied in the Civil Courts' Guide, 1120, for reference. The particular notifications prescribing the qualifications for Sheristadar's post have not been produced. Rule 40 in Part II of the Travancore Service Regulations corrected up to 1959 reads:

"No person who is not a subject of His Highness the Maharaja and who has not the requisite academic qualification, as per the Public Service Notification (vide Appendix No. 1A) may be appointed to the Public Service in the State without the special sanction of Government, nor may any person be appointed to the Public Service without a certificate in the following form (with suitable modifications when necessary) from a Medical Officer in the Government Service, who must be a Licentiate or a Graduate in Medicine, or from the Director of Ayurveda."

Appendix No. 1A of the Travancore Service Regulations prescribes the qualifications for the posts in the several departments in the State including the Judicial Department. It includes the qualifications for the post of the Sheristadar, District Court, or Head Clerk, Munsiff's Court. The Government Orders forming the basis for the entry are given in the third column in Appendix No. 1A against the entry Sheristadar, District Court, or Head Clerk, Munsiff's Court, shown in the second column. They are G. O. No. J. 10024, dated the 9th December 1913 and G. O. R. Dis. No. 2872/37/Judl. dated 11-10-1937. The learned counsel for the petitioner therefore submitted that the prescription of the qualification for the post of the Sheristadar, District Court, is not by the High Court in its rule making power under the Civil Procedure Code of Travancore, but by the Government and what is embodied in the Travancore Civil Courts' Guide is only based on the Government Orders. In this connection the learned counsel for the petitioner referred to an order of the Government of Kerala dated 24-7-1958 issued 'by order of the Governor'. This Order came to be passed in the following circumstances. Three persons who were working in the Judicial Department of the erstwhile Cochin State and who had no law qualification and acted as Sheristadars in the Cochin State were promoted as Sheristadars in the District Courts in the Travancore-Cochin State on the basis of the exemption from law qualification granted to them by the Government. Persons on the Travancore wing having no law qualification made representations to the Government for exempting them also on the analogy of the three persons of the Cochin branch. That representation was refused by the Government Order cited above stating thus:

"The Registrar, High Court, has reported that the persons who are granted exemption are Sarvashree M. Kochunny Menon, A. R. Narayana Iyer and K. L. Chummar. As per the rule in force in the erstwhile Cochin State, Law qualification was not required for promotion as Sheristadar of District Courts. The petitioners belonged to the erstwhile Travancore State Service and according to the rules in force, in Travancore, law Graduates alone were appointed as District Court Sheristadars. To adopt a uniform rule the High Court decided that only law graduates should be posted as Sheristadars of the District Courts. But in doing so, claim of the above 3 persons (Sri Kochunny Menon and two others) came in for special consideration and the High Court granted them exemption from Law qualification to hold the post of District Court Sheristadar by reason of the fact that they had also acted as Sheristadars.

Government have examined the claims of the petitioners with reference to the relevant rules in the matter and are convinced that the cases of exemption given to Sri. Kochunny Menon, Narayana Iyer and Chummar who belonged to the Cochin area and who had already acted as Sheristadars even before the adoption of the unified rules cannot be treated as analogous to the case of the petitioners." The above Government Order is also stressed by the learned counsel for the petitioner as an item of evidence to prove the existence of a rule in force on the relevant date. The questions whether the prescription of qualification for the post of the Sheristadar, District Court in the erstwhile Travancore State was by the Government or by the Travancore High Court and if it was framed by the latter only in exercise of the rule-making power under the Travancore Civil Procedure Code the adoption of the same by the Travancore State in the Travancore Service Regulations and the acceptance of the same as amounting to a rule in force even after the formation of the Travancore-Cochin State and the Kerala State are matters which are relevant to a proper consideration of Ext. P2. Even if Rule 3 of the Travancore Cochin Civil Rules of Practice, 1956 repeals the rule in the Travancore Civil Courts Guide prescribing the minimum qualification for the post of the Sheristadar, the said rule cannot in any way affect the Travancore Service Regulations which have been recognised in Rule 2 (1) of the Kerala State and Subordinate Services Rules, 1958.

It does not appear from the materials placed before us that the 2nd defendant had this aspect in view when passing Ext P3 order. Though in the counter-affida-

vit filed by the second respondent it is asserted that the G. O. of 24-7-1958 already referred to proceeded on a wrong impression, there is no counter-affidavit filed by the State to that effect. It is not possible to discern either from Ext. P3 or from the counter-affidavit filed by the second respondent that any ground other than the one stated in Ext. P3 was responsible for the rejection of Ext. P2. We are therefore satisfied that there was no proper consideration of Ext. P2 by the second respondent in the light of the very relevant materials to be taken into account. Subsequent to Ext. P2, the 2nd respondent appointed respondents 3 to 8 having no law qualification as Sheristadars, District Court in the Travancore-Cochin area overlooking the alleged claim of the petitioner. Ext. P-2 has therefore to be considered afresh in the light of the claims of respondents 3 to 8 also.

5. The learned counsel for the respondent pleaded that this writ petition is not maintainable as the prayer is for issuing a writ to the High Court itself. It is well settled that the High Court acting in its judicial capacity cannot be said to be an authority subject to the jurisdiction of the High Court itself under Article 226 of the Constitution for the issue of a writ of certiorari. In *Goonesinha v. De Kretser*, AIR 1945 PC 83 Lord Goddard observed:

"It is well settled, and counsel did not seek to argue to the contrary, that a Court having jurisdiction to issue a writ of certiorari will not and cannot issue it to bring up an order made by a Judge of that Court. Now will a Superior Court issue the writ directed to another Superior Court—(1883) 11 Q. B. D. 473—and if the Election Judge is to be regarded as a special or independent tribunal his Court would, in their Lordships' opinion, be a Superior Court. Considering that the Court is held before a Judge of the Supreme Court from whose decision there is no appeal, it could not be otherwise. But their Lordships are of opinion that the true view is that cognisance of these petitions is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court and consequently certiorari cannot be granted to bring up any order made in the exercise of that jurisdiction."

6. The above principle has application only to orders passed by courts in exercise of judicial functions. The order in question was passed by the High Court in exercise of its administrative authority in view of the control over the subordinate courts vested in it. In these circumstances we are not prepared to hold that the petition is not maintainable. We see nothing in the wording of Article 226 of the Constitution which war-

rants the imposition of a limitation that the jurisdiction of the High Court under the said Article cannot be invoked for the purpose of calling in question orders passed by the Chief Justice or by the High Court itself on the administrative side. The decision in *In re, Babul Chandra*, AIR 1952 Pat 309 (FB) and *Saina Bhai v. State*, 1955 Ker LT 813 = (AIR 1957 Trav Co 176) were relied on by the learned Government Pleader to support his contention that there is no such power in the High Court. But then the Supreme Court pointed out in *Pradyat Kumar Bose v. Chief Justice of Calcutta High Court*, AIR 1956 SC 285 at p. 294, thus:

"This would be enough, to dispose of the case against the appellant. The learned Judges of the High Court have also dealt at some length with the question as to the maintainability of an application for a writ in a case of this kind and of the availability of any remedy by way of a writ against the action of the Chief Justice, whether administrative or judicial.

Arguments in this behalf have also been strongly urged before us by the learned Advocate-General of West Bengal. In the view, however, that we have taken as to the contentions raised before us regarding the validity of the order of dismissal, we do not feel called upon to enter into the discussion relating to the availability of the writ. We express no opinion on the question so raised.

We consider it, however, desirable to say that our view that the exercise of power of dismissal of a civil servant is the exercise of administrative power may not necessarily preclude the availability of remedy under Art. 226 of the Constitution in an appropriate case. That is a question on which we express no opinion one way or the other in this case."

7. Even though the Supreme Court has not expressed any final opinion on the matter, the above passage seems to suggest that an order passed by a Chief Justice on the administrative side can in an appropriate case be the subject matter of a proceeding under Article 226 of the Constitution in the same High Court. The decision of the Supreme Court was in an appeal filed against the decision of the Calcutta High Court where a Special Bench of that Court took the view that no petition under Article 226 of the Constitution would lie in a High Court to quash the order of the Chief Justice of that Court passed on the administrative side. It is at any rate clear from the decision in AIR 1956 SC 285 that their Lordships of the Supreme Court were not prepared to accept the extreme view of the Calcutta High Court. The subsequent decision of the Supreme Court in

Jyoti Prokash Mitter v. H. K. Bose, C.J. Calcutta, AIR 1965 SC 961, also, by implication, tends to support this view.

The result of adopting a contrary view would lead to the anomalous position that while all other civil servants who may feel aggrieved by orders passed against them by other heads of Departments of Government, can in appropriate cases challenge such orders before the High Court under Article 226, the benefit of such opportunity is denied to the personnel belonging to the staff of the High Court and the subordinate courts, and they will be left without the benefit of the efficacious and comparatively cheap remedy provided for by Article 226 even if the ground of challenge against the order be a violation of Article 311 of the Constitution or of the statutory rules framed under Art. 309. We do not think that the framers of the Constitution while enacting Article 226 intended to restrict its scope so as to lead to such hardship and anomaly. We therefore overrule the preliminary objection and hold that the petition is maintainable.

8. We accordingly quash Ext. P3 and direct that the petitioner's representation evidenced by Ext. P2 should be considered and disposed of afresh in the light of the observations contained in this judgment. We make it clear that we are not expressing any opinion on the question whether the provisions of the Travancore Service Regulation are only in the nature of executive directions. In the circumstances of the case we make no order as to costs.

Order accordingly.

AIR 1970 KERALA 30 (V 57 C 7) FULL BENCH

P. T. RAMAN NAYAR,
V. BALAKRISHNA ERADI AND V. R.
KRISHNA IYER, JJ.

P. D. Palakattumala Devaswom, represented by the Secy. Travancore Devaswom Board and others, Appellants v. Ulahannan Pylee, Kanjirakkuzhiyil Alapuram and others, Respondents.

Unnumbered Appeals from LAR and Etc. Cases D/- 17-1-1969, from Sub Courts.

(A) Land Acquisition Act (1894), Ss. 54, 18, 30, 11, 26 (2) — Kerala Civil Courts Act (1 of 1957), Ss. 12, 13 — All appeals from decisions of Subordinate Judge in land acquisition proceeding lie to High Court irrespective of value of subject matter — Proceeding under Land Acquisition Statutes is not suit within S. 13 of latter Act — Whether reference under Section 18 of former Act amounts to award or only decree makes no difference —

HM/IM/D694/69/SSG/D

1965 K. L. T. 616, Partly overruled — (Kerala Land Acquisition Act (21 of 1962), Ss. 20, 32, 60)—(Travancore Land Acquisition Act (11 of 1089), Ss. 18, 27) — (Civil P. C. (1908), Ss. 2 (2), 26, 96).

Having regard to the provisions of sections 12 and 13 of the Kerala Civil Courts Act, 1957, irrespective of the value, irrespective of whether the decision is on a reference under section 18 or one under section 30 of the Land Acquisition Act (sections 18 and 27 respectively of the Travancore Act, and sections 20 and 32 of the Kerala Act) and irrespective of whether the dispute relates to the amount of the compensation, or to the title to receive it or to both, all appeals from decisions of Subordinate Judges lie to the High Court. It makes no difference whether an adjudication regarding title on a reference under section 18 of the Central Act (section 20 of the Kerala Act and Sec. 18 of the Travancore Act) amounts to an award or is only a decree.

(Paras 2, 6)

Under the Central and Travancore Acts appeals from awards lie only to the High Court whatever be the value of the subject-matter. The question regarding the forum arises only in respect of decrees and awards under the Kerala Act and decrees that are not awards under the Central and Travancore Acts. This question has to be answered with reference to the provisions of sections 12 and 13 of the Kerala Civil Courts Act.

(Para 7)

A proceeding in "the Court" under the land acquisition statutes is not instituted by the presentation of a plaint or in such other manner as may be prescribed by the rules in the First Schedule to the Code, and though the proceeding is a proceeding of a civil nature, it is not a suit in the sense in which that word is used in section 13 of the Kerala Civil Courts Act. Therefore, appeals from the decrees or orders of a Subordinate Judge's Court in such proceedings lie to the High Court under Section 12 of the Kerala Civil Courts Act irrespective of the value of the subject-matter; and, in no circumstances, can section 13 apply so as to make an appeal maintainable in the District Court.

(Para 8)

A proceeding in "the Court" under the land acquisition statutes is not a suit. The fiction has had to be enacted, and, it was to limit its operation to the award and the proceedings pursuant thereto, and exclude it from proceedings prior to the award that it was, in fact, enacted only in respect of the award — else it could have been said that the proceeding in "the Court" shall be deemed to be a suit.

(Para 9)

Hence, under the provisions of the Kerala Civil Courts Act, all appeals from the

decisions of a Subordinate Judge under the provisions of the Central Act, or the Kerala Act, or the Travancore Act, lie to the High Court irrespective of the value of the subject-matter. (Amendment in Kerala Acts suggested). 1965 Ker L.T. 616 Partly overruled. (Paras 11, 12)

(B) Civil P. C. (1908), Ss. 96, 11, O. 41 Rr. 1, 23 — In certain land acquisition appeals, after hearing parties High Court holding that appeals lay to District Court and ordering return of memorandum of appeal — Decision is binding on parties — It is immaterial that the appeals were re-entertained by High Court after being returned by the District Court upon presentation there in accordance with direction of the High Court—Land Acquisition Act (1894), S. 54. (Para 13)

Cases Referred: Chronological Paras

- (1968) 1968 Ker LT 64 = ILR
 (1968) 1 Ker 127, Tahsildar Qui-
 landy v. Viswanathan 13
 (1967) AIR 1967 Ker 205 (V 54)=
 1967 Ker LT 126 (FB), K. Raman
 v. Special Tahsildar for Land
 Acquisition, Kozhikode 4
 (1965) 1965 Ker LT 616 = ILR
 (1965) 2 Ker 159, Thomas v. Vis-
 wanathan Pillai 1, 2, 11, 12, 13
 (1958) AIR 1958 SC 875 (V 45) =
 1959 SCR 703, Venkatachalam v.
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 (1940) AIR 1940 Mad 474 (V 27)=
 ILR (1940) Mad 791 (FB), Chikkanna
 v. Perumal 4
 (1939) AIR 1939 PC 133 (V 26)=
 ILR (1939) All 460, Mt. Bhagwati
 v. Ram Kali 4, 6
 (1936) AIR 1936 Mad 514 (V 23)=
 ILR 59 Mad 554, Krishnamoorthy v.
 Spl. Deputy Collector of Land
 Acquisition, Kumbakonam 4
 (1934) AIR 1934 Mad 103 (2) (V 21)=
 ILR 57 Mad 271 (FB), Rajagopala
 v. Hindu Religious Endowment
 Board, Madras 4
 (1922) AIR 1922 PC 80 (V 9)=ILR
 45 Mad 320, Ramachandra Rao v.
 Ramachandra Rao 3, 4, 6
 (1916) AIR 1916 PC 21 (V 3)=ILR
 39 Mad 617, Secy. of State v.
 C. Rama Rao 4
 (1913) ILR 40 Cal 21=39 Ind App
 197 (PC), Rangoon Botatoung Co.,
 Ltd. v. Collector of Rangoon 3
 (1856) 9 Suth WR 402=Beng LR
 Supp Vol. 985, Hurro Chunder
 Roy Chawdhury v. Shoorodhones
 Debia 4

P. Karunakaran Nair; P. Sukumaran Nair; C. K. Sivasankara Panicker; D. Narayanan Potti; K. Ravindranathan Nair; K. C. John; K. Chandrasekharan; T. Chandrasekhara Menon and G. Viswanatha Iyer, for Appellants, Advocate-General was also heard.

RAMAN NAYAR, J.: These are appeals brought against decisions of "the Court" (in each case, a Subordinate Judge) in land acquisition proceedings, five of them under the provisions of the Kerala Land Acquisition Act, 1961 which we shall hereafter call the Kerala Act, and the remaining five under the provisions of the (Travancore) Land Acquisition Act, 1089 which we shall hereafter call the Travancore Act. (With the exception of one provision, namely, section 60 of the Kerala Act, the provisions of these two statutes are, so far as we are here concerned, the same as the provisions of the Central Act, namely, the Land Acquisition Act, 1894, and, in discussing matters covered by identical provisions of the three statutes, we shall refer to the older, better known, and more widely and more authoritatively construed provisions of the Central Act). In all the ten cases, the value of the subject-matter of the proceeding is (or is assumed to be) not over Rs. 10,000/-. The appeals have not been registered pending decision of the question whether, in the light of the Division Bench ruling in *Thomas v. Viswanathan Pillai*, 1965 Ker LT 616 they lie to this court and ought not to have been instituted in the concerned District Court. This question, referred by a single Judge to a Division Bench, and, in turn, by the Division Bench to a Full Bench, in the view that the decision just referred to might require reconsideration, is the question before us.

2. We have come to the conclusion that, having regard to the provisions of sections 12 and 13 of the Kerala Civil Courts Act, 1957 (which were not considered in 1965 Ker LT 616), irrespective of the value, irrespective of whether the decision is on a reference under S. 18 or one under section 30 of the Central Act (sections 18 and 27 respectively of the Travancore Act, and sections 20 and 32 of the Kerala Act) and irrespective of whether the dispute relates to the amount of the compensation, or to the title to receive it (in other words, the title to the land acquired — apportionment when there is more than one person entitled is also a question of title, the question being the extent of the title or interest of each of the persons entitled), or to both, all appeals from decisions of Subordinate Judges — we express no opinion as to appeals from decisions of a Land Acquisition Court established under section 58 of the Kerala Act; none has yet been established — lie to the High Court.

And this we think is as it should be. For, apart from that disputes regarding the amount of the compensation generally involve much larger stakes than the subject-matter of the particular proceeding, any attempt to divide the work be-

tween the High Court and the District Courts on the basis of the value of the subject-matter is fraught with difficulties of valuation, and, therefore, with uncertainty. And, so far as disputes as to title are concerned, there is no difference whatsoever between a dispute referred under section 18 and a dispute referred under section 30 of the Central Act. Yet, if the value of the subject-matter be the basis, it might well happen that, although the value be the same, an appeal from a decision regarding title on a reference under section 30 lies to the District Court while one on a reference under S. 18 lies to the High Court if the latter be regarded as an award. Or, if it be not so regarded, that, in the case of a composite reference under section 18, the appeal from the decision on the question of title lies to the District Court, while the appeal from the decision on the question of the amount of the compensation lies to the High Court. We have had the assistance of the learned Advocate General, and, of course, of counsel for the appellants — notice has not gone to the respondents — and gain assurance for our conclusion from the circumstance that they have all argued for the position that all appeals lie to the High Court, and are all agreed that that is as it ought to be.

3. Section 11 of the Central Act requires the Collector to

"make an award under his hand of—

- (i) the true area of the land;
- (ii) the compensation which in his opinion should be allowed for the land; and
- (iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him."

The third requirement necessarily involves a determination by him as to which among several rival claimants is entitled to the compensation. But, in case of dispute, section 30 (which though appearing in a different part of the Act is really in the nature of a proviso to S. 11, just as section 29 is supplemental to it) enables the Collector, if he is so minded, to reserve this question for the decision of the Court and to complete the award so far as he is concerned — in that event he would deposit the amount of the compensation in the Court as required by sub-section (2) of section 31. When that happens, the proceeding in the Court is, as pointed out by the Judicial Committee in *Ramachandra Rao v. Ramachandra Rao*, ILR 45 Mad 320 = (AIR 1922 PC 80), not different from an ordinary suit (an interpleader suit) regarding title to the property acquired — that the property has been converted into money does not, in any way, alter the position. And as

their Lordships were anxious to establish, it is only proper that the decision of the Court should be subject to the same appeals and to the same forums as in an ordinary title suit relating to property of the same value.

This led their Lordships to distinguish between an adjudication regarding title, which they held was a decree within the meaning of the Civil Procedure Code and therefore subject to the appeals provided by Sections 96, 100 and 109 of the Code, on the one hand, and, on the other, a determination of the amount of the compensation which being in the nature of an arbitral award was not a decree and was, therefore, as held by their Lordships in *Rangoon Botatoung Co. Ltd. v. Collector, Rangoon*, (1913) ILR 40 Cal 21 (PC), subject only to such appeals as were expressly provided by the statute (namely, the Central Act, section 54), the Civil Procedure Code making no provision in this behalf.

4. It must now be regarded as well settled that appeals lie under the provisions of the Civil Procedure Code from a decision by the court on a reference under section 30 of the Central Act, the decision being a decree within the meaning of the Code, the forum being determined, so far as first appeals are concerned, by the provisions of the relevant Civil Courts Act. There are numerous decisions of the several High Courts to this effect, but, for our purposes, it is sufficient to refer to the full bench decisions in *Chikana v. Perumal*, AIR 1940 Mad 474 (FB) and *K. Raman v. Special Tahsildar, for Land Acquisition, Kozhikode*, 1967 Ker LT 126 = (AIR 1967 Ker 205) (FB). This highly satisfactory result has been reached by an application of the principle laid down in ILR 45 Mad 320 = (AIR 1922 PC 80), but, it must be confessed, not without slurring over the requirement in the definition of a decree in section 2 (2) of the Code that the adjudication must be in a suit, and the requirement in section 26 that "every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed" so that a proceeding instituted by a mere reference can hardly be a suit within the meaning of the Code.

"As may be prescribed", of course means prescribed by the rules in the First Schedule of the Code — see clauses (16) and (18) of section 2 thereof — and this is forgotten by decisions which depend on these words to give the word, "suit" the wider ambit given to it by Sir Barnes Peacock in *Burro Chunder Roy Chowdhry v. Shoorodhones Debia*, (1856) 9 Suth WR 402, as including "any proceeding in a Court of Justice to enforce a demand", at a time when the Code con-

tained no provision like section 26. And by presenting a Nelson's eye to the circumstance that the decisions which Secretary of State v. C. Rama Rao, AIR 1916 PC 21 and ILR 45 Mad 320 = (AIR 1922 PC 80), said were decrees within the meaning of the Code were decisions in appeal rendered at a time when, by definition, a decision in appeal was a decree within the meaning of the Code whether in a suit or not. (In this connection reference may profitably be made to *Rajagopala v. Hindu Rel. End. Board, Madras* AIR 1934 Mad 103 (2) (FB) and *Krishnamoorthy v. Spl. Deputy Collector of Land Acquisition Kumbakonam*, AIR 1936 Mad 514). Also by assuming that in merely recapitulating what had been decided in ILR 45 Mad 320 = (AIR 1922 PC 80), *Mt. Bhagwati v. Ram Kali*, AIR 1939 PC 133, asserted that the change in the definition of, "decree" necessitating that the adjudication must be in a suit, did not alter the position.

There is the further difficulty that a Subordinate Judge appointed to perform the functions of the Court under S. 3 (d) of the Central Act or under section 3 (c-2) of the Travancore Act (as amended by the Kerala Civil Courts Act, 1957) does not decide land acquisition cases as a Subordinate Judge's Court or as a Subordinate Judge so as to attract the provisions of sections 12 and 13 of the Kerala Civil Courts Act, or, in Madras, S. 13 of the Madras Civil Courts Act. (Under the Kerala Act section 58 sub-section (4), it is the Subordinate Judge's Court that has been invested with jurisdiction so that unless a Land Acquisition Court is established under sub-section (1) of the section this particular difficulty might not arise).

5. But justice obviously requires that in such cases there should be appeals as in an ordinary suit on title; the legislative intent to vouchsafe such appeals is manifest from the opening words of section 54 of the Central Act and S. 38 of the Travancore Act, "Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees" and seems to us implicit in sections 28 and 60 of the Kerala Act; and, with great respect, we think the courts rightly brushed aside the difficulties created by lapses in draftsmanship.

6. An adjudication on title on a reference under section 18 of the Central Act stands on the very same footing as such an adjudication on a reference under section 30 or on a deposit under sub-section (2) of Section 31 unaccompanied by a reference. If such an adjudication is of its own force, and without resort to the fiction in sub-section (2) of Section 26, a decree within the meaning of the Civil Procedure Code and is not an award with-

in the meaning of Section 54 of the Central Act, then the forum of appeal would depend, just as in an ordinary suit on title, on the value of the subject-matter. But, if it is an award within the meaning of Section 54, an appeal would lie only to the High Court. The conventional view reached by an application of the principle laid down in ILR 45 Mad 320 = (AIR 1922 PC 80) seems to be that such an adjudication, whether or not it is accompanied by an adjudication regarding the amount of the compensation (the reference under Section 18 being a composite reference), is only a decree as defined by Section 2 (2) of the Civil Procedure Code and is not an award within the meaning of the Central Act.

As we have indicated, the result might well be the obviously unsatisfactory result that, in a given case, the appeal in respect of that part of the adjudication that relates to title lies to the District Court whereas the appeal with regard to the part that relates to the amount of the compensation lies to the High Court. For ourselves, we see little difficulty in reading sub-section (1) of section 26 of the Central Act as requiring the award to specify the amount awarded to each of the claimants under each of the clauses of sub-section (1) of section 23 having regard to the fact that the adjudication of the court on a composite reference under section 18 has, in addition to determining the amount to be awarded as compensation, to determine to whom the compensation is to be awarded. If that be so, the adjudication regarding title would also be an award to which section 54 would apply; and we might mention that, after observing that so far as appeals to the Privy Council were concerned, the distinction drawn between an award and a decree in ILR 45 Mad 320 = (AIR 1922 PC 80) had become academic in view of the amendment of section 54 of the Central Act which provides for such appeals in the case of awards, AIR 1939 PC 133 went on to recognise that sub-section (2) of section 26 inferentially provides for a determination by the award of a dispute as to the persons interested. However that might be, as we shall presently show, having regard to the provisions of sections 12 and 13 of the Kerala Civil Courts Act, it makes no difference for our purposes whether an adjudication regarding title on a reference under section 18 of the Central Act (section 20 of the Kerala Act and section 18 of the Travancore Act) amounts to an award or is only a decree.

7. Section 26, sub-section (2) of the Central Act (section 28 (2) of the Kerala Act) says that every award made thereunder shall be deemed to be a decree within the meaning of section 2, clause (2)

of the Civil Procedure Code. Had nothing more been said this would have sufficed to attract the provisions for appeals in sections 96, 100 and 109 of the Code to an award. But the forum for a first appeal is specified not by section 96 of the Code which only says that the appeal shall lie to the court authorised to hear appeals from the decisions of the court which passed the decree, but by the concerned Civil Courts Act. And, under those Acts, the value of the subject-matter would determine whether an appeal from a decision of a Subordinate Judge lies to the District Court or to the High Court. As a matter of policy, it was thought that all appeals from awards determining the amount of the compensation as distinguished from mere decrees adjudicating only the question of title, should lie to the High Court, and, therefore, section 54 of the Central Act provides that, subject to the provisions of the Civil Procedure Code with regard to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force, an appeal from an award shall only lie to the High Court.

The Kerala Act apparently did not appreciate the difference between adjudications that are awards and those which are mere decrees when it provided by section 60 (quite unnecessarily in view of sub-section (2) of section 28) that appeals shall lie from the award as if the award were a decree made by a civil court under the provisions of the Civil Procedure Code. And under the Travancore Act before its amendment by the Kerala Civil Courts Act appeals could lie only to the High Court since references were heard only by District Courts — section 38 thereof accordingly provides for an appeal to the High Court from an award leaving appeals from mere decrees to be governed by the Civil Procedure Code. Thus it is clear that under the Central and Travancore Acts, appeals from awards lie only to the High Court whatever be the value of the subject-matter. The question regarding the forum arises only in respect of decrees and awards under the Kerala Act and decrees that are not awards under the Central and Travancore Acts. This question has to be answered with reference to the provisions of Sections 12 and 13 of the Kerala Civil Courts Act.

8. Sections 12 and 13 of the Kerala Civil Courts Act run as follows:

"12. Appeals from decrees and orders of District Court or Subordinate Judge's Court:— Save as provided in S.13, regular and special appeals shall, when such appeals are allowed by law, lie from the decrees or orders of a District Court or

a Subordinate Judge's Court to the High Court.

"13. Appellate jurisdiction of District Court and Subordinate Judge's Court — Appeals from the decrees and orders of a Munsiff's Court and where the amount or value of the subject-matter of the suit does not exceed ten thousand rupees, from the original decrees and orders of a Subordinate Judge's Court shall, when such appeals are allowed by law, lie to the District Court:
xx xx xx"

This means that appeals from the decrees or orders of a Subordinate Judge's Court lie (when such appeals are allowed by law) to the High Court excepting that where the amount or value of the subject-matter of the suit does not exceed Rupees 10,000/- the appeal shall lie to the District Court. For section 13 to apply so as to make the forum of appeal the District Court instead of the High Court, the appeal must be from a decree or order in a suit, for, it is only when the amount or value of the subject-matter of the suit does not exceed Rs. 10,000/- that it comes into play. When the appeal is from a decree or order in a proceeding which is not a suit, section 12 alone applies, and, irrespective of the value of the subject-matter — in most such proceedings the subject-matter would have no money value and the Suits Valuation Act would not apply to give it one — the appeal would lie to the High Court.

Section 11 of the Kerala Civil Courts Act speaks of "original suits and proceedings of a civil nature" clearly recognizing that there are proceedings of a civil nature which are not suits within the meaning of that statute; that statute is, by its very nature, a supplement to the Civil Procedure Code, and, in particular, by sections 12 and 13, prescribes the forum for an appeal under section 96 of the Code; and it is obvious that it uses the word, "suit" to mean a suit within the meaning of the Code, namely, a proceeding "instituted by the presentation of a plaint or in such other manner as may be prescribed." A proceeding in "the Court" under the land acquisition statutes is not instituted by the presentation of a plaint or in such other manner as may be prescribed by the rules in the First Schedule to the Code, and it follows that, though the proceeding is a proceeding of a civil nature, it is not a suit in the sense in which that word is used in section 13 of the Kerala Civil Courts Act. Therefore, appeals from the decrees or orders of a Subordinate Judge's Court in such proceedings lie to the High Court under section 12 of the Kerala Civil Courts Act irrespective of the value of the subject-matter; and, in no circumstances, can section 13 apply so as to make

an appeal maintainable in the District Court.

9. We are not forgetting that sub-section (2) of section 28 of the Kerala Act, like sub-section (2) of section 26 of the Central Act, says that an award shall be deemed to be a decree within the meaning of the Civil Procedure Code—there is no such provision in the Travancore-Act — and that section 60 of the Kerala Act says that an appeal lies from an award as if the award were a decree passed under the Civil Procedure Code. But the fiction attaches only to the award; it says no more than that the award shall be deemed to be a decree; there is no fiction enacted in respect of the proceeding in which the award is made; and it does not follow that, because the award is to be deemed to be a decree, the proceeding in which the award is made is to be deemed to be a suit because under the definition in section 2 clause (2) of the Code a decree is made in a suit, any more than it follows that because under section 26 of the Code a suit is instituted by the presentation of a plaint, a reference by the Collector is a plaint and therefore exigible to court fee as such.

On the contrary, it is precisely because a proceeding in "the Court" under the land acquisition statutes is not a suit that the fiction has had to be enacted, and, it was to limit its operation to the award and the proceedings pursuant thereto, and exclude it from proceedings prior to the award that it was, in fact, enacted only in respect of the award — else it could have been said that the proceeding in "the Court" shall be deemed to be a suit.

10. True, a fiction must be given full rein within the limits set for its operation; our imagination must not boggle at the consequences — see Venkatachalam, v. Bombay Dyeing & Mfg. Co. Ltd., AIR 1958 SC 875, but, beyond those limits, it is to be rigidly excluded.

11. We hold that under the provisions of the Kerala Civil Courts Act, all appeals from the decisions of a Subordinate Judge under the provisions of the Central Act, or the Kerala Act, or the Travancore Act, lie to the High Court irrespective of the value of the subject-matter and that, to the extent that it held otherwise, 1965 Ker LT 616 was wrongly decided.

12. It is brought to our notice by the learned Advocate-General that, following 1965 Ker LT 616 which was a case of an appeal from a decree, and misapplying it to awards, appeals have, in fact, been instituted in District Courts and decided by them not merely from decrees but also, despite section 38 of the Travancore Act, from awards under that Act. The result of our decision might, perhaps,

be to render the decisions in those appeals void. This is a problem beyond our province but is, we think, capable of ready solution by the Legislature. A provision in the Kerala Act to the effect that a decision of the Court as to the amount of the compensation or the title to receive it (including the apportionment thereto) shall be deemed to be a decree, along with a provision, in place of the present section 60, to the effect that, notwithstanding anything to the contrary in any enactment for the time being in force, an appeal from a decree of the Court shall lie only to the High Court would make the position clear both for purposes of execution and for purposes of appeal whether "the Court" be a Land Acquisition Court or a civil court invested with the jurisdiction of a Land Acquisition Court.

And a retrospective provision in the Kerala Civil Courts (similar to that in section 54 of the Kerala Court-Fees and Suits Valuation Act 1959) to the effect that no decision in appeal shall be regarded as defective merely because the appeal ought to have been instituted in the High Court instead of in the District Court, or in the District Court instead of in the High Court, although that may be a ground for interference in appeal or revision where objection has been taken at the earliest possible opportunity and the error has resulted in a failure of justice, would provide for all appeals, not merely appeals in land acquisition proceedings, brought mistakenly though in good faith in the High Court instead of in the District Court, or, vice versa.

13. In three of these cases, namely, C. F. A. 1871/68, C. F. A. 3327/68 and C. F. A. 3332/68, appeals were, in the first instance, instituted in this Court and they were registered as A. S. No. 530 of 1968, A. S. No. 91 of 1963 and A. S. No. 92 of 1963 respectively. All of them arose from references under section 27 of the Travancore Act (section 30 of the Central Act), and, after hearing both sides, this court held that the appeals lay to the District Court and ordered the return of the memoranda of appeal—in fact that much was conceded by counsel having regard to the decision in 1965 Ker LT 616. On the appeals being presented in the District Court that court purporting to follow the decision in *Tabsildar, Quilandy v. Viswanathan*, 1968 Ker LT 64 (which was a case of a dispute regarding the amount of the compensation referred to the Court under section 20 of the Kerala Act) held that the appeals lay to the High Court and not to the District Court.

Accordingly, it ordered the return of the memoranda of appeal for presentation to the proper court and they have

once again been presented here. It is needless to point out that, so long as the decision of this court, a decision made after hearing both sides, stands, that decision is binding on the parties and that there can be no question of the appeals being re-entertained by this court. To say the least, the learned District Judge was guilty of grave impropriety in holding that he had no jurisdiction in the face of the decision of the High Court in the very case on hand — possibly he lost sight of the fact that the decision was in the very case before him and seems to have thought that it was a matter of choice between two conflicting precedents.

14. The District Judge's order returning these cases is being taken up in revision suo motu, and, pending orders in revision, the papers will be retained here.

15. In the remaining seven cases the appeals will be registered and numbered. Order accordingly.

AIR 1970 KERALA 36 (V 57 C 8)

M. U. ISAAC AND

P. NARAYANA PILLAI, JJ.

L. Jose Kannampilly, Applicant v. Controller of Estate Duty, Kerala, Ernakulam, Respondent.

Income-tax Refd. Case No. 36 of 1967, D/- 4-10-1968, reference made by Income Tax Appellate Tribunal, Madras Bench in R. A. No. 1050 of 1966-67.

(A) Estate Duty Act (1953), S. 10 — Deceased depositing certain sums in Bank in the name of minor son — Drawing interest accrued as guardian of donee and using it for his own purpose — Deposit amount passes on death of the deceased donor. (Para 4)

(B) Estate Duty Act (1953), S. 10 — "To the entire exclusion of the donor" — Deeds of gift of immoveable properties in favour of sons of donor — Donor taking power of attorney from major son and managing property pursuant thereto and as guardian of minor son and utilising income — Gifts, held, hit by S. 10 — (1957) 32 I. T. R. (Suppl.) 33 (P. C.) & (1959) 37 I. T. R. (Suppl.) 89 (P. C.) Relied on. (Paras 6 to 10)

Cases Referred: Chronological Paras
(1968) AIR 1968 Ker 203 (V 55) =
1967 Ker LT 996, Abdul Hameed v. Controller of Estate Duty 5
(1967) AIR 1967 SC 849 (V 54) =
1967-63 ITR 497, George Da Costa v. Controller of Estate Duty 5
(1964) AIR 1964 Cal 160 (V 51) =
(1964) 52 ITR (ED) 1, Rash Mohan Chatterjee v. Controller of Estate Duty 5

(1959) 1959-37 ITR (Supp) 89=1958
AC 435 (PC), Clifford John Chick
v. Commr. of Stamp Duties 8
(1957) 1957-32 ITR (Supp) 33=1956
AC 512 (PC), Commr. of Stamp
Duties of New South Wales v.
Permanent Trustee Co. of New
South Wales 6
(1912) 13 CLR 503, Lang v. Webb 8
(1898) 1898-2 QB 534 = 67 LJ QB
947, Attorney General v. Earl
Grey 5

C. K. Viswanatha Iyer and M. A. T.
Pai, for Applicant; C. T. Peter, for Res-
pondent.

ISAAC, J.: This is a reference made by
the Madras Bench of the Income-Tax
Appellate Tribunal under Section 64 (1)
of the Estate Duty Act, 1953, on the ap-
plication of the Assessee. The questions
referred are:

(1) Whether on the facts and in the
circumstances of the case, the sum of
Rs. 25,000/- deposited by the assessee in
the Bank in the name of his minor son
K. L. Baby on 2-1-1957 is includible in
the estate of the deceased under S. 10
of the Estate Duty Act?

(2) Whether on the facts and in the
circumstances of the case, the value of
the agricultural properties gifted by the
deceased to his sons under the gift deed
dated 14-12-1956 is includible in the
estate of the deceased under Section 10
of the Estate Duty Act?

2. Kannampilly Lonappan Lonakunju
died on 14-12-1962. On 2-1-1957 he
deposited a sum of Rs. 25,000/- in the
Catholic Syrian Bank, Ltd., in the name
of his minor son, K. L. Baby. The deceas-
ed was the guardian; and in that capa-
city, he drew the interest from the bank.
He did not maintain any accounts regard-
ing the amounts so withdrawn. On 14-
12-1956, he executed a deed of gift in res-
pect of some iminovable properties in
favour of his seven sons, of whom there
were three minors. He took powers-of-
attorney from the major sons, and he
was managing these properties till his
death as attorney of the major sons and
guardian of the minors. On 2-9-1962, he
executed his last will, which stated,
among other things, that the income of
the gifted properties was utilised by him
to the extent of Rs. 49,000, and that the
said sum can be recovered by the donee
from his Estate. The Appellate Tribunal
and the subordinate authorities held that
the aforesaid sum of Rs. 25,000/- and the
properties gifted by the deceased to his
sons would be deemed to be properties
passing on the death of the donor by
virtue of section 10 of the Act.

3. Section 10 reads:

"Gifts whenever made where donor not
entirely excluded: Property taken under

any gift, whenever made, shall be deem-
ed to pass on the donor's death to the
extent that bona fide possession and en-
joyment of it was not immediately assum-
ed by the donee and thenceforward
retained to the entire exclusion of the
donor or of any benefit to him by con-
tract or otherwise."

Dealing with the deposit of Rs. 25,000/-
in the name of the minor son of the
deceased, the Appellate Tribunal stated:

"The mere deposit of a sum of money
in the Bank in the name of another per-
son does not, by itself, constitute a valid
gift of that amount in favour of that per-
son. There must be some other evidence
to show that the donor intended to per-
manently part with his absolute rights
over the gifted properties in favour of
the donee and that the donee also ac-
cepted the gift. There is no such evi-
dence in this case. There was nothing to
prevent the deceased from withdrawing
this amount from the bank at any time
he liked. Admittedly, the deceased had
received the interest that had accrued on
the deposited amount. The deceased did
not maintain any account to show that
he had credited the interest income in
the name of his minor son. There was no
need for the deceased to have withdrawn
the interest from the Bank and he could
have allowed it to lie in the Bank itself
to the credit of the minor if it was his
intention that the interest income should
also go to benefit of the minor. The
deceased, therefore, not only retained pos-
session of this amount but also enjoyed
the benefit arising from the gifted pro-
perties in the shape of interest income.
Therefore, this amount of Rs. 25,000 also
has been rightly included in the estate of
the deceased and such inclusion is hereby
confirmed."

4. The learned counsel for the asses-
see contended that the Appellate Tribu-
nal went wrong in holding that the depo-
sit of the amount made by the deceased
in the name of his minor son did not
constitute a valid gift, that it was on the
basis of such a finding that the Tribunal
held this amount was rightly included in
the estate of the deceased, and that, in
so far as the said finding was untenable,
the inclusion of the said amount as part
of the deceased's estate was also wrong.
We think that there is considerable force
in the contention that the Tribunal's
finding that there was no valid gift can-
not be sustained. The amount was admit-
tedly deposited in the name of his minor
son. The deceased drew the interest ac-
crued thereon only in his capacity as
guardian. Possession of the deposit receipt
and dealing with the deposited amount as
guardian amount to acceptance of the
gift. This constitutes under law a valid
gift of the amount in favour of the son.

Still the question arises whether by virtue of section 10 of the Act, this amount would be deemed property passing on the death of the donor. The learned counsel for the assessee submitted that the donor was drawing the interest on the deposit only as guardian, that he was liable to account for all amounts of the minor which came into his hands, that, if the guardian used the amount for his own purposes, it would be misappropriation, and that it would not affect the character of the gift. The learned counsel may be right in the above submission; but the question is whether section 10 of the Act would be attracted, as the donor was having control of the donated property as guardian of the donee, and he was drawing the interest thereon and using it for his own purposes, without keeping it separate from his own funds. The learned counsel for the Revenue submitted that this was sufficient to attract Section 10.

5. The scope and ambit of the above section came up for consideration before the Supreme Court in *George Da Costa v. Controller of Estate Duty*, (1967) 63 ITR 497 at p. 501 = (AIR 1967 SC 849 at pp. 850-851). The Supreme Court said:

"A gift of immovable property under section 10 will, however, be dutiable unless the donee assumes immediately exclusive and bona fide possession and enjoyment of the subject-matter of the gift, and there is no beneficial interest reserved to the donor by contract or otherwise. The section must be grammatically construed as follows: "Property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and of which property bona fide possession and enjoyment shall not have been thenceforward retained by the donee to the entire exclusion of the donor from such possession and enjoyment, or of any benefit to him, by contract or otherwise. The crux of the section lies in two parts: (1) the donee must bona fide have assumed possession and enjoyment of the property, which is the subject-matter of the gift, to the exclusion of the donor, immediately upon the gift, and (2) the donee must have retained such possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to him, by contract or otherwise. As a matter of construction we are of opinion that both these conditions are cumulative. Unless each of these conditions is satisfied, the property would be liable to estate duty under section 10 of the Act. This view is borne out by the decision of the Court of Appeal in *Attorney-General v. Earl Grey* (1898) 2 Q. B. 534, 541, with regard to an analogous provision under

section 38 (2) of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889."

The above decision was referred to by this Court in *Abdul Hameed v. Controller of Estate Duty* 1967 Ker LT 996 at p. 999 = (AIR 1968 Ker 203 at p. 205) and *M. S. Menon, C. J.*, stated:

"One aspect of S. 10 did not arise for consideration in the decision of the Supreme Court mentioned above; the fact that the words "to the extent" in that section is a conscious departure from the English provision."

The learned Chief Justice then referred to the decision of the Calcutta High Court in *Rash Mohan Chatterjee v. Controller of Estate Duty*, (1964) 52 ITR (ED) 1 = (AIR 1964 Cal 160), wherein the above aspect was considered; he quoted the following passage from the Statement of Objects and Reasons, which would show the legislative intent of the above departure from the English Statute:

"This clause brings under charge property given in gift, but in which the donor retains some interests by contract or otherwise. Where the donor retains such interests in a part of the property only, estate duty is payable on that part only."

6. In support of the contention that the fact that the donor acted as guardian of the donee and drew the interest accrued thereon and made use of it, without keeping it separate, was sufficient to bring the case under section 10 of the Act, the learned counsel for the Revenue cited the decision of the Privy Council in *Commissioner of Stamp Duties of New South Wales v. Permanent Trustee Co., of New South Wales*, (1957) 32 ITR (Supp.) 33 (PC). In that case the testator created a trust over certain fund in favour of his minor daughter and transferred the same to the trustees. Several years after that, when the daughter attained majority, she opened an account in a bank as instructed by her father, to which the trustees transferred the income from the trust fund as directed by the daughter. The father was also given authority by the daughter, as desired by him, to withdraw from the account as much as he wanted for being used by him, subject to an obligation on his part to repay to her the amounts not applied for her benefit or at her request. Section 102 (2) (d) of the Stamp Duties Act, 1920-1940, of New South Wales is similar in terms to section 10 of the Estate Duty Act, 1953; and it reads as follows:

"102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided the estate of a deceased person shall be deemed to

include and consist of the following classes of property:— (2) (d) Any property comprised in any gift made by the deceased at any time whether before or after the passing of this Act of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died.”

7. The question which arose in the above case was whether by virtue of the above statutory provision, the estate of the deceased would be deemed to include the fund settled by the testator in trust for his daughter. Dealing with this question, Viscount Simonds, delivering the judgment of the Judicial Committee, stated:

“Section 102 (2) (d) of the Stamp Duties Act has been the subject of much judicial discussion, as have been the corresponding provisions of the United Kingdom Finance Acts, but in the present case the difference of opinion in the High Court is due not to any difficulty in ascertaining the law but to that of correctly appreciating the facts to which the law is to be applied, a difficulty which, as has on more than one occasion been pointed out in the High Court, is not diminished by the transparent defects of the procedure by way of case stated. But whatever limitations this procedure may impose upon an investigation of the facts, it appears to their Lordships that the inference is not only open but inevitable that from 1939 onward the testator was (to use the words of the Chief Justice) “master of the income as it was paid over by the trustee”. He was, too, in a position to ensure that it was so paid over. His dual authority from his daughter, which enabled him on the one hand to direct the trustee how her money should be disposed of and on the other to deal with it when it reached the bank, placed him in a position of unchallengeable control, unless and until it was revoked. And it was not revoked. In these circumstances, the conclusion is irresistible that the daughter, who at material times was the sole beneficiary under the settlement, did not retain bona fide possession and enjoyment of the trust property to the entire exclusion of her father or of any benefit to him. Here it does not seem that any nice question arises whether it was from the subject matter of the gift that the donor (the testator) was excluded or, alternatively, from any benefit, nor whether it is necessary that the benefit taken by the donor should impair the possession and enjoyment by the donee of the subject matter

of the gift. For here the design and the result of the arrangement were that the daughter's possession and enjoyment were reduced and impaired precisely by the measure of the testator's use and enjoyment of her income.”

8. The above decision was quoted with approval by the Privy Council in *Clifford John Chick v. Commissioner of Stamp Duties* (1959) 37 ITR (Supp) 89 (PC). Dealing with an argument, that section 102 (2) (d) of the New South Wales Statute had no application to a case, where the donor happened to enjoy a benefit out of the gifted properties under a transaction which was not related to the gift, the Privy Council stated:

“Their Lordships see no reason why a gloss should be put upon the plain words of the sub-section by excluding from its operation such transactions. As long ago as in 1912 in *Lang v. Webb* (1912) 13 C. L. R. 503 (a case where a testatrix gave certain blocks of land to her sons and on the same day took leases from them of the same land) Isaac J. said: “the lease, however, gave to the donor possession and enjoyment of the land itself, which is a simple negation of exclusion, and brings the case within the statutory liability. It was argued that as the rent was full value, the lessee's possession and occupation were not a benefit. The argument is unimportant because the lease, at whatsoever rent, prevents the entire exclusion of the donor.” This view of the sub-section has never been departed from and their Lordships respectfully adopt the words of Isaac J. in the present case. It is irrelevant that the donor gave (if he did give) full consideration for his right as a member of the partnership to possession and enjoyment of the land that he had given to his son.”

9. These authorities fully support the contention of the learned counsel for the Revenue; and accordingly we hold that the gift of Rs. 25,000/- made by the deceased in favour of his son would be deemed property passing on the death of the deceased under Section 10 of the Act.

10. The position regarding the gift of the Agricultural properties is similar, if not stronger for the Revenue. Admittedly, these properties were managed by the donor as attorney of the major sons and guardian of the minor sons; and their income was taken and utilised by the donor. Section 10 of the Act is clearly attracted.

11. In the result, we answer both the questions in the affirmative and against the assessee. The Controller of Estate Duty will get the costs from the assessee, the applicant in this reference. A copy,

of the judgment will be forwarded to the Appellate Tribunal as required by Section 64 (6) of the Act.

Reference answered against the assessee.

AIR 1970 KERALA 40 (V 57 C 9)

M. U. ISAAC AND
P. NARAYANA PILLAI, JJ.

Pakruthen Vava Rawther Abdul Hameed Rawther, Appellant v. Raman Pillai Balakrishna Pillai and others, Respondents.

A. S. No. 293 of 1966, D/- 25-9-1968, from judgment of Raghavan, J. in S. A. No. 1242 of 1965.

Transfer of Property Act (1882), Ss. 106, 116 — Lease deed containing undertaking by tenant to surrender building on expiry of lease period — Corresponding undertaking by landlord to return advance amount without interest at that time — Tenant continuing in possession after expiry of lease period — Suit for eviction held not maintainable, unless lease was determined by notice under S. 106.

In the absence of an agreement to the contrary, Section 116 of the Act applies to a lessee continuing in possession of the property after the expiry of the period of the lease and in such a case, a notice satisfying the requirements of S. 106 is necessary to determine the lease. (Para 5)

Mere provision in a lease deed that the tenant shall surrender the building on the expiry of the period of the lease without any dispute or any damage to the building, and that on the expiry of the said period, the landlord shall return the advance amount without interest at that time does not amount to a contract dispensing with the requirements of a notice as provided in S. 106. Therefore, in such a case, if a tenant holds over the property after the expiry of the lease period, Section 116 of the T. P. Act applies and the landlord is not entitled to get a decree for eviction without determining the lease by a valid notice as required by S. 106 of the T. P. Act. 1963 Ker LJ 556 and AIR 1949 F. C. 124 Foll. AIR 1964 SC 461 Explained. AIR 1964 Ker 218, Ref. to.

(Paras 6, 7)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 461 (V 51)=

(1963) Sup 2 SCR 906, Puran Chand v. Motilal 4

(1964) AIR 1964 Ker 218 (V 51)=
1963 Ker LT 1009, Subramonia Iyer v. Ammu 6

(1963) 1963 Ker LJ 556=ILR (1963) 1 Ker 712, Moothorakutty v. Ayissa Bi 4

DM/DM/B649/69/GDR/D

(1949) AIR 1949 FC 124 (V 36)=
1949 FCR 262, Kai Khurshroo
Bezongjee v. Bai Jerbai 5

T. N. Subramania Iyer, for Appellant;
G. Viswanatha Iyer and K. George Varghese, for Respondent (No. 3).

ISAAC, J.: This is a defendant's appeal under Section 5 of the Kerala High Court Act, 1959 from the judgment of our learned brother, Raghavan J., in S. A. No. 1242 of 1965; and it arises out of a suit for eviction of the defendant from a shop building held by him under a lease deed Ext. D-1 dated 28-9-1961, and also for arrears of rent and future rent. Ext. D-1 was executed by the defendant in favour of the first plaintiff; and the rights of the first plaintiff subsequently devolved on the third plaintiff. The lease was for a period of one year on monthly rent of Rs. 17.50, payable before the 30th of every month. The defendant also paid a premium or advance of Rs. 200/- in consideration of the lease. The period of the lease expired on 28-9-1962; but the defendant remained in possession of the shop building after the expiry of the said period, and paid rent as provided in Ext. D-1, till the end of September 1963. Thereafter he defaulted payment of rent. The defendant was, therefore, called upon several times to surrender the building and pay the arrears of rent; but he did not do so in spite of notices sent to him. Ext. D-4 dated 4-2-1964 and Ext. D-3 dated 5-5-1964 are two notices issued to the defendant on behalf of the landlord. Both Exts. D-4 and D-3 required the defendant to surrender the building within 15 days of the date of the said notices. The defendant did not comply with the demand and therefore this suit was instituted.

2. The defendant contended among other things that the suit was not maintainable, as the tenancy of the building had not been validly terminated. This contention was apparently based on the provisions contained in Sections 106 and 116 of the Transfer of Property Act, 1882. Section 106, the first part of which alone is relevant, reads as follows:—

"106. In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy."
Section 116 deals with the effect of hold-

ing over of the property after the determination of the lease; and it reads:—

"116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106."

3. The defendant contended that, as he was holding over the property after the expiry of the period of one year for which the lease was given, and as the landlord had admittedly received rent thereafter for another one year, the lease had been renewed by virtue of Section 116 of the Act, and that it would not be determined except by a notice as required by Section 106 of the Act. There is no dispute that neither Ext. D-3 nor Ext. D-4 would satisfy the requirements of Section 106. But the plaintiffs contended that Ext. D-1 contained a contract to the effect that a yearly or monthly tenancy as provided in S. 116 would not be created after the expiry of the original period of the lease, and that a notice as required by Section 106 was not necessary to determine the lease. The plaintiffs relied on the following provision in Ext. D-1:—

(Original extract in Malayalam omitted).

The trial Court accepted the plaintiffs' contention, and decreed the suit. This contention was also accepted by the Subordinate Judge, before whom the defendant filed an appeal. He, therefore filed Second Appeal in this Court. The learned Single Judge held that the above provision did not amount to a contract dispensing with the requirements of a notice as provided in Section 106; but he also held that Section 116 did not apply to a lease, which was for a fixed period, and that in such a case the question of determination of lease by a notice as required by Section 106 did not arise. In the result, he confirmed the decree, though for entirely different reasons. The defendant, therefore, filed the present appeal.

4. Our learned brother relied on a decision of the Supreme Court in *Puran Chanda v. Motilal*, AIR 1964 SC 461 in support of his view that Sections 106 and 116 of the Transfer of Property Act did not apply in the case of a lessee remaining in possession of the property after the expiry of the period of the lease and paying rent to the landlord. It may, however, be mentioned that an opposite view was expressed by the learned Judge in *Moothorakutty v. Ayissa*

Bi, 1963 Ker LJ 556. In that case he said:—

"Ext. A was of the year 1941 with a term of six years which expired in 1947. Thereafter till the filing of the suit in 1949, the tenant was holding over; and to such a tenancy, Section 116 of the Transfer of Property Act must apply." It does not appear that this decision was brought to the notice of the learned Judge. The learned counsel for the plaintiffs contended that in the light of the above decision of the Supreme Court, the decision of this Court in *Moothorakutty's case*, 1963 Ker LJ 556 was wrong. This contention requires a careful examination. The case before the Supreme Court arose out of a suit for eviction of a tenant of a building. The lease was for a period of one year commencing on 1st August, 1952, on a monthly rent of Rs. 70/-. On 27-6-1954, the landlord issued notice to the tenant calling upon him to vacate the building by midnight of 31st July 1954-1st August 1954. On 2-8-1954, the landlord instituted the suit for eviction. One of the contentions in the suit—and this was urged before the Supreme Court also—was that the notice was not valid in determining the tenancy, as it was short by 24 hours. In dealing with the above contention, the Supreme Court said:

"It is not necessary in this appeal to express our opinion on the validity of the contention, for we are satisfied that the term of the tenancy had expired by efflux of time; and, therefore, no question of statutory notice would arise."

It is the above passage that has been quoted by our learned brother in support of his decision under appeal. There is no finding in the Supreme Court case that, after the expiry of the period of one year for which the lease was created, the tenant was holding over, and a tenancy under Section 116 of the Transfer of Property Act had been created. We cannot assume that it was an omission. It must be a case where Section 116 had no application; and if so, the tenancy had expired by efflux of time, and no question of notice arose, as held by the Supreme Court. This decision does not, therefore, support our learned brother's view that Sections 106 and 116 of the Transfer of Property Act have no application to the case of a tenant holding over after the expiry of the period of the lease.

5. The above question arose pointedly for decision before the Federal Court in *Kai Khurshroo Bezonjee v. Bai Jerbal*, AIR 1949 FC 124. That case arose out of a suit for eviction of a lessee of a building. The period of lease expired on 31-8-1942; and the landlord had issued notices to the lessee, requiring him and

the sub-lessees to vacate the building on the expiry of the period. But they did not surrender the building. They continued to pay the rent and the landlord continued to accept the same, till the suit was instituted on 7-12-1945. It was contended among other things that the suit was not maintainable for want of a proper notice as required by Section 106 of the Transfer of Property Act, as the tenants were holding over the property under Section 116 of the Act. Dealing with this matter, the Federal Court said:

"On the determination of a lease, it is the duty of the lessee to deliver up possession of the demised premises to the lessor. If the lessee or a sub-lessee under him continues in possession even after the determination of the lease, the landlord undoubtedly has the right to eject him forthwith; but if he does not, and there is neither assent nor dissent on his part to the continuance of occupation of such person, the latter becomes in the language of English law a tenant on sufferance who has no lawful title to the land but holds it merely through the laches of the landlord. If now the landlord accepts rent from such person or otherwise expresses assent to the continuance of his possession, a new tenancy comes into existence as is contemplated by Section 116, T. P. Act, and unless there is an agreement to the contrary, such tenancy would be regarded as one from year to year or from month to month in accordance with the provisions of Section 106 of the Act."

The Court also added:

"What Section 116, T. P. Act contemplates is that on one side there should be an offer of taking a renewed or fresh demise evidenced by the lessee's or sub-lessee's continuing in occupation of the property after his interest has ceased and on the other side there must be a definite assent to this continuance of possession by the landlord expressed by acceptance of rent or otherwise."

This decision is clear authority for the position that, in the absence of an agreement to the contrary, Section 116 of the Act would apply to a lessee continuing in possession of the property after the expiry of the period of the lease, and that in such a case, a notice satisfying the requirements of Section 106 is necessary to determine the lease.

6. The learned counsel for the plaintiffs however contended that the lease created under Section 116 of the Act would be one from year to year or from month to month, only in the absence of an agreement to the contrary, that Ext. D-1 contained such an agreement, that notice as required by Section 106 of the Act was not, therefore, necessary to determine the lease, and that the finding of

our learned brother to the contrary was wrong. We have already extracted the relevant portion of Ext. D-1, on which reliance was made. It only states that the tenant shall surrender the building on the expiry of the period of one year without any dispute or any damage to the building, that on the expiry of the said period, the landlord shall return to the tenant the sum of Rs. 200/-, which the landlord was receiving as advance, without interest, and that then the tenant shall surrender the building.

The learned counsel contended that the tenancy was for a period certain, and thereafter until the amount of advance was returned by the landlord to the tenant, and that Section 106 of the Act had, therefore, no application to the case. This contention was advanced on the basis of certain observations contained in the decision of this Court in *Subramonia Iyer v. Ammu*, 1963 Ker LT 1009 = (AIR 1964 Ker 218). It is unnecessary for us to consider the above contention, as we are in agreement with our learned brother that the lease deed does not make out an agreement to the contrary, as canvassed by the plaintiffs' learned counsel. In our opinion, the clause relied on by him is only a conditional undertaking on the part of the tenant to surrender the building on the expiry of the period of the lease, and a corresponding undertaking on the part of the landlord to return the advance amount without interest at that time. A number of decisions were cited by the learned counsel in support of his contention that this clause would make out such an agreement. It is unnecessary to refer to any of them as they do not deal with a similar clause, and ordinarily any decision on the construction of a particular clause in a document cannot be of any assistance in construction of another document.

7. We are, therefore, constrained to differ from the conclusion of our learned brother, and hold that the plaintiffs are not entitled to get a decree for eviction in this suit, as the defendant has been holding over the property under S. 116 of the Transfer of Property Act after the expiry of the period of the lease, and as the lease thus created has not been determined by a valid notice as required by Section 106 of the Act. The third plaintiff has also got a decree for arrears of rent and future rent after setting off the advance paid by the defendant; but no question of future rent or set off of the advance amount arises in the absence of a decree for eviction. We, therefore, give a decree to the 3rd plaintiff for arrears of rent payable at the rate fixed in the lease deed till the end of August 1968. All amounts found by the trial Court to have been paid towards rent and

all payment made thereafter will be given credit to the defendant. Disputes, if any, regarding payments made after the date of the trial Court's decree, will be settled by the execution Court. The third plaintiff will also get interest at 6% per annum on the amounts found due hereunder from this date. In the circumstances of the case, we direct the parties to bear their respective costs in all the Courts.

Order accordingly.

AIR 1970 KERALA 43 (V 57 C 10)

M. U. ISAAC AND

P. NARAYANA PILLAI, JJ.

The Good Land Plantation (Private) Ltd., Puthupally Village, Appellant v. State Bank of Travancore, Respondent.

A. S. No. 39 of 1965, D/- 20-1-1969, from judgment of a learned judge of this Court in O. S. No. 1 of 1963, reported in AIR 1965 Kerala 297.

(A) Banking Companies Act (1949), Section 45 (10)—Default in conducting chitty by foreman bank due to order of moratorium made by Central Government — Scheme for amalgamation of foreman bank with State Bank of Travancore — Suit for amount subscribed by plaintiff on ground of default — Orders under S. 45 (10) providing that period during which chitty was not conducted would be treated as period of suspension — Held, that orders were beyond scope of power conferred on Central Government under S. 45(10) — (Travancore Chitties Act (26 of 1120), Ss. 38 (2), 39 (2), 41.)

The plaintiff was a subscriber in a chitty conducted by the Kottayam Bank Ltd., which was governed by the Travancore Chitties Act, 1120 under which the foreman had to register a "Variola" which was the articles of agreement between the foreman and the subscriber. The Central Government acting under S. 45 (7) had sanctioned a scheme for amalgamation of the Kottayam Bank Ltd. (the foreman bank) with the State Bank of Travancore. It had made provision regarding the chitties conducted by the foreman bank. He instituted the suit against the State Bank of Travancore for the amount subscribed by him for the first four instalments of the chitty on the allegation that he became entitled to get that amount under Section 41 of 1120 Act as the foreman defaulted the chitty after fourth instalment. The only defence was that the default took place on account of the order of moratorium made by the Central Government under Section 45 (2) and by virtue of orders made by the Central Government under S. 45 (10), providing that the period during which the

chitty was not conducted should be treated as a period of suspension of the chitty. The plaintiff's contention was that the orders passed under S. 45 (10) were beyond the powers of Central Government.

Held, that the orders were beyond the scope of the power conferred on the Central Government under S. 45 (10).

(Para 8)

A reading of S. 45 (10) shows that an order thereunder can be made only for the purpose of removing any difficulty that arises in giving effect to the provisions of the scheme, and that the said order should not be inconsistent with the provisions of the scheme. Under the Travancore Chitties Act and the provisions of the Variola, the foreman became liable to the plaintiff to pay the amount of subscription contributed by it on the termination of the chitty. There was nothing in the scheme which modified or otherwise affected that liability. The scheme made the defendant (State Bank of Travancore) liable to pay the said amount to the plaintiff. What the order under S. 45 (10) provided was that the period during which the chitty was not conducted would be treated as a period of suspension of the chitty by a special resolution of the subscribers. The result of that provision was that the right of the plaintiff to get from the defendant the amount subscribed to the chitty was taken away and substituted with a liability to draw the prize amount on furnishing security for payment of future instalments. This was a provision which was clearly inconsistent with the provisions of the scheme.

(Para 8)

Even if the object of the scheme for amalgamation in respect of the chitties was that the defendant bank should continue them in spite of the fact that they were terminated, the orders were beyond the scope of S. 45 (10). It did not empower the Central Government to pass any order which would materially affect the rights and liabilities of persons as under the scheme. A provision that the period during which the chitty was not conducted should be treated as a period of suspension and that the chitty should be revived and continued after the said period was of far-reaching consequence to the non-prized subscribers.

(Para 9)

The order under sub-section (10) could only be one for removing difficulties, if any, in giving effect to the provisions of the scheme, and it could not amend, alter or add to the provisions contained in the scheme, in such a way as to affect the rights and liabilities of persons thereunder. The orders passed under S. 45 (10) amounted to such an amendment or addition to the scheme, and they were

These two questions alone were raised by the parties before the learned trial Judge, who decided both questions against the plaintiff and dismissed the suit. It may here be mentioned that he did not specifically consider the validity of Ext. P-4. The plaintiff has raised the same questions before us.

6. I shall now consider the first question. There is no dispute that the chitty was not conducted by the foreman with effect from the fifth instalment, and that, under the provisions of the Travancore Chitties Act and the terms of the variola, the foreman would become liable to pay to the plaintiff on the fifth instalment, namely 10-1-1961, the amount of Rs. 1,600/- which it had subscribed to the chitty. The only defence is that the default took place on account of the order of moratorium made by the Central Government, and that by virtue of Exts. P-3 and P-4, the period during which the chitty was not conducted should be treated as a period of suspension of the chitty. The effect of the moratorium was to stay commencement or continuance of all actions and proceedings against the foreman from 18th December 1960 till 16th June 1961, and to direct that the foreman shall not make any payment to any depositors or discharge any liabilities or obligations to any other creditors during the above period, except as otherwise provided by the order of moratorium. Discharge of chitty liabilities was not one of the payments permitted by the order of moratorium.

The order of moratorium does not and could not condone the default of the chitty by the foreman. But by virtue of that order, the foreman was not permitted to discharge the plaintiff's liability till 16th June 1961, and the plaintiff was debarred from instituting any action for the amount of subscription which it became entitled to get on account of the termination of the kuri till the above date. In the meanwhile, the scheme was sanctioned by the Central Government for the amalgamation of the foreman bank with the defendant bank. It has made provision regarding the chitties conducted by the foreman bank; and I have already extracted that provision.

7. The plaintiff's contention is that, under the scheme, all the assets and liabilities of the Kottayam Orient Bank Ltd., stood transferred to the defendant as from the prescribed date: that in relation to the chitties, the defendant became the foreman, and it "shall continue to exercise all powers and to do all such acts and things as would have been exercised or done by the transferor bank in so far as they are not inconsistent with this scheme"; that accordingly the defendant became liable to discharge the lia-

bility of the original foreman and to pay the amount subscribed by the plaintiff to the chitty on the expiry of the period of moratorium; that Exts. P-3 and P-4, in so far as they wipe off the said liability by treating the period during which the chitty was not conducted as a period of suspension by a special resolution of the subscribers, was something inconsistent with the provisions of the scheme; that no difficulty arose for giving effect to the provisions of the scheme; that in effect Exts. P-3 and P-4 contain an amendment of the scheme; and that they are, therefore, beyond the scope of sub-section (10) of Section 45 of the Banking Companies Act. Dealing with the above contention, the learned trial Judge stated:

"The object of the scheme was that the defendant bank should take over and conduct the business of the Kottayam Orient Bank Ltd., and, so far as the chitties run by the latter were concerned, the object was that these chitties, should be run to a successful conclusion by the defendant bank. But the scheme lost sight of the fact that the chitties had already terminated under the provisions of sub-section (2) of section 39 read with sub-section (2) of Section 38 of the Chitties Act by reason of the failure to conduct it at the monthly instalments which fell due during the period of the moratorium and that, for continuing the chitty, it would be necessary to suspend it for the period of the moratorium and prolong it by that period which, both under sub-section (1) (iv) of section 13 of the Chitties Act and clause 29 of the variola, could be done by a special resolution of the subscribers to the chitty. It was therefore necessary to provide for the prolongation of the chitty and for its continuance as if it had not terminated if the object of the scheme were to be fulfilled, and it is precisely to remove the difficulty which stood in the way of the object being fulfilled that the impugned order was made. It is no use saying that the defendant bank could have had no difficulty in accepting that the chitty had terminated and paying off the unpriized subscribers. For, that would not be to work the scheme which clearly contemplates that the defendant bank should run the chitties to a successful conclusion. The difficulty that stood in the way of this being done was certainly a difficulty in giving effect to the provisions of the scheme."

With the greatest respect, I am unable to agree with the learned Judge. The scheme was for the amalgamation of the Kottayam Orient Bank Ltd., with the defendant bank; and it was effected by making a statutory transfer of all the assets and liabilities of the former bank in favour of the latter. So far as the Chit-

ties are concerned, I can find nothing in the scheme, and particularly in the provision therein relating to chitties, to show that the object was to run them "to a successful conclusion". The Reserve Bank and the Central Government were at the time of making the scheme admittedly aware of the fact that the Kottayam Orient Bank Ltd. were running chitties. It is an obvious fact that during the period of the moratorium, the conduct of the chitties would be defaulted; and there is no warranty for assuming that they were not aware of that fact or of the liability of a defaulting foreman of the chitties. Conduct of chitties is not a normal banking business; and ordinarily the Reserve Bank would not allow a bank like the State Bank of Travancore to take up chitty business for conducting the defaulted chitties run by the Kottayam Orient Bank Ltd.

It is all the more so; because it was not possible to run these chitties unless they were revived; and if in spite of that, the Reserve Bank and the Central Government wanted the State Bank of Travancore to run these defaulted chitties "to a successful conclusion", necessary provision would have been certainly made in the scheme itself. The absence of any such provision shows that they did not, at the time of making the scheme, want the defendant to conduct these chitties. Whatever that may be, there is nothing in the scheme to show the contrary, namely the object of the scheme, so far as the chitties were concerned, was that the defendant should continue to conduct them, in spite of the fact that they had been terminated.

8. I shall now quote sub-section (10) of Section 45 of the Banking Companies Act:

"If any difficulty arises in giving effect to the provisions of the scheme, the Central Government may by order do anything not inconsistent with such provisions which appear to it necessary or expedient for the purpose of removing the difficulty."

A reading of the above provision shows that an order thereunder can be made only for the purpose of removing any difficulty that arises in giving effect to the provisions of the scheme, and that the said order should not be inconsistent with the provisions of the scheme. Under the Travancore Chitties Act and the provisions of the Variola, the foreman became liable to the plaintiff to pay the amount of subscription contributed by it on the termination of the chitty, namely 10-1-1961. There is nothing in the scheme which has modified or otherwise affected that liability. The scheme made the defendant liable to pay the said amount

to the plaintiff. There is no difficulty in paying the amount. The difficulty is only for not paying it; and what was achieved by Exts. P-3 and P-4 was the creation of that difficulty. What Ext. P-3 provides is that the period during which the chitty was not conducted would be treated as a period of suspension of the chitty by a special resolution of the subscribers. The result of that provision was that the right of the plaintiff to get from the defendant the amount subscribed to the chitty was taken away and substituted with a liability to draw the prize amount on furnishing security for payment of future instalments. This is a provision which is clearly inconsistent with the provisions of the scheme. Exts. P-3 and P-4 are, therefore, in my view beyond the scope of the power conferred on the Central Government under sub-section (10) of Section 45 of the Banking Companies Act.

9. As held by the learned trial Judge, if the object of the scheme in respect of the chitties was that the defendant bank should continue them in spite of the fact that they were terminated, I would still hold that Exts. P-3 and P-4 are beyond the scope of the above statutory provision. In my opinion, it does not empower the Central Government to pass any order which would materially affect the rights and liabilities of persons as under the scheme. Sub-sections (4) and (5) of Section 45 provides that the Reserve Bank may prepare a scheme containing the necessary provisions. Sub-section (6) provides that a scheme for amalgamation shall be sent in draft to all banking companies concerned in the amalgamation, and that the Reserve Bank may make such modifications in the draft as it may consider necessary in the light of suggestions and objections received from the said banking companies and from any members, depositors or other creditors of those companies. Sub-section (7) provides that the scheme shall, thereafter, be placed before the Central Government, and that it may sanction the scheme without any modification or with such modifications as it may consider necessary.

A provision that the period during which the chitty was not conducted should be treated as a period of suspension and that the chitty should be revived and continued after the said period is of far-reaching consequence to the non-prized subscribers. The present case is illustrative. The plaintiff auctioned the chitty on 10-12-1960 for Rs. 12,000/- reducing a sum of Rs. 8,000/- from the chitty amount, on the basis that it would get the prize amount on 10-1-1961 on furnishing security for the future instalments. In all probability, the chitty might have been auctioned at such a reduced amount for

meeting an urgent need. As the chitty was defaulted by the foreman, the plaintiff did not get the prize amount; but it became entitled to get the subscribed amount. By Exts. P-3 and P-4, the period from 18th December 1960 till 31st December 1962 was treated as a period of suspension of the chitty, with the result the plaintiff can only claim to get the prize amount of Rs. 12,000 on 10-1-1963 on its furnishing security for payment of Rupees 18,000/- in 45 future instalments. It may not at that time require this amount; or even it required the amount, it may not be in a position to furnish the security and draw the amount. Still, the plaintiff has to pay the future instalments amounting to Rs. 18,000/-, against which it would get credit only for the prize amount of Rs. 12,000/-.

Thus the right of the plaintiff to get the subscribed amount was converted into a liability by virtue of the orders Exts. P-3 and P-4. If such a provision was included in the scheme prepared by the Reserve Bank, I cannot postulate that persons like the plaintiff would not have objected to that provision, and that even after considering such an objection, the Reserve Bank would have still retained this provision or the Central Government would not have made the necessary modification therein. Therefore, in my opinion these are matters which should come in the scheme, when it is prepared by the Reserve Bank. The order that can be passed under sub-section (10) of S. 45 can only be one for the very limited purpose mentioned therein. It does not provide for any objection being raised by any interested person before the order is made. Therefore, it must be of such a nature as not to give room for any person for raising any substantial objection thereto. In other words, the order under sub-section (10) can only be one for removing difficulties, if any, in giving effect to the provisions of the scheme, and it cannot amend, alter or add to the provisions contained in the scheme, in such a way as to affect the rights and liabilities of persons thereunder. In my view, Exts. P-3 and P-4 amount to such an amendment or addition to the scheme, and they are beyond the scope of sub-section (10).

10. There is also another aspect of this question, which does not appear to have been presented before the learned trial Judge. The effect of Ext. P-3 was to treat the period from 18th December 1960 till 31st December 1961 or any part of that period as a period of suspension of the chitty as if by a special resolution of the subscribers. Assuming that Ext. P-3 is valid, the result is that the chitty would be revived, and it has to be conducted by the foreman after the expiry

of the above period in accordance with the terms and conditions of the variola with effect from the next instalment. This, I suppose, would remove the so-called difficulty in giving effect to the provisions of the scheme for running the chitties. Accordingly, the defendant had to conduct the chitty in this case on the instalment which falls on 10-1-1962. Admittedly the defendant did not conduct it either on the above or on the next instalment. All that is stated in the written statement is that the defendant was proposing to revive the chitty and continue the same with effect from 10th March 1962. Therefore, by virtue of the defendant's default to conduct the chitty on 10-1-1962, it has to be deemed to have terminated on the above date. Ext. P-4 was passed to extend the period of suspension created by Ext. P-3. In other words, Ext. P-4 provides that the period from 31-12-1961 till 31-12-1962, which is a period after the revival of the chitty by Ext. P-3, would also be treated as a period of suspension of the chitty by a special resolution of the subscribers.

In any view of the matter, this is not a provision for removing any difficulties for giving effect to the scheme for the conduct of the chitties, the difficulties having been already removed by Ext. P-3. Ext. P-4 is also inconsistent with the provisions of the scheme read with Ext. P-3. Ext. P-4, is, therefore, certainly beyond the scope of sub-section (10) of Section 45 of the Banking Companies Act; and this is sufficient to entitle the plaintiff to claim payment of amount subscribed by it in the chitty.

11. I shall now proceed to consider the question relating to the constitutional validity of Section 45 (10) of the Banking Companies Act. This provision is attacked on the ground that it is in excess of permissive delegation, and it amounts to an abdication of the legislative power. Article 245 of the Constitution provides that subject to the provisions of the Constitution the power to make laws for the whole of India is vested in Parliament, and the power to make laws for the State is vested in the Legislature of the State. Broadly speaking, the authority must remain where it is located; and it cannot be delegated. At the same time, it is well established that the essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct, and that it is permissible for the Legislature to confer upon administrative authorities powers to make subordinate legislation for the purpose of implementing the provisions of the Statute. What exactly constitutes the essential feature

(1960) AIR 1960 SC 1328 (V 47)=
(1960) 2 Lab LJ 37, Newspapers
Ltd. v. State Industrial Tribunal 9
(1960) 64 Cal WN 186, Royal Calcutta
Golf Club v. Third Industrial Tri-
bunal, West Bengal 4

(1958) AIR 1958 SC 1012 (V 45)=
1958-2 Lab LJ 492, Macropollo
D and Co., (Pvt.) Ltd. v. Macropollo
D. and Co. (Pvt) Ltd. Employees'
Union 4

(1953) 1953-1 All ER 327=1953-1.
QB 704, Rex v. Disputes Commit-
tee of National Joint Council for
the Craft of Dental Technicians 3
Y. S. Dharmadhikari, for Petitioners;
P. S. Nair, for Respondents.

A. P. SEN, J.:— By this application
under Articles 226 and 227 of the Consti-
tution of India, the petitioners, the
Modern Stores, Jabalpur and their Mana-
ger (hereinafter referred to as the 'Manage-
ment') apply for a writ of Certiorari for
quashing an award of the Presiding
Officer, Labour Court, Jabalpur, dated
15th April 1968, which directs the re-in-
statement of the 9 salesmen discharged
from their service and payment of back
wages and allowances to them with effect
from 1st January 1968, and for an appro-
priate writ or direction to restrain that
authority, from implementing the said
Award.

2. The relevant facts, briefly stated,
are these. The Modern Stores, Jabalpur,
are the sole distributors of cigarettes
manufactured by the Imperial Tobacco
Company, Limited, under a distributing
agreement dated 20th May 1967, for the
Jabalpur region. For distributing ciga-
rettes to the retail dealers, the Manage-
ment employed the respondents nos. 3
to 11 as salesmen (hereinafter referred
to as the 9 'salesmen'). These 9 salesmen
have formed an Union of themselves,
known as the Cigarettes Salesmen's Union,
which is duly registered as a trade Union.
Apparently, the Union started agitation
for betterment of the Service conditions
of its members and eventually, the
Management entered into an agreement
dated 16th March 1967 with the Union,
laying down the terms and conditions of
their employment. Among other terms,
what is of significance, is Clause 4, which
guarantees to them permanence of their
service. It reads:

"कॉई भी सेल्स मेन माडर्न स्टोर्स से उस वक्त
तक कार्य मुक्त नहीं किया जायगा जब तक माडर्न स्टोर्स
के पास इम्पॉरियल टैबोको कंपनी का सिग्रेट वितरण का
कार्य है अथवा कार्य संतोषजनक है।"

Thereafter, the Union appears to have
moved the Labour Court, Jabalpur, for
fixation of minimum wages for the sales-
men employed by the Management, under

the Minimum Wages Act, (Act No. XI of
1948). While the proceedings were pend-
ing, the Management served a notice of
termination of service, of the 9 salesmen
from 1st January 1968 stating:

"चूंकि आप के द्वारा सिगरेट की बिक्री पर फर्म को
सुकसान उठाना पड़ रहा है और आर्थिक दृष्टि से आप
को नियुक्ति कायम रखना हानिकारक है। इसलिये
आपको मध्य प्रदेश एम्प्लॉयमेंट स्टैंडिंग आर्डर्स रूलस की
धारा ११ के अनुसार नोटिस दिया जाता है कि आपकी
नियुक्ति दिनांक १-१-१९६८ को समाप्त हो जावेगी।

आप नोटिस के बदले एक माह का वेतन लेकर तथा
१५दिन प्रति वर्ष के हिसाब से कम्पनशेसन लेकर रसीद
दे दें।"

After this notice of retrenchment, the
9 salesmen started an agitation alleging
that in reality there was a wrongful
termination of their employment, as a
mark of punishment for their trade Union
activities. The Management, accordingly,
entered into an agreement with the
Union on 22nd January 1968 in Form 'C'
under Rule 7 of the Madhya Pradesh In-
dustrial Disputes Rules, 1957. In accord-
ance therewith, the dispute as "regards
the termination of service of the 9 sales-
men was referred to the respondent no. 1
Shri Krishnadas Shah, Presiding Officer,
Labour Court, Jabalpur, for his arbitra-
tion under Section 10-A of the Indust-
rial Disputes Act, 1947. Incidentally the
agreement shows that 9 out of 11 sales-
men are affected by the notice of termi-
nation. Immediately upon the reference
being made, the learned Presiding Officer
commenced his arbitration proceedings.
The Union filed its statement of claim be-
fore the Tribunal, attributing ulterior
motives to the management in terminating
the services of its members, i. e., of the
9 salesmen in question. It was
alleged that these 9 salesmen were
not rendered really surplus, on account of
any genuine change in the method of
business by the Management, but that
they, in the guise of ordering retrench-
ment had, in fact victimised the 9 sales-
men, for forming a trade Union and for
agitating for the betterment of their ser-
vice conditions. In other words, the Union
urged that the notice of termination was
a colourable exercise of the power of
retrenchment which the Management
ordinarily has, and was, in reality, an
unfair labour practice which was lacking
in good faith and the notice was, there-
fore, a notice of termination of services
as a disciplinary action, by way of punish-
ment.

Apart from this, the Union also alleg-
ed that the mandatory requirements of
Section 25-F were not complied with and,
therefore, the retrenchment, if any, was

invalid and also that the notice of termination being in breach of the settlement arrived at between the Union and the Management was invalid. The Management however, in their written statement denied the charge of victimisation and asserted that the difference between the purchase price charged by the manufacturers and the retail selling price fixed by them was the margin of profit of the Modern Stores. Apart from this, the Management are not entitled to any discount or commission on the price for employing salesmen for distribution of cigarettes and their margin of profit was not sufficient to cover the cost of distribution. That they had, therefore, terminated the employment of the 9 salesmen on grounds of economy as they had now decided to distribute cigarettes themselves to the retailers directly, instead of through the salesmen in question and, therefore, their services had become surplus. In their supplementary statement, the Management also tried to support their order of termination on the ground of misconduct of the 9 salesmen, and furnished a statement of allegations which showed that their working had become increasingly unsatisfactory. After taking the evidence adduced by the parties, the Tribunal has by the impugned Award found the retrenchment of the 9 salesmen to be illegal and has, accordingly, directed the Management to re-instate all these 9 salesmen and to pay them their back wages and allowances w.e.f. 1st January 1968.

3. It is urged by the learned Counsel appearing on behalf of the Union that although the functions of an arbitrator to whom a dispute is referred under S. 10-A of the Act are of a quasi-judicial nature, the High Court should not ordinarily interfere with an Award rendered by him settling the dispute, unless there was some kind of injustice caused by his adjudication. In support of this contention, the learned counsel placed reliance on *Agnani v. Badri Das*, 1963-1 Lab LJ 684 (SC), and *Parry's (Calcutta) Employees' Union v. Parry & Co.*, 1966-1 Lab LJ 535 = (AIR 1961 Cal 31). We are unable to accept the contention. In *Agnani's* case, 1963-1 Lab LJ 684 (SC) (supra), their Lordships of the Supreme Court had reversed the decision of the Punjab High Court reported in *Badri Das v. Industrial Tribunal, Punjab, Patiala*, 1962-1 Lab LJ 526 = (AIR 1961 Punj 515), mainly on the ground that it had exceeded in its jurisdiction under Article 226 of the Constitution, in interfering with the findings of the Industrial Tribunal in regard to the construction of a resolution by which an Inquiry Committee was appointed by the Management and as regards the nature of misconduct proved against the petitioner in that case. Now, it is well settled that,

only errors of jurisdiction, the wrongful assumption or non-exercise of it, or errors of law apparent on the face of the record, justify the issue of a writ of Certiorari and not on a mere error of fact which has to be demonstrated by a process of reasoning. The Punjab High Court had in that case, unwittingly, assumed the jurisdiction of an appellate Court, which clearly is distinguishable from the jurisdiction of the High Courts under Article 226 of the Constitution.

In *Parry's* case, 1966-1 Lab LJ 535 = (AIR 1961 Cal 31) (supra), H. K. Bose, C.J. and B. C. Mitra, J., reversed the judgment of a Single Judge of the Calcutta High Court because he had tried to review findings of fact or inference drawn by the Industrial Tribunal in that case, from the evidence adduced before it by the parties and upon a re-appraisal of the evidence, substituted another set of findings of his own, on the merits of controversy which had to be tried and decided exclusively by the Industrial Tribunal itself. Neither of these decisions are, in our opinion, really applicable, to the present case. Recently, we had occasion to deal with this aspect in *Hindustan Steel Ltd. v. Presiding Officer, Industrial Tribunal-cum-Labour Court (Central), Jabalpur*, Misc. Petn. No. 153 of 1967, D/- 10-2-69 (MP), and this is what we have stated:

"We would like to affirm that a writ of Certiorari can issue against an arbitrator functioning under Section 10-A of the Industrial Disputes Act. In *Rex v. Disputes Committee of National Joint Council for the Craft of Dental Technicians*, 1953-1 All ER 327, Lord Goddard C. J. had stated:

"There is no instance of which I know in the books, where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator, and a statutory arbitrator is a person to whom, by a statute, the parties must resort."

Following this dictum, there was a conflict of opinion whether an arbitrator functioning under Section 10-A of the Industrial Disputes Act, 1947, was a statutory arbitrator against which a "writ of certiorari" can issue under Article 226. That conflict has now been settled by their Lordships of the Supreme Court in *Engineering Mazdoor Sabha v. Hind Cycle Ltd.*, AIR 1963 SC 874. Having regard to the different provisions of the Industrial Disputes Act and the rules framed thereunder, their Lordships have stated that, although an arbitrator appointed under Section 10-A cannot be treated to be exactly similar to a private arbitrator to whom a dispute has been referred by an arbitration agreement under the Arbitration Act, nevertheless, he is clothed with certain powers, his

procedure is regulated by a set of rules and the award pronounced by him is given by statutory provisions a certain validity and a binding character for a specified period; therefore, such an arbitrator must be regarded as a statutory arbitrator. Their Lordships, accordingly held that a writ may issue for quashing his award under Article 226 of the Constitution. These principles equally apply to this case. Even otherwise, the present reference of an industrial dispute for its adjudication is to the Industrial Court, which undoubtedly is a tribunal amenable to this Court's directions under Article 227 of the Constitution."

We find no reason to take view of this Court's powers under Articles 226 and 227 of the Constitution in relation to adjudications and/or arbitrations under Section 10-A of the Industrial Disputes Act, 1947, different from that taken by us in this case. It would, indeed, result in a "complete failure of justice", to use the words of the learned counsel for the Union, if we did not issue a writ of Certiorari in this case for quashing the impugned Award which is vitiated by errors apparent on the face of the record.

4. The true legal concept of "retrenchment" in the Industrial law is not in doubt. Retrenchment is a managerial function, and it is for the Management to decide the number of workmen required to carry out efficiently the work involved in their industrial undertaking, and this must always be left to be determined by the Management in their discretion. Sometimes, the number of employees may, however, exceed the reasonable and legitimate needs of the undertaking. In such a case, if any workmen become surplus, it would then be open to the Management to retrench them, for proper reasons. The principle that it is always open to an employer to terminate the services of an employee, as a result of a reorganisation of his business, has now been authoritatively laid down by their Lordships of the Supreme Court in *Macropollo D. and Co. (Pvt.) Ltd. v. Macropollo D. and Co. (Pvt.) Ltd. Employees' Union*, AIR 1958 SC 1012. In that case, the facts were that previous to 1946 the firm of M/s D. Macropollo, which carries on business in Calcutta as tobacconists, used to sell their manufactured products through distributors. They had no workmen of their own for distributing the goods. In 1946, because of the communal riots, the system had to be changed. The concern, therefore, introduced the use of their own outdoor-salesmen who distributed the goods to the Panwalas and petty retail dealers. In or about 1954, owing to the slackness of business, it was found no longer practicable from the business point of view to continue the Company's own outdoor-sales department.

In other words, the Company decided to revert back to the old practice of selling through distributors again. In these altered circumstances, the distributors again appointed their own outdoor-salesmen and the Company had no concern with it, and, accordingly, served notices of termination. It was alleged that this discharge of the outdoor-salesmen by M/s D. Macropollo and Co. Ltd., was against the provisions of the Industrial Disputes Act and was, therefore, illegal. This contention was, however, repelled by their Lordships of the Supreme Court, stating:

"We have no doubt that on the record it must be taken as fully proved that the appellant has adopted the re-organisation scheme and the same has been implemented in all the areas where the appellant's business is conducted, between 1954 to 1957. It would be fantastic to suggest that in adopting this scheme of re-organisation over such a wide area the appellant was actuated by malice against its employees in Calcutta or that the scheme is a mere device adopted by the appellant for the purpose of discharging them.

x x x x x x

If the re-organised scheme has been adopted by the appellant for reasons of economy and convenience, and it has been introduced in all the areas of its business, the fact that its implementation would lead to the discharge of some of the employees would have no material bearing on the question as to whether the re-organisation has been adopted by the appellant bona fide or not; and so the learned Judge was clearly in error in attaching importance to the consequence of re-organisation, in regard to the fourteen salesmen in the present case. Their discharge and retrenchment would have to be considered as an inevitable, though very unfortunate, consequence of the re-organised scheme which the employer, acting bona fide, was entitled to adopt." Thus it follows that an employer has the right to re-organise his business, and if such re-organisation becomes necessary for reasons of economy or convenience, then the fact that it may lead to discharge of some of his employees will not matter and no inference can be drawn that such discharge is mala fide. In other words, such discharge will be an inevitable, though a very unfortunate consequence of a re-organisation scheme, which the employer acting bona fide is entitled to adopt. In *Royal Calcutta Golf Club v. Third Industrial Tribunal, West Bengal*, (1960) 64 Cal WN 186. D. N. Sinha, J. (as he then was), reiterated this principle, in the following words:

"A person has the right to re-organise his business in any fashion he likes, for the purpose of economy or convenience,

and nobody is entitled to tell him how he should conduct his business. The only limitation is that he should do it bona fide and not for the purpose of victimising his employees and in order to get rid of their services, which it would otherwise not be permissible. Provided, however, that he acts within these limits, it is not for the Court of the Tribunal to tell him how he should conduct his business."

In that particular case, the Royal Calcutta Golf Club decided to terminate the employment of its female labourers who were all along engaged on a temporary basis for removing leaves, weeding the greens, etc., from its golf courses, with the intention of handing over this part of the work to a contractor, as the Club officials felt that employment of female labourers was undesirable on account of difficulty experienced by them, in carrying out proper supervision of their work. According to Sinha J., the question whether this particular change would bring about any economic relief to the Club was not one and the only test. Apart from this, there was also the test of convenience and the Club authorities had adduced evidence to the effect that they found it extremely inconvenient to supervise this kind of labour and at various times of the year the female labour had to sit idle, and could not be diverted into other employment and, therefore, became altogether a dead-weight upon the Club. The learned Judge held that if for that reason the Club wanted to re-organise its system of employment of labour, and brought in a contractor to do the job, there was no explicable reason why the well accepted principle should not be applied.

In *Workmen of Subong Tea Estate v. The Outgoing Management of Subong Tea Estate*, 1964-5 SCR 602=(AIR 1967 SC 420), *M/s Macneill & Barry Ltd.*, who managed the Subong Tea Estate, transferred the said Estate to another concern, and their Manager, accordingly, served notices on 8 employees, intimating that their services would no longer be required. The employees in question were also paid retrenchment compensation, but it appears that the requirements of Section 25-F were not fully complied with. The Union representing the said employees protested against the retrenchment. The dispute in regard to the retrenchment, was referred to the Industrial Tribunal, under Section 10(1)(d) of the Industrial Disputes Act. Although, their Lordships held that the retrenchment was invalid in law and the acceptance of retrenchment compensation, if any, by the workmen concerned, would not create a bar against them in the proceedings, for the reason that such technical pleas are not generally entertained in an industrial adjudication, and though they also held

that no case had been made out there for effecting any retrenchment at all, that case is, however, an authority for the following proposition:

"The management can retrench its employees for proper reasons. It is undoubtedly true that it is for the management to decide the strength of its labour force, for the number of workmen required to carry out efficiently the work involved in the industrial undertaking of any employer must always be left to be determined by the management in its discretion, and so, occasions may arise when the number of employees may exceed the reasonable and legitimate needs of the undertaking. In such a case, if any workmen become surplus, it would be open to the management to retrench them. Workmen may become surplus on the ground of rationalisation or on the ground of economy reasonably and bona fide adopted by the management, or of other industrial or trade reasons. In all these cases, the management would be justified in effecting retrenchment in its labour force."

5. Applying these principles to the facts of the present case, we find that the Tribunal has arrived at its adjudication, on a complete misconception of law. It has held that the termination of employment of these salesmen be illegal, not on any finding that no new system had really been adopted by the Management for distribution of cigarettes, as alleged by them but on the hypothesis that the change in the system of working introduced by the Management was with an ulterior object (i) of victimising their employees, for their trade union activities, and (ii) of earning greater profits, by dispensing with their services. In this connection, the Tribunal observed:

"इन श्रमिकों के निकालने के वस्तुतः दो कारण होना पाया जाता है। एक तो यह कि श्रमिकों ने अपनी यूनियन बनाकर अपनी वेतन वृद्धि आदि की मांगों को रखना प्रारम्भ कर दिया जिसके माडर्न स्टोर्स को प्रदर्श पी० १ व पी० २ के समझौते इन सेल्समेनों से करने पड़े व उन्हें वेतन वृद्धि कमीशन, व साइकल अलाउन्स आदि देने पड़े श्रमिकों द्वारा मिनिमम वेजेज एक्ट के अन्तर्गत एक दावा श्री माडर्न स्टोर्स के विरुद्ध भी दायर किया गया है। इन सब कारणों से नियोक्ता स्वभावतः रुष्ट हुवा। दूसरा कारण इन श्रमिकों को निकालने का साक्ष्य से यह पाया जाता है कि वह इन सेल्समेनों से अपनी सिगरेट विक्राने के वजाय प्रत्यक्ष रूप से थोक व फुटकर दुकानदारों को कम से कम कमीशन देकर परस्पर सिगरेट बेचना चाहता है। जिसमें उसे अधिक लाभ मिलने की संभावना है।"

At another place, the Tribunal has remarked:

श्रमिकों के साक्ष्य से पाया जाता है कि श्रमिकों ने १९६६ के प्रारम्भ में अपना एक यूनियन बनाया व फरवरी १९६६ में एक मांग पत्र प्रस्तुत किया। इस पर से दोनों पक्षों में एक समझौता प्रदर्श पी० १ हुआ। इसके द्वारा सिगरेट सेल्समैनों के वेतनमान निश्चित हुये इस समझौता की शर्तें क्रमांक ४ द्वारा पक्षकारों में यह भी तय पाया कि कोई भी सेल्समेन माडर्न स्टोर से उस वक्त तक कार्य नहीं किया जावेगा जब तक माडर्न स्टोर के पास इम्पीरियल टुवैको कंपनी का सिगरेट वितरण का काम रहेगा। अथवा उसका कार्य संतोषजनक है। उसके पश्चात् २५-११-१९६६ को पक्षकारों में एक और समझौता हुआ जिसमें सेल्समैनों की कमीशन व साइकिल भत्ता आदि देने का तय हुआ। (प्रदर्श पी० २)।

* * *

ऐसा एक अनुबन्ध समझौता प्रदर्श पी० १ है। जैसा कि ऊपर बताया गया है कि इस समझौते के पद ४ के अनुसार जबतक इम्पीरियल टुवैको कंपनी की सिगरेटों के वितरण का कार्य माडर्न स्टोर्स के पास हो व सेल्समैनों का काम संतोषजनक हो उन्हें नहीं निकाला जा सकता।

* * *

जहां तक सेल्समैनों के काम से आर्थिक हानि होने का संबंध है वो साक्ष्य से सिद्ध होना पाया नहीं जाता।

* * *

“अतः सेल्समैनों को निकालने का जो आर्थिक हानि का कारण बताया गया है वह सही नहीं है। माडर्न स्टोर्स की ओर से ये भी कहा गया है कि उन्होंने इन श्रमिकों को छुट्टी (रिट्रैचमेंट) किया है। पर छुट्टी के भी कोई उचित कारण नहीं हैं।”

And, eventually the conclusion reached by it, was to the following effect:

“ये दोनों ही कारण इन श्रमिकों को सेवा से मुक्त किये जाने के उचित कारण नहीं हैं। प्रथम कारण तो स्पष्टतया इन सेल्समैनों को उनकी यूनियन व अन्य वैध कार्यवाहियों के कारण शिकार बनाने के समान है।

दूसरा कारण भी स्पष्टतया अनुचित है। किन्हीं स्थायी श्रमिकों को इस कारण नहीं निकाला जा सकता कि उनका कार्य दूसरे व्यक्तियों से कम वेतन या कमीशन लेकर कराया जा सकता है। यदि नियोजकों को इस प्रकार से कार्य करने की स्वतंत्रता दी गई तो किसी स्थायी श्रमिकों को भी सेवा की कोई सुरक्षा नहीं होगी। जिससे औद्योगिक अशांति पैदा होगी।”

6. We have quoted the relevant portions of the impugned Award in extenso because the findings that have been arrived at, are self-contradictory, and, in our view, the eventual award can, therefore, hardly be supported. In the first place, the Tribunal holds that the Management had “acted with the ulterior object of victimising their employees” so as to get rid of their services, with the motive of earning higher profits, which otherwise was not permissible, and termination of their employment for this reason, was not an act justifiable under the industrial law. Nevertheless, it has also in the same breath, held that the Management want to introduce a new system of distribution of cigarettes, directly to the retailers, after allowing to them a commission to cover their own cost of collection. So far as such reorganisation of business is concerned, the law on the subject has already been stated, and an employer has undoubtedly the right to arrange his affairs in any fashion he likes. It is, therefore, obvious that the findings reached by the Tribunal are illogical and such inconsistent findings cannot be allowed to co-exist because if the Union has succeeded in establishing a case of victimisation, it could not at the same breath, arrive at contrary conclusion that the Management truly and really want to introduce a new system of distribution of cigarettes without the agency of the 9 salesmen in question.

7. The learned counsel appearing on behalf of the Union has, however, strenuously endeavoured to support the Award, on other grounds. Firstly, it is urged that the finding reached by the Tribunal that the Management had bona fide adopted a new system of distribution of cigarettes, was wholly outside the terms of reference. In fact, the termination of employment was not claimed by the Management themselves to be a retrenchment of the workmen in question. Our attention was invited to (i) the notice of termination, (ii) the terms of reference under S. 10-A ibid, as well as to (iii) the written statement filed by the Management, before the Tribunal. Now, the question whether the Management were entitled to justify the termination of employment as a “retrenchment”, is one for the Tribunal to decide, having regard to the notice of termination, the terms of reference which define the extent of its jurisdiction as also the written statement. Secondly, relying on the Supreme Court decision in the case of Workmen of Subong Tea Estate, 1964-5 SCR 602 = (AIR 1967 SC 420) (supra), it is also urged that the impugned retrenchment had not been validly effected by the Management because the requirements of Section 25-F had not been fully complied with. No doubt, Section 25-F prescribes the condi-

tions precedent for retrenchment, S. 25-G lays down the procedure for such retrenchment and Section 25-H recognises the rights of retrenched workers for re-employment. When the requirements of Section 25-F are not fulfilled, the retrenchment would per se be invalid but this is a question which cannot be decided without further investigation.

Thirdly, it was urged that the retrenchment, if any, was also invalid, because it was in breach of the settlement arrived at between the Union and the Management, as per the Agreement dated 16th March 1966 which guaranteed to the workmen their permanence of employment, and the retrenchment being contrary to this agreement could not be supported, unless the said settlement was avoided in the manner provided under the Act. It is clear that under Sec. 25-J, the Management cannot act in derogation of any right which the workmen may have, under an Award for the time being in force, or, any subsisting contract with the employer. In our view, the term of permanence in an employment is itself a "benefit" within the meaning of Sec. 25-J *ibid.* But we do not know whether the aforesaid Agreement has the force of a "settlement" under the Act. We would, therefore, leave the parties free to urge these questions before the Tribunal itself, particularly when the infirmity in the Award already adverted to, vitiates it altogether.

8. Before remitting the reference for a fresh adjudication under Section 10-A *ibid.*, we feel it necessary to state that the following contentions urged by the Management in challenging the validity of the Award, namely—

(1) The existence of an industrial dispute i.e., a dispute between the employers and their workmen, is a pre-requisite of a reference under Section 10-A of the Industrial Disputes Act, 1947, and inasmuch as a dispute between the Union and the Management cannot be so regarded, the proceedings before the Tribunal are vitiated; and

(2) The failure of the State Government to publish the arbitration agreement in the Official Gazette within one month from the date of receipt of its copy, has resulted in a non-compliance of the mandatory requirements of Section 10-A(3) of the Act, and hence the impugned award is vitiated; cannot be accepted, for the reasons we shall presently state.

9. As to the first, the reliance placed on the decision of this Court in *Aulia Bidi Factory, Burhanpur v. Industrial Tribunal, Madhya Pradesh*, 1966 MPLJ 354=(AIR 1967 Madh Pra 44), is wholly inapposite. In that case, the Court was concerned with the validity of a reference

under Section 10(1) of the Industrial Disputes Act, under which the State Government was required to form an opinion that an "industrial dispute", as defined in Section 2(k), existed, or, was apprehended. Now, the formation of an opinion as regards the existence of an "industrial dispute" between the employers and their employees, is a condition precedent to the validity of the reference of such dispute under Section 10(1), as unless there was an "industrial dispute" factually in existence within the meaning of Section 2(k), in respect of which a reference is made, the reference itself would be invalid. That case is hardly an authority for the proposition now sought to be advanced by the learned counsel, for challenging the validity of a reference under Section 10-A, in the present case. The agreement in Form 'C' under Rule 7 was signed on behalf of the workmen by the Secretary, the Cigarettes Salesmen's Union, of which the 8 salesmen are members. The Management knew full well that non-employment of all these 9 salesmen was the "industrial dispute" in question which existed between them and their employees, and having agreed to a reference of such dispute for adjudication in arbitration, they cannot now be heard to say that the dispute referred was not an 'Industrial Dispute' within the meaning of Section 2(k) of the Act, or, that the reference under Section 10-A *ibid.* made by the parties, or, the Award rendered therein were invalid, particularly when they throughout participated in the proceedings before the Tribunal, with full knowledge of the nature of the actual dispute that had been referred, without any objection. Once it is shown that a body of workmen, acting through their union or otherwise, sponsored a workmen's dispute with the management, it becomes an 'industrial dispute' as defined in Section 2(k) *ibid.* See, *Newspapers Ltd. v. State Industrial Tribunal*, AIR 1960 SC 1328; *The Bombay Union of Journalists v. The Hindu, Bombay*, 1961-2 Lab LJ 436=(AIR 1963 SC 318); and *Suman Verma v. Nav-Bharat Karmachari Sangh*, 1967 MP LJ 184=(AIR 1967 Madh Pra 275). According to these decisions, what is essential for converting a dispute in respect of an alleged wrongful termination of employment into an 'industrial dispute' is that before it is referred to the Labour Court or the Tribunal for adjudication, it must be supported by the Union of the employees or by an appreciable number of the employees in the same establishment. That test is clearly satisfied in the present case. The decision in *Aulia Bidi Factory's case*, 1966 MP LJ 354=(AIR 1967 Madh Pra 44) (supra) is not applicable to the circumstances of the present case, being clearly distinguishable on facts.

10. The only other contention is equally untenable. Section 10-A(3) in terms makes it obligatory for the State Government to publish the arbitration agreement in their Official Gazette within one month from the date of its receipt. The Agreement between the Management and the Union, in Form 'C', under Rule 7, was executed by the parties before the Assistant Labour Commissioner, Jabalpur Division on 21st January 1968, who by his D.O. letter dated 23rd January 1968 forwarded it in original, to the Presiding Officer, Labour Court, Jabalpur, for his formal consent so that it could be sent to the Government for publication in the Gazette, as required by Section 10-A(3) of the Act. The Tribunal signified its willingness to take up the dispute in arbitration, by its letter No. 140/68 of even date. Thereafter, the agreement in question was forwarded to the State Government for publication, and it appears that it was actually published in the Official Gazette on 29th March 1968. In the meanwhile, the Tribunal had assumed the reference and completed its proceedings by drawing up an award on 8th March 1968, but did not make and pronounce it until 15th April 1968 for want of a notification under S. 10-A(3) which was still awaited. In the circumstances, it may be that the publication of the agreement in the Official Gazette was actually after the award had been prepared by the Tribunal. The learned counsel appearing for the Management, however, contends that all the requirements of Section 10-A(3) are mandatory. We are unable to accept the contention. Now, that Section reads:

"10-A(3). A copy of the arbitration agreement shall be forwarded to the appropriate Government and the conciliation officer and the appropriate Government shall, within one month from the date of the receipt of such copy, publish the same in the official Gazette."

On a true construction of the section, we are of the view that although the first condition as regards the publication of an agreement in the official Gazette is obligatory, i.e., a sine qua non, the other requirement, namely, of its notification within one month from its receipt, is only directory and not imperative. In our view, the requirements of Section 10-A(3) are partly mandatory and partly directory. The Award is, therefore, not rendered invalid merely by the subsequent notification of the Agreement in the Official Gazette, not on account of the Tribunal having assumed the reference or having written out the Award in anticipation.

11. The result is that the petition partly succeeds and is allowed. The Award of the Presiding Officer, Labour Court, Jabalpur, dated 15th April 1968, is

hereby quashed by a writ of Certiorari, with the direction that he shall now re-adjudicate upon the dispute referred to him under Section 10-A of the Industrial Disputes Act, 1947, in the light of our observations made above. The costs shall abide the event. Hearing fee Rs. 100/-; if certified.

Order accordingly.

AIR 1970 MADHYA PRADESH 23
(V 57 C 6)

FULL BENCH

BISHAMBHAR DAYAL C. J.,
SHIV DAYAL AND A. P. SEN JJ.

Shri Digambar Jain and others, Applicants v. Sub Registrar, Stamps, Indore, Opposite Party.

Misc. Civil Case No. 85 of 1965,
D/- 4-8-1969.

(A) T. P. Act (1882), S. 8 — Interpretation of deeds — Harmonious Construction — Meaning of words — True or literal meaning.

The cardinal rule of construction is that a document must be read as a whole, each clause being read in relation to the other parts of the document, and an attempt should be made to arrive at an interpretation which will harmonise and give effect to the other clauses thereof. It is not legitimate to pick out an expression torn from its context and try to interpret the document as a whole in the light of that expression. Such a forced construction on the document in question cannot but defeat the very object which its executants had in view. (Para 7)

It is the duty of the court to give to the expression its true meaning. It is competent for a court to disregard the literal meaning of the words used in a document and to give to them their real meaning if they are sufficiently flexible to bear that interpretation. (Para 8)

(B) Stamp Duty — Indore Stamp Act (2 of 1907), S. 2(9), Schedule I, Arts. 17 and 47-A — Document merely declaring existence of trust coupled with transfer of its management — Does not fall within definition of term "conveyance" — Stamp duty leviable thereon will be governed by Art. 47-A and not under Art. 17 — (Words and Phrases — "Conveyance").

Where from the recitals in the document it is clear that the executors were only making a declaration of a pre-existing trust coupled with transfer of its management and were not transferring their ownership in any specific trust property nor were they creating a trust by executing the deed in favour of the trustees, such a document, by no stretch

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of reasoning, be treated as a "conveyance" as defined in S. 2(9). The stamp duty leviable thereon will be governed by Art. 47-A of Schedule I to the Act and not under Art. 17 thereof.

(Paras 8, 9, 10)

V. S. Dabir, for Applicants; Kumari Rama Gupta, Govt. Advocate, for Opposite Party.

A. P. SEN J.:— The Chief Controlling Revenue-authority, Madhya Pradesh (hereinafter referred to as 'the Revenue-authority') has stated this case under Section 55(1) of the Indore Stamp Act (No. II of 1907) (hereinafter referred to as 'the Act'), referring the following questions for the opinion of this Court:—

(1) Whether the trust-deed dated 11-9-57, as on record, is to be held to be a 'declaration of trust' of or concerning any property, or a 'conveyance' within the meaning of Section 2(9) of the Act; and

(2) Whether the stamp duty leviable on the document will be governed by Article 47-A of Schedule I to the Act or by Article 17 of the Schedule.

2. The circumstances giving rise to this reference, briefly stated, are these. By a deed executed on 11th September 1957, seven persons, describing themselves as the Panchas managing the affairs of 'Shri Digambar Jain Tera Panthi Mandir of Indore' and its properties, transferred the management thereof to a committee of eleven trustees named in the deed, defining their functions, powers and duties. The deed recited, inter alia, that after the constitution of this committee of management, the entire property of the temple valued at Rs. 1,18,651.00 would no longer be in the supervision and control of the Panchas but the management thereof would stand 'transferred' to the trustees. It was engrossed on a stamp-paper worth Rs. 18.75 Paise and was presented by the trustees before the Sub-Registrar, Indore for registration. According to the Sub-Registrar, the deed amounted to a 'conveyance' and, as such, should have borne stamp worth Rs. 1,462.50 Paise. Therefore, under Section 37 of the Act, he forwarded the deed to the Collector along with his opinion, for an adjudication as to the proper stamp duty payable thereon. The Collector, agreeing with the Sub-Registrar, held the instrument to be deficiently stamped; and, upon his determination that it was chargeable with a duty of Rs. 1,462.50 Paise as a deed of conveyance, directed under Section 39(1)(b) of the Act that the trustees should make good the deficit of Rs. 1,443.75 Paise, and since the matter concerned a trust, a nominal penalty of Rs. 5.00 was imposed. Being aggrieved by the decision of the Collector, the trustees preferred a revision before the Board of Revenue,

Madhya Pradesh, which has been invested with the powers of the Chief Controlling Revenue authority. The members of the Board of Revenue dealing with the revision as the Chief Controlling Revenue-authority for the time being expressed conflicting views on the question. Shri K. Radhakrishnan, President of the Board of Revenue, held that the document was a conveyance as defined in Section 2(9) of the Act and not a mere declaration governed by Article 47-A of Schedule I to the Act. His successor-in-office Shri Y. Bhargava reviewed that decision at the request of the trustees for the purpose of making a reference and found that there were errors apparent on the face of the record. The result was that the revision was re-heard by Shri R. C. Rai Poddar, President, Board of Revenue, who was of the view that the deed in its recitals tends to show that what was intended by the Panchas was not merely to make a declaration of trust but also to transfer their rights of ownership in specific trust property. In other words, the learned President indicated that the document in question effected both a declaration of trust as well as a conveyance of the trust property to the trustees, and, therefore, being an instrument comprising of two distinct transactions, it was governed by Article 47-A of Schedule I to the Act. However, since the matter regarding the proper stamp duty leviable was not free from doubt, he has made this reference.

3. The answer to the questions referred depends on whether the instrument in question was a conveyance within the meaning of Section 2(9) or one making a declaration of trust under Article 47-A of Schedule I to the Act.

4. The recitals in the instrument which are material for answering the questions are these:

“हम उपरोक्त पंचों ने अपने तारीख २६-९-१९५६ के प्रस्तावानुसार निश्चित किया है कि इस संस्था की सब की सब अचल जायदाद और संपत्ति जो कि परिशिष्ट व में और चल संपत्ति (परिभूतियां नगदी-जायदाद, इत्यादि) जो कि परिशिष्ट व में निहित हैं तथा जो कि इस दस्तावेज का एक जो स्वरूप इसके साथ नत्थी है और जिस में कि इस संस्था का अभातक कार्यभार सुचारु रूप से चलाने के फलस्वरूप पंचों का पूर्ण रूप से कानूनी अधिकार था, उसे आज हम धार्मिक भलाई दि० जैन के ज्ञानवृद्धि, सामाजिक, नैतिक, औद्योगिक एवं धार्मिक उत्थान के हेतु प्रचलित विधि विधान के अनुसार उपरोक्त ट्रस्टियों को अपने संपूर्ण अधिकारों एवं दायित्वों के साथ संभालने, सुव्यवस्था करने, रक्षा करने या कार्य सुचारु रूप से चलाने के लिये नौपते हैं।”

इस समय जो अधिकार मालकाना वा वारसाना उपरोक्त पंचों का था वही सब अधिकार मालकाना वा वारसाना आज से ट्रस्टियों का होगा।

वैसे तो यह पहले से ही एक रिलीजस और चैरिटेबल ट्रस्ट है परन्तु कोई लिखित और वैज्ञानिक रूप से ढीढ़के न होने के कारण यह कार्य किया जा रहा है इस ट्रस्ट के कार्यभार को सुचारु रूप से चलाने हेतु हम उपरोक्त पंच इस ट्रस्ट के निम्नलिखित उद्देश्य, नियम, योजना एवं शर्तें बनाते हैं।

इस ट्रस्ट का नाम श्री दिगंबर जैन तेरा पंथी मंदिर ट्रस्ट शंकर बाजार इन्दौर रहेगा।

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जो जायदाद इस दस्तावेज के अनुसार ट्रस्टियों को ट्रस्ट की हैसियत से दी जाती है, उस पर ट्रस्टियों का पूर्ण अधिकार होगा परन्तु साथ ही उनका यह दायित्व है कि जहां तक हो सके वे इस बात का ध्यान अवश्य रखें कि ट्रस्ट के मूल-धन याने चल और अचल संपत्ति में कमी न होने पावे।”

The entire controversy turns on the meaning of the expression “मालकाना व वारसाना” appearing in the deed.

5. Before dealing with the questions referred, it would be convenient to refer to the provisions of Section 2(9) and Articles 17 and 47-A of Schedule I to the Act:

“Section 2(9). In this Act, unless there is something repugnant in the subject or context, ‘conveyance’ includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I”.

“Article 17. Conveyance (as defined by Section 2 (9)), not being a Transfer charged or exempted under No. 45—
where the amount or value of the consideration for such conveyance as set forth therein exceeds Rs. 900/ but does not exceed Rs. 1,000 ... Twelve rupees eight annas;
and for every Rs. 500 or part thereof in excess of Rs. 1,000 ... Six rupees four annas”.

“Article 47-A. Declaration of Trust of or concerning any property when made by any writing not being a will ... The same duty as on a Bond (No. 12) for a sum equal to the amount or value of the property concerned as set forth in the instrument but not exceeding eighteen rupees and twelve annas.”

These provisions are in pari materia with Section 2(10), Article 23 and Article 64-A respectively of the Indian Stamp Act (No. II of 1899), which, with such modifications as felt necessary, seems to have been extended by the Holkar Darbar to the erstwhile Indore State.

6. In stating the case, the Revenue-authority has indicated that in its opinion, the document was one creating a trust which involved transfer of specific property to the trustees, and, therefore, it had to be stamped both as a conveyance as well as a declaration of trust and was chargeable under Articles 17 and 47-A of Schedule I to the Act. It states:

“The recital in the document tends to show that what was intended was not merely the declaration of a trust but also the transfer of rights of ownership and succession (‘अधिकार मालकाना व वारसाना’) of the specified properties from the seven Panchas to the eleven trustees named in the document. The authors of the trust are evidently different persons from the trustees, and the properties given in trust

are also quite specific

..... It will not be altogether unreasonable to hold that the document in question effects a declaration of trust as well as a conveyance to the trustees of the specified trust property, and thus it being an instrument comprising two distinct transactions is governed by both Article 47-A and Article 17 of the Schedule for its taxation. If the temple and the Jain community were the real owners of the property in question they did not at least come in the picture in the transaction that was being made in the document in question. For the purpose of determining the stamp duty leviable on the document we have to go by the facts recited in the document itself and it is not possible to go into other facts which do not appear in the document that is to be taxed.”

It would be noticed that the Revenue-authority arrived at that conclusion having regard to the expression “अधिकार मालकाना व वारसाना” appearing in the instrument.

7. We are unable to agree with the Revenue-authority on the interpretation of the document in question. From the recitals appearing therein, the instrument is one declaring the pre-existence of a trust coupled with transfer of management from one set of trustees to another. The cardinal rule of construction is that a document must be read as a whole, each clause being read in relation to the other parts of the document, and an attempt should be made to arrive at an interpretation which will harmonise and give effect to the other clauses thereof. It is not legitimate to pick out an expression torn from its context and try to interpret the document as a whole in the light of that expression. Such a forced construction on the document in question cannot but defeat the very object which its exponents had in view. In our opinion, the expression 'अधिकार मालकाना व वारसाना' has not been used in its usual sense as signifying rights of ownership in property or heritability of such rights.

8. The document is undoubtedly inartistically drafted. It is, therefore, the duty of the Court to give to the expression its true meaning. It is competent for a Court to disregard the literal meaning of the words used in a document and to give to them their real meaning, if they are sufficiently flexible to bear that interpretation. In our view, the expression (अधिकार मालकाना व वारसाना) must be interpreted, in the context in which it appears, as meaning 'authority, power and control' which the Panchas had over the management of the trust and the properties endowed to the temple. Indeed, the Panchas of Shri Digamber Jain Terapanthi Mandir had no kind of ownership in the endowed properties. They were merely holding the same in trust for the beneficiaries, i.e., the Digamber Jain Terapanthi sect, for the worship of the Tirthankars enshrined in the temple. From the recitals in the document, it appears that the Panchas were only making a declaration of a pre-existing trust and were not transferring their ownership in any specific trust property because they had none. Nor were they creating a trust by executing the deed in favour of the trustees.

9. It, accordingly, follows that the deed in question does not fall within the definition of the term 'conveyance', as defined in Section 2(9) of the Act, because there was no 'transfer' of any property by the Panchas to the trustees as envisaged in that section. What had been transferred was only the management of the trust. On a plain reading of the recitals, no other construction is possible than that the instrument merely declares the existence of trust coupled with the transfer of its management. Such a document can,

by no stretch of reasoning, be treated as a conveyance. Even otherwise, the definition of the term 'conveyance' as contained in the Section excludes such a document from its purview, because, even as a transfer, if any, it is 'otherwise specially provided for' by Schedule I to the Act, viz., by Article 47-A as 'Declaration of Trust' and was, therefore, not liable to be stamped as 'conveyance' under Article 17.

10. In that view, our answer to the first question is that the deed dated 11th September 1957, executed by the Panchas of Shri Digambar Jain Terapanthis was a 'Declaration of Trust' and not a 'Conveyance' within the meaning of Section 2(9) of the Act. The answer to the first question answers the second. The stamp duty leviable thereon will, therefore, be governed by Article 47-A of Schedule I to the Indore Stamp Act, 1907, and not under Article 17 thereof. The trust will be entitled to its costs of these proceedings. Hearing fee Rs. 150.00, if certified.

Reference answered accordingly.

AIR 1970 MADHYA PRADESH 26 (V 57 C 7)

FULL BENCH

P. K. TARE, K. L. PANDEY AND
SURAJBHAN, JJ.

State of Madhya Pradesh, Appellant v. Hukumsingh Ramprasad and others, Respondents.

Criminal Appeal No. 84 of 1965, D/- 29-7-1969, decided by Full Bench on order of reference made by Shiv Dayal and N. M. Golvalkar, JJ., D/- 3-3-1966.

Criminal P.C. (1898), Ss. 345(6), 369, 430, 403— Trial for offences under Ss. 307, 325, 324, 148 and 149 of I.P.C. — Conviction of some accused for offence under S. 323 only — Subsequent acquittal of those accused under S. 345(6), Cr. P. C. by compounding of offence in appeal without notice to State — State appeal against acquittal of those accused of offences under Ss. 307, 148 and 149 and of remaining accused for offences under Ss. 301, 325, 324, 148 and 149 is not barred.

Where the accused was prosecuted for offences under Ss. 307, 325, 324, 148 and 149 of I.P.C. and some of them were convicted for offence under S. 323, an order of their acquittal, in appeal, under S. 345(6) of Criminal P. C. passed on application for leave to compound the offence under S. 323, does not bar a State appeal against their acquittal of offences under Ss. 307, 148 and 149 when such order of acquittal was passed without notice to the State. So also a State appeal

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against an order of acquittal of the remaining co-accused under Ss. 307, 325, 324, 148 and 149 is not barred, subject to the limitations that the judgment in appeal filed by an accused after notice to the State becomes final. Criminal Appeal No. 219 of 1966, D/- 30-10-1968 (SC), Foll. (Paras 1 and 8)

Cases Referred: Chronological Paras

- (1968) Cri. Appeal No. 219 of 1966 D/- 30-10-1968=1969-2 SCWR 133, Nirbhay Singh v. State of Madhya Pradesh 7, 8
- (1963) AIR 1963 Guj 21 (V 50)= 1963 (1) Cri LJ 168, State v. Diwanji Gardharji 6
- (1958) AIR 1958 Punj 233 (V 45)= 1958 Cri LJ 938 (FB), The State v. Mansha Singh 6, 7
- (1955) AIR 1955 SC 633 (V 42)= 1955 Cri LJ 1410, U. J. S. Chopra v. State of Bombay 6
- (1952) AIR 1952 Madh Bha 81 (V 39) =1952 Cri LJ 887 (FB), State v. Kalu 6, 7
- (1932) AIR 1932 Nag 121 (V 19)= 28 Nag LR 233=33 Cri LJ 849 (FB), Mohammadi Gul v. Emperor 6, 7
- (1914) AIR 1914 All 191 (2) (V 1) =15 Cri LJ 64, Sailani v. Emperor 5
- M. L. Chansoria, Dy. Govt. Advocate, for the State; Rajendra Singh, S. C. Dutt and Surendra Singh, as amicus curiae.

TARE, J.:— The following questions have been referred to this Full Bench by a Division Bench of this Court by order, dated 3-3-1966:—

(1) Does an order of acquittal under Section 345(6), Criminal Procedure Code, passed on an application for leave to compound an offence under Section 323, Penal Code of which the accused was convicted by the trial Court, bar a State appeal against his acquittal of the offence under Section 307 of the Penal Code, even when such order under Section 345(6), Criminal Procedure Code, was passed without notice to the State?

(2) Does such an order of acquittal bar a State appeal from his acquittal under Sections 148 and 149, Penal Code?

(3) Does such an order of acquittal bar a State appeal from an order of acquittal of a co-accused under Sections 307, 325, 324, 148 and 149, Penal Code? If so, to what extent?

2. The said questions arose under the following circumstances: In Sessions Trial No. 90 of 1964 of the Court of Additional Sessions Judge, Vidisha, 10 persons in all by name Hukumsingh, Mehtab, Lalsingh, Moharsingh, Halku, Raghuwarprasad, Laxman, Ramnarayan, Balaprasad and Shivcharan were prosecuted for alleged offences under Sections 307, 325, 324, 148 and 149, Indian Penal Code in connection with an incident that took place on-13-10-1963 when the accused

were said to have committed the said offences. The trial Judge acquitted the other 6 accused and found Hukumsingh, Moharsingh, Halku and Mehtab guilty of the offence under Section 323, Indian Penal Code and sentenced them to rigorous imprisonment for 3 months.

3. Hukumsingh and 3 others who had been convicted by the trial Judge filed Criminal Appeal No. 17 of 1965 in the High Court. According to the High Court Rules, that appeal went before a Single Bench. In that appeal, an application was made for composition of the offence under Section 323, I.P.C. and by order, dated 16-2-1965, permission was granted to compound the offence and consequently, those 4 accused were acquitted under Section 345(6), Criminal Procedure Code. In that case although notice had been ordered to be issued to the State, the order in question came to be passed before the interim date fixed by the office for appearance of the other side i.e. 23-2-1965. Thus, the State had no opportunity to put in appearance in that case as the offence had already been allowed to be compounded on 16-2-1965. It is pertinent to note that the application did not bear the signatures of the victims who might have been considered to be complainants, nor it was made on their behalf, nor had anybody signed on their behalf. However, it appears as per the order of the learned Single Judge that complainants had appeared before him.

4. Thereafter on 19-4-1965, the State filed the present appeal i.e. Criminal Appeal No. 84 of 1965 against all the 10 accused claiming that they be convicted under Sections 307, 325, 324 read with Sections 149 and 148, Indian Penal Code. Therefore, on behalf of the accused an objection was raised that the present appeal filed by the State was not tenable as the order, dated 16-2-1965, in Criminal Appeal No. 17 of 1965 filed by 4 accused had become final and the rights of the State to file an appeal was lost.

5. Finality to a judgment of a criminal Court has been conferred by Section 369, Criminal Procedure Code which allows merely accidental slips or clerical errors to be corrected and subject to that power, a judgment in a criminal case cannot be altered by that Court. Similarly, S. 430, Criminal Procedure Code makes the appellate judgment in a criminal case final except in cases covered by Sec. 417, Criminal Procedure Code or Chapter XXXII, Criminal Procedure Code. In some types of cases, Section 403, Criminal Procedure Code, debarring a second trial, may also be relevant. This has been a debatable question in the past on which there was a difference of opinion in some High Courts. In Sailani v. Emperor, AIR 1914 All 191(2), two persons were tried for causing simple hurt to another person

the value to be attached to it is obvious. S. 13(5) refers to admissibility of the report and leaves it to the Court to determine, in the light of the circumstances of the case, what value ought to be attached to it. There is nothing in this provision to indicate that the report would be admissible only if it is obtained in the manner prescribed by the rules made under the Act. (Para 5)

Cases Referred: Chronological Paras

- (1969) AIR 1969 Delhi 198 (V 56)
=1969 Cri LJ 881, Nawal Kishore v. State 7
- (1968) Cri. Appeal No. 29 of 1968, D/- 2-12-1968=1969 Ker LT 50 (SC), K. K. Pookunju v. K. K. Ramakrishna Pillai 7
- (1968) AIR 1968 Bom. 247 (V 55)
=1968 Cri LJ 729, Krishna Rajaram v. M. V. Koranne 7
- (1968) AIR 1968 J. & K. 17 (V 55)
=1968 Cri LJ 162, Jammu Municipality v. Faquir Hussain 7
- (1968) AIR 1968 Mys 196 (V 55)
=1968 Cri LJ 952, Belgaum Borough Municipality v. Shridhar Shanker 7
- (1967) AIR 1967 SC 970 (V 54)=
1967 Cri LJ 939, Municipal Corporation of Delhi v. Ghisa Ram 5
- (1967) 1967 Cri LJ 1723=1967 M.P. LJ 872, State of Madhya Pradesh v. Abbasbhai 1, 9
- (1967) AIR 1967 Mys 33 (V 54)=
1967 Cri LJ 382, Laxman Sitaram v. State of Mysore 7
- (1967) AIR 1967 Raj 237 (V 54)=
1967 Cri LJ 1374, State of Rajasthan v. Kapoor Chand 7
- (1966) AIR 1966 SC 128 (V 53)=
1966 Cri LJ 106, Mangaldas v. State of Maharashtra 5
- (1966) AIR 1966 Ker 70 (V 53)=
1966 Cri LJ 416, Food Inspector, Cannanore Municipality v. P. Kannan 7
- (1966) Cri. Appeal No. 180 of 1966, D/- 25-8-1966 (M.P.), State of Madhya Pradesh v. Shankar Lal 1, 2, 4, 7, 9
- (1966) Cri. Appeal No. 495 of 1964, D/- 3-10-1966 (M.P.), Municipal Council Multai v. Juggan 2
- (1966) AIR 1966 Mys 244 (V 53)=
1966 Cri LJ 1036, Mary Lazrado v. State of Mysore 7
- (1966) AIR 1966 Ori 81 (V 53)=
1966 Cri LJ 562, State v. Uma-charan Ram 7
- (1964) AIR 1964 All 199 (V 51)=
1964 (1) Cri LJ 502, Municipal Board, Faizabad v. Lalchand 7
- (1964) AIR 1964 Guj 136 (V 51)=
1964 (2) Cri LJ 32, State of Gujarat v. Shantaben 4, 7
- (1952) AIR 1952 Nag 83 (V 39)=
1952 Cri LJ 448, The State v. Sonabai 2

(1951) AIR 1951 Nag 191 (V 38)=
1952 Cri LJ 471, Dattappa v. Buldana Municipality 2
M. V. Tamaskar, Dy. Government Advocate, for the State.

PANDEY, J.:— This case comes before us on a reference made by Golwalkar and Bhawe, JJ., for examining the correctness of the view taken by Newasker and Sen, JJ. in State of Madhya Pradesh v. Shankerlal, Cri. Appeal No. 180 of 1966, D/- 25-8-1966 (MP), which was decided along with State of Madhya Pradesh v. Abbasbhai, 1967 MP LJ 872=(1967 Cri LJ 1723). The same question is raised in Ataul Haque v. State of Madhya Pradesh, (Cri. Revn. No. 431 of 1966 (MP)), and Kundanlal v. State of Madhya Pradesh, (Cri. Revn. No. 591 of 1966 (MP)), and, therefore, these two cases also are before us for the same purpose.

2. In the first case, the respondent Chhotekhan was convicted under S. 7 read with Section 16(1)(a)(ii) of the Prevention of Food Adulteration Act, 1954, for selling adulterated milk and was sentenced to rigorous imprisonment for one year and a fine of Rs. 2,000/- or, in default, to like imprisonment for a further term of six months. In appeal, the Sessions Judge acquitted Chhotekhan on the ground that there was no specific evidence to show which preservative had been added to the sample of milk sent to the Public Analyst and what was the quantity so added and, therefore, his report was of no value. In taking that view, the Sessions Judge relied upon Dattappa v. Buldana Municipality, AIR 1951 Nag 191. Against that acquittal, the State filed this appeal, which came up for hearing before Golwalkar and Bhawe JJ. They regarded Dattappa's case, AIR 1951 Nag 191, decided by Mudholker J. (as he then was) as overruled by The State v. Sonabai AIR 1952 Nag 83, and Municipal Council, Multai v. Juggan, Cri. Appeal No. 495 of 1964, D/- 3-10-1966 (MP).

It was, however, argued that there was no specific evidence to show that a specimen of the seal had been sent separately as required by Rule 18 of the Prevention of Food Adulteration Rules, 1955, or that the Public Analyst had compared the seal on the container with the one separately sent to him as required by Rule 7 of those Rules and, therefore, the report of the Public Analyst was not admissible in evidence. For this view, reliance was placed upon Shankerlal's case, Cri. Appeal No. 180 of 1966, D/- 25-8-1966 (MP), mentioned in the opening paragraph. Golwalkar and Bhawe JJ. doubted the correctness of the view taken in that case and made this reference.

3. In the second case, Ataul Haque was convicted under Section 7 read with

Section 16(1)(a)(ii) of the Act for selling adulterated milk and sentenced to rigorous imprisonment for one year and a fine of Rs. 2,000/- or, in default, to a further term of like imprisonment for four months. He has challenged his conviction inter alia on the ground that no evidence was led to show that the provisions of Rules 7 and 18 of the Prevention of Food Adulteration Rules, 1955, were complied with. In the third case too, Kundenal was convicted under Section 7 read with Section 16(1)(a)(i) of the Act for selling adulterated ghee and sentenced to rigorous imprisonment for one year and a fine of Rs. 2,000/- or, in default, to like imprisonment for three months. He too has raised the point that Rules 7 and 18 *ibid* were not complied with.

4. In Shankerlal's case, Cri. Appeal No. 180 of 1966, D/- 25-8-1966 (MP), the Division Bench relied upon *State of Gujarat v. Shantaben*, AIR 1964, Guj 136, and observed:

"It cannot be doubted that the report of the Public Analyst is admissible only under certain circumstances. It is admissible under the Prevention of Food Adulteration Act provided certain formalities are observed. If the formalities are not observed, the reports cannot be made admissible. That shows that the rules are mandatory. If the rules are mandatory, there cannot be a presumption that official acts have been properly performed. The fixing of the seal is no doubt an official act, sending the sample of the seal also is an official act, but the admissibility of the document depends on the performance of the official acts which should be proved by evidence. There is not an iota of evidence in this report. Section 13(5) of the Act says that the report signed by the Public Analyst can be used as evidence of the fact stated therein. It is therefore clear that the public analyst must mention in his report that he received the seal intact and he had compared the seal with the specimen seal that was sent to him by the Food Inspector and they tallied. If that is done, no other proof may be necessary."

5. Section 13(5) of the Act, which provides for use of report of the public analyst as evidence, reads:

"Any document purporting to be a report signed by a Public Analyst, unless it has been superseded under sub-section (3), or any document purporting to be a certificate signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under this Act or under Sections 272 to 276 of the Indian Penal Code (Act XLV of 1860):

Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory shall be

final and conclusive evidence of the facts stated therein."

The distinction between relevancy or admissibility of a piece of evidence and the value to be attached to it is obvious and need not be elaborated. It is plain enough that sub-section (5) refers to admissibility of the report and leaves it to the Court to determine, in the light of the circumstances of the case, what value ought to be attached to it. It may be noted that there is nothing in this provision to indicate that the report would be admissible only if it is obtained in the manner prescribed by the rules made under the Act. So, in *Mangaldas v. State of Maharashtra*, AIR 1966 SC 128, their Lordships observed:

"This provision clearly makes the report admissible in evidence. What value is to be attached to such report must necessarily be for the Court of fact which has to consider it. Sub-section (2) of Section 13 gives an opportunity to the accused vendor or the complainant on payment of the prescribed fee to make an application to the Court for sending a sample of the allegedly adulterated commodity taken under S. 11 of the Act to the Director of Central Food Laboratory for a certificate. The certificate issued by the Director would then supersede the report given by the Public Analyst. This certificate is not only made admissible in evidence under sub-section (5) but is given finality to the facts contained therein by the proviso to that sub-section. It is true that the certificate of the Public Analyst is not made conclusive, but this only means that the Court of fact is free to act on the certificate or not, as it thinks fit." (Page 132).

In a subsequent case, *Municipal Corporation of Delhi v. Ghisa Ram*, AIR 1967 SC 970, their Lordships laid down that the report of the Public Analyst does not cease to be good evidence even where a certificate from the Director of the Central Food Laboratory cannot be obtained for any cause and the conviction of the accused is unsustainable on the ground that, by reason of deprivation of the valuable right under Section 13(2) of the Act owing to lapse of time, he is prejudiced in his defence.

6. In this case, we are not required to consider what value should be attached to the report of the Public Analyst where it is established by evidence that a specimen of the seal had not been sent separately to the Public Analyst or he did not also compare the seal on the container with the other seal. In this situation, the Court may conclude that it was not established that the sample seized was examined by the Public Analyst. The limited question before us is whether there is, in view of illustration (e) under Section 114 of the Evidence Act, a rebut-

table presumption that official acts like sending a specimen seal separately and the comparison of the seal on the container with that seal so sent were properly performed.

7. In Shankerlal's case, Cri. Appeal No. 180 of 1966, D/- 25-8-1966 (MP) (supra), it was observed that, since the rules were mandatory, there could be no presumption that the procedure as therein prescribed, being official acts, were properly followed. For that view, reliance was placed upon the observations of the Gujarat High Court in Shantaben's case, AIR 1964 Guj 136 (supra). There is, however, nothing in the judgment of Raju J. delivered in the Gujarat case to indicate that he considered the applicability of Section 114 of the Evidence Act and illustration (e) thereunder to the acts of the Food Inspector and the Public Analyst. That aspect of the question was not considered in *Mary Lazarado v. State of Mysore*, AIR 1966 Mys 244; *State of Rajasthan v. Kapoor Chand*, AIR 1967 Raj 237, and *Belgaum Borough Municipality v. Shridhar Shanker*, AIR 1968 Mys 196, also, although the view taken in the Gujarat case was adopted. A contrary view was, however, taken in *Municipal Board, Faizabad v. Lal Chand*, AIR 1964 All 199; *State v. Uma Charan Ram*, AIR 1966 Ori 81; *Laxman Sitaram v. State of Mysore*, AIR 1967 Mys 33, and *Nawal Kishore v. State*, AIR 1969 Delhi 198, without referring to the presumption under Section 114 of the Evidence Act and also in *Food Inspector, Cannanore Municipality v. P. Kannan*, AIR 1966 Ker 70; *Jammu Municipality v. Faquir Hussain*, AIR 1968 J. & K. 17, and *Krishna Rajaram v. M. V. Koranne*, AIR 1968 Bom. 247, on the basis of the presumption under the section. In many of these cases, the Gujarat case was specifically distinguished or dissented from. The contrary view taken in these cases is supported by the following observations of the Supreme Court in *K. K. Pookunju v. K. K. Ramakrishna Pillai*, Cri. Appeal No. 29 of 1968, D/- 2-12-1968 (SC):

"The only point of any substance which has been pressed before us by the learned counsel for the appellants is that the Rules framed under the Act had not been complied with inasmuch as it has not been proved that the specimen impression of the seal used had been sent to the Public Analyst. Rule 18 of the Prevention of Food Adulteration Rules, 1955, provides that a copy of the memorandum and a specimen impression of the seal used to seal the packet shall be sent to the Public Analyst separately by post. The High Court was not at all impressed with the contention based on Rule 18. It relied on the report of the Public Analyst Exh. P-9 which was in

Form III as prescribed by the Rules in which it was stated, inter alia, that the Public Analyst had received from the Food Inspector a sample of compounded miskey asafetida marked No. C. 2/65 for analysis, properly sealed and packed and that he had found the seal intact and unbroken. The contention which was pressed and which has been reiterated before us is that it is nowhere stated in Exh. P/9 that the Public Analyst had compared the specimen impression of the seal with the seal on the packet of the sample. The High Court relied on the principle that official acts must be presumed to have been regularly performed. Under Rule 7, the Public Analyst has to compare the seal on the container and the outer cover with the specimen impression received separately on receipt of the packet containing the sample for the analysis. The High Court considered that it must be presumed that the Public Analyst acted in accordance with the Rules and he must have compared the specimen impression received by him with the seal of the container.

We do not find any error in the decision of the High Court on the above point."

8. The principle embodied in illustration (e) under Section 114 of the Evidence Act is that when any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that the formal requisites for its validity have been complied with. As we have indicated elsewhere, if the Statute itself had provided that certain regulations and formalities must be complied with before the report of the Public Analyst could be admitted in evidence, the position would have been different, for, in that case, it would be necessary to specifically establish that those regulations and formalities were duly observed. In the absence of such a provision, what purports to be report signed by a Public Analyst is, without any other proof, admissible in evidence and the presumption arising under Section 114 of the Evidence Act to the regular performance of official acts also applies to it. The accused is not thereby prejudiced. He may rebut the presumption by cross-examining prosecution witnesses or leading other evidence. He has also been given under sub-section (2) of Section 13 of the Act the right to show, if possible, that the report is incorrect. So, in AIR 1967 SC 970 (supra), the Supreme Court observed:

"Obviously the right has been given to the vendor in order that, for his satisfaction and proper defence, he should be able to have the sample kept in his charge analysed by a greater expert whose certificate is to be accepted by Court as conclusive evidence." (Page 972).

9. For all these reasons, we are of opinion that the view taken in Cri. Appeal

No. 180 of 1966, D/- 25-8-1966 (MP) (supra) and 1967 MP LJ 872=(1967 Cri LJ 1723) (supra) is not correct. In our opinion, the presumption under Sec. 114 of the Evidence Act and Illustration (e) thereunder in relation to regular performance of official acts applies to the report of a Public Analyst. It is, however, a rebuttable presumption. That being so, such a report is not inadmissible only because it has not been specifically established by evidence aliunde that the requirements of Rules 7 and 18 of the Prevention of Food Adulteration Rules, 1955, were duly complied with.

Order accordingly.

AIR 1970 MADHYA PRADESH 33
(V 57 C 9)

SPECIAL BENCH

BISHAMBHAR DAYAL C. J.,
SHIV DAYAL AND A. P. SEN, JJ.

Mahajan Dwarka Prasad, Applicant v.
Sub-Registrar, Narsinghpur, Opp. Party.

Misc. Civil Case No. 299 of 1965, D/-
23-7-1969.

Stamp Duty — Stamp Act (1899), S. 2 (15) and S. 2(24) (b) — Division of joint family property by Karta — It is partition and not settlement.

A deed of partition necessarily presupposes that more than one person has a joint share in the property and that joint share is divided between the parties. Where the Karta who is the father exercises the power to divide the joint family property, the document bringing about the division is clearly an instrument of partition within the meaning of S. 2(15) of the Stamp Act, whether all the co-owners have got a share is not relevant. Therefore, such a document is liable to Stamp Duty. The document could be a 'settlement' within the meaning of S. 2(24)(b) if the property belonged to the settler. When the property is of the joint family and not of the settler alone, the document by which such property is divided cannot be described as a 'settlement'. (Paras 4,5)

R. S. Dabir, for Applicant; Ku. Rama Gupta, Govt. Advocate, for Opp. Party.

BISHAMBHAR DAYAL, C. J.:— This is a reference under the Indian Stamp Act, 1899. The questions have been referred to this Court on account of a requisition made by this Court in Miscellaneous Petition No. 331 of 1964. The questions referred are:

(1) Whether the Batwaranama dated 3rd September 1959 is a document on which a stamp duty is leviable under the provisions of the Indian Stamp Act, 1899?

(2) If so, whether the document is an instrument of partition within the meaning of Section 2(15) of the Act, or an instrument of non-testamentary settlement within the meaning of Section 2(24)(b) of the Act?

2. The facts which have been stated in the reference giving rise to the dispute are that one Dwarka Prasad executed the document in question, by which he distributed the property between himself and his sons. The sons were minor and were represented by their mother as guardian. No share was given to the mother. In the document, Dwarka Prasad stated that he had the right to partition the property, and because there was no certainty of life he had decided to make the partition. The document is described as a deed of partition. It is in Hindi, and the relevant portion of the document has been quoted in the reference as follows:

“बाबत ऐसी जो कि द्वारकाप्रसाद आत्मज श्री महाजन देवताल जो निवासी सिंहपुर तहसील व जिल्हा नरसिंहपुर जिले में ग्राम चलमेटा नांव ५४ के कास्तकार है व कथित ग्राम में हमारी जमीन के भूमिस्वामी व भूमिधारी स्थित है चूं कि आजकल जिन्दगी का कोई भरोसा नहीं है। इस लिये हम अपनी जमीने स्थित ग्राम चलमेटा का नीचे अनुसार अपने व अपने लड़कों अनिलकुमार व अखिलकुमार वयस्क पालक माता श्रीमती मीराबाई के बीच बटवारा कर देते हैं व जिसके करने का कानूनन हमें अधिकार है।”

3. When the document was presented for registration the Registrar impounded the same and sent it for the opinion of the Collector. The Collector considered it to be a non-testamentary settlement as defined by Section 2(24)(b) of the Act. On a revision before the Board of Revenue the same was upheld and the Board refused to make a reference; but when a writ petition was allowed, the reference has now been made. During this reference, it appears to have been taken for granted that this was a joint Hindu family consisting of Dwarka Prasad, his two minor sons Anilkumar and Akhilkumar, and the wife of Dwarka Prasad and mother of the two sons. The Revenue authorities were of opinion that this partition deed had been executed by Dwarka Prasad alone and this was not the result of a multilateral agreement between the members of the family and therefore it could not be described as a partition, but it must be held to be a disposition of property by Dwarka Prasad and also because mother had not been given a share.

4. Having heard learned counsel for both the parties, we are of opinion that the Revenue authorities were not right in taking that view of the case. Under the definition of 'instrument of partition' under Section 2(15) of the Stamp Act,

what is necessary is that either the property should actually be divided or there should be an agreement to divide the property. In the present case, the property has actually been divided. Whether all the co-owners have got a share is not relevant. A deed of partition necessarily presupposes that more than one person have a joint share in the property and that joint share is divided between the parties. In the present case, there is no dispute that the property was divided by Dwarka Prasad, as he states in the document, in the exercise of his right to divide the property. This indicates that this was joint family property and Dwarka Prasad being the Karta of the family exercised that right to divide it. When the Karta who is the father exercises the power to divide the property, such a division is binding upon the sons. We are therefore satisfied that this document is clearly an instrument of partition within the meaning given to it by the Stamp Act.

5. The document could be a 'settlement' within the meaning of Section 2 (24)(b) if the property had belonged to the settler. The relevant sub-section is as follows:

"Settlement" means any non-testamentary disposition, in writing, of movable or immovable property made—

(b) for the purpose of distributing property of the settler among his family..... The property therefore must be "of the settler". If the property is of the joint family and not of the settler alone, the document by which such property is divided cannot be described as a 'settlement'.

6. There is no allegation before us that this document is not chargeable to any duty. Our answer to the questions referred to us therefore is:

(1) The document is liable to stamp duty under the Indian Stamp Act, 1899.

(2) The document is an instrument of partition within the meaning of S. 2(15) of the said Act.

7. These answers shall be sent to the Board of Revenue.

Reference answered accordingly.

AIR 1970 MADHYA PRADESH 34 (V 57 C 10)

SHIV DAYAL AND S. M. N. RAINA, JJ.
Laxmi Chand Gangaram, Plaintiff, Appellant v. Brijbhushandas and others, Defendants, Respondents.

First Appeal No. 23 of 1965, D/- 27-11-1968, from decree of 1st Addl. Dist. J., Gwalior, D/- 11-11-1963.

Civil P. C. (1908) O. 34, R. 11 and S. 107 — Interest pendente lite — Powers of Court — Court has discretion whether to

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allow contractual rate of interest or not — Discretion is to be exercised judicially; — Matters to be considered by Court.

Rule 11 of O. 34 makes a clear distinction between two periods: (i) from the date of the suit upto the date of redemption; and (ii) from the date of redemption to the date of realisation. For the former, the Court may allow interest on the principal amount at the rate payable on the principal, or where no such rate is fixed, at such rate as the Court deems reasonable. For the latter period the question has been left in the discretion of the Court and interest may be allowed on the total amount due. In respect of interest pendente lite it is in the discretion of the Court whether to allow or not the contractual rate of interest: AIR 1940 FC 20, Rel. on. (Para 4)

It is settled law that under Order 34 Rule 11 C.P.C. the Court is not bound to allow contractual rate of interest for the period from the date of the suit to the date fixed for payment in the preliminary decree and the matter is discretionary with the Court. But, the discretion cannot be exercised arbitrarily or capriciously. In exercising its discretion the Court has to bear in mind that it must be exercised judicially as any other discretion. This means that all the circumstances of the case must be present to the mind of the Court. No hard and fast rules can be formulated. Where interest claimed is penal or extortionate or is contrary to the provisions of any law the rate must be reduced. The Court can have regard to the length of litigation, the nature of the loan and other circumstances of the particular case. Where rate of interest is fixed as one of the terms of the mortgage, the discretion must be exercised on sound principles. In the exercise of such discretion the Court should ask itself whether there is any reason for not allowing the contractual rate of interest. If it finds that the rate is penal, excessive, or unconscionable, it would not allow that rate, but would reduce it to a reasonable extent. A variety of circumstances may weigh before the Court when in exercise of its discretion it does not allow interest pendente lite at the contractual rate; even if the rate of interest is not penal or unconscionable or otherwise excessive. If a Judge proceeds on a wrong principle in a matter within his discretion his order may be set aside by an appellate Court. (1876) 3 Ch. D. 380, Rel. on. (Para 6)

Cases Referred: Chronological Paras
(1940) AIR 1940 FC 20 (V 27)=
ILR (1940) Kar 33, Jaigobind Singh v. Lachmi Narain Ram 5
(1927) AIR 1927 PC 1 (V 14)=54
Ind. App. 1, Jagannath Prasad v. Surajmul Jalal 3
(1876) 3 Ch D 380, Watson v. Rodwell 6

A. R. Naoker, for Appellant; J. R. Sharma, for Respondent.

JUDGMENT.— The appellant's suit for sale against the respondents was in respect of mortgaged property on foot of a mortgage dated September 2, 1956, for Rs. 17,000/-, and another mortgage dated July 6, 1947, for Rs. 5,000/-. The agreed rate of interest under the former was 10 annas per cent per month and under the latter 12 annas per cent per month. The suit was instituted on April 19, 1957. The defendants resisted the suit. The trial Court passed a preliminary decree for sale for the entire claim of the plaintiff i.e. principal sum Rs. 22,000/- and interest at the stipulated rates from the date of the execution of the mortgages to the date of the institution of the suit. But from the date of the institution of the suit to the date of preliminary decree it allowed 3% per annum (4 annas per cent per month).

2. In this appeal the plaintiff's grievance is that there was no justification for not allowing interest pendente lite at the contractual rates as it was mandatory under Order 34, Rule 11, C.P.C. Alternatively, it is argued that discretion has been exercised arbitrarily. Under O. 34, Rule 11 of the Code of Civil Procedure a Court may order payment of interest upto the date on which payment of the amount found due or declared under the preliminary decree is to be made by the mortgagor at the rate payable on the principal.

3. The provisions now contained in Order 34, Rule 11 C.P.C. were enacted by the C. P. C. Amendment Act No. 21 of 1929. Earlier, in Jagannath Prosad v. Surajmul Jalal, 54 Ind App 1 = (AIR 1927 PC 1), the suit was to enforce by sale a mortgage bond which provided for interest at 12% per annum with quarterly rests. The Subordinate Judge passed a decree in favour of the plaintiff and allowed interest at 9% per annum until the date of the institution of the suit and 6% per annum from that date until payment. The plaintiffs appealed as to the interest allowed. The High Court allowed the appeal and made a decree for interest at 12% per annum with quarterly rests, as stipulated in the bond, to the date fixed by the decree for payment, and thereafter at 6% per annum. The Privy Council took the view that till the period of redemption has expired, the matter remains in contract and the interest has to be paid at the rate and with the rests specified in the contract of mortgage.

4. After the decision of the Privy Council the present Rule 11 in Order 34 of the Code of Civil Procedure was enacted by Act No. 21 of 1929. This Rule makes a clear distinction between two periods:

(i) from the date of the suit upto the date of redemption; and (ii) from the date of redemption to the date of realisation. For the former, the Court may allow interest on the principal amount at the rate payable on the principal, or where no such rate is fixed, at such rate as the Court deems reasonable. For the latter period the question has been left in the discretion of the Court and interest may be allowed on the total amount due. In respect of interest pendente lite it is in the discretion of the Court whether to allow or not the contractual rate of interest.

5. Sulaiman J. speaking for the Court observed in Jaigobind Singh v. Lachmi Narain Ram, AIR 1940 FC 20, thus:—

"This special provision, which removes any conflict that there might have been between Section 34 and Order 34, Rules 2 and 4, gives a certain amount of discretion to the Court, so far as interest pendente lite and subsequent interest are concerned. It is no longer absolutely obligatory on the Courts to decree interest at the contractual rate upto the date of redemption in all circumstances, if there be no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918."

His Lordship further observed:—

"Of course, whether the Court would or would not give relief in respect of interest in excess of nine per centum simple per annum, and if so to what extent, will depend on the special circumstances of each case."

Their Lordships emphasised that the use of the word 'may' indicates that the Court has a discretion and rejected the contention that the word 'may' should be read as 'shall'. In that case the suit was to enforce simple mortgage debts carrying interest at Re. 1-1-0 per cent per mensem compound every year. In the opinion of the High Court compound interest at Re. 1-1-0 per cent per mensem with yearly rests was quite prudent one. The question arose before the Federal Court whether the Court was bound to allow the contractual rate of interest pendente lite. Their Lordships allowed interest at 12% per annum simple from the date of the institution of the suit to the date fixed for payment in the revised decree to be passed by the High Court. Interest was allowed at 6% per annum after that date on the aggregate amount of principal, interest and costs upto the date of realisation.

6. Thus, it is settled law that under Order 34, Rule 11 C.P.C. the Court is not bound to allow contractual rate of interest for the period from the date of the suit to the date fixed for payment in the preliminary decree and the matter is discretionary with the Court. But, the discretion cannot be exercised arbitrarily or

capriciously. In exercising its discretion the Court has to bear in mind that it must be exercised judicially as any other discretion. This means that all the circumstances of the case must be present to the mind of the Court. No hard and fast rules can be formulated. Where interest claimed is penal or extortionate or is contrary to the provisions of any law the rate must be reduced. The Court can have regard to the length of litigation, the nature of the loan and other circumstances of the particular case. Where rate of interest is fixed as one of the terms of the mortgage, the discretion must be exercised on sound principles. In the exercise of such discretion the Court should ask itself whether there is any reason for not allowing the contractual rate of interest. If it finds that the rate is penal, excessive, or unconscionable, it would not allow that rate, but would reduce it to a reasonable extent. A variety of circumstances may weigh before the Court when in exercise of its discretion it does not allow interest pendente lite at the contractual rate, even if the rate of interest is not penal or unconscionable or otherwise excessive. If a Judge proceeds on a wrong principle in a matter within his discretion his order may be set aside by an appellate Court. [See, *Watson v. Rodwell*, (1876) 3 Ch. D 380].

7. In the present case the suit was instituted as back as on April 19, 1957. The plaintiff has not yet been able to reap the fruits of his decree. Shri Naoker has shown us from the record that the respondent was himself a prior mortgagee, that a decree for redemption was passed and the mortgagor was ordered to pay Rs. 35,152/15/0, that when he deposited the amount in the trial Court in pursuance of the decree for redemption the appellant made an application for attachment of that amount, but by raising all sorts of objection the defendant has not permitted the plaintiff to withdraw that amount. Even during the pendency of this appeal an application was made by the appellant that he should be permitted to withdraw that amount but the respondent opposed it.

8. While the contractual rate was 10 annas and 12 annas per cent per months the trial Court allowed only 4 annas per cent per month with the following observations:—

"In view of the fact that plaintiff Brijbhushandas has no other means of livelihood, except the rents of the houses under mortgages. I allow -4/- per cent p.m. interest on the decretal amount, from the date of the institution of the suit till the realisation of the decretal amount, and proportionate costs." The trial Court is not right when it says that at the time when the mortgage was

executed the maximum rate of interest allowable on the mortgage was only 6% per annum. On September 2, 1946, and July 6, 1947, the Gwalior Interest Act was in force under which the maximum rate of interest allowable on the secured debts was Rs. 12% per annum. That Act was repealed by the Madhya Bharat Interest Act, 1956, which came in force on August 18, 1956.

9. That the defendant is earning rents of houses under the mortgages was a ground to be considered against him rather than as one in his favour. Under the Madhya Pradesh Money Lenders Act, the Usurious Loans Act and the Madhya Bharat Interest Act interest can be charged at the rate of 6% per annum on the secured debts. We are of the opinion that having regard to the circumstances of the case the plaintiff should be allowed interest from the date of the suit to the date of realisation at the rate of Rs. 5% per annum on the principal amount i.e. Rs. 22,000/-.

10. The appeal is partly allowed. The judgment and decree of the trial Court are modified only to this extent that the plaintiff shall get interest on Rs. 22,000/- at Rs. 5% per annum from the date of the institution of the suit till realisation. The rest of the decree of the trial Court is maintained. Parties shall bear their own costs in this appeal.

Order accordingly.

AIR 1970 MADHYA PRADESH 36 (V 57 C 11)

SHIV DAYAL AND S. M. N. RAINA, JJ.

Anna Saheb, Appellant v. Tarabai, Respondent.

First Appeal No. 13 of 1966, D/- 28-11-1968, against judgment and decree of Dist. J., Gwalior in Civil Suit No. 3-A of 1965.

(A) Hindu Marriage Act (1955), S. 10 (1)(b) — Cruelty — Husband's petition for restitution of conjugal rights — Defence of cruelty — Husband, on certain occasions, persuading his wife to accompany him and even pressing her for the same — This conduct on the husband's part giving rise to unpleasantness because wife was unwilling to go with him — Held, such conduct on husband's part was perfectly justified and could, by no stretch of imagination, be treated as cruelty. (Para 9)

(B) Hindu Marriage Act (1955), S. 23 (1)(d) — Delay — In order to disentitle petitioner to relief on ground of delay it has to be shown that delay was both unnecessary and improper — Conduct of parties must be taken into account to

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see if delay was really culpable — Held on facts that there was no unreasonable delay on part of petitioner so as to disentitle him to relief (Paras 11 and 12)

(C) Hindu Marriage Act (1955), S. 9 — Reasonable excuse — Meaning of — Even those excuses which do not strictly fall under S. 9(2) can be considered as reasonable excuses — If husband is not guilty of misconduct, his petition cannot be dismissed merely because wife does not like to stay with him.

A petition for restitution of conjugal rights cannot be dismissed merely on the ground that there was no possibility of the parties ever making a happy home in the absence of any positive evidence to show that the petitioner himself was responsible for creating a situation like that. Under sub-section (1) of S. 9 of the Act, the relief of restitution of conjugal rights can be decreed, if the court is satisfied that the respondent has, without reasonable excuse, withdrawn from the society of the petitioner. The words 'reasonable excuse' have not been defined. Any excuse which falls within the purview of sub-section (2) of S. 9 would certainly be a reasonable excuse, but there may be other excuses which, though they do not strictly fall within the purview of sub-section (2), can still be considered as a reasonable excuse so as to disentitle the petitioner to the relief: AIR 1963 Madh Pra 5, Rel. on. (Para 14)

Thus, if the evidence shows that the petitioner (husband) is guilty of misconduct, which though does not fall within the purview of sub-section (2), is such as to furnish a reasonable excuse to his wife to withdraw herself from his society, the petition may be dismissed, and in this connection the court may examine the conduct of the husband to see if there is any possibility of the parties living together happily. (Para 15)

But if the husband is not guilty of misconduct, the petition cannot be dismissed merely because the wife does not like her husband or does not want to live with him, because he is too poor or is otherwise not fit to be a proper life companion for her. Once a marriage has been solemnised the husband is entitled to the society of his wife and he cannot be denied such society merely because she does not like him, and for reasons of her own does not feel happy with him: AIR 1964 Madh Pra 73, Disting. (Para 17)

(D) Hindu Marriage Act (1955), S. 9 — Husband's petition for restitution of conjugal rights — Defence of maltreatment on part of husband — Burden is on respondent wife to prove it. (Para 6)

Cases Referred: Chronological Paras (1964) AIR 1964 Madh Pra 73 (V 51)

=1963 MP LJ 426, Baburao v.

Mst. Sushila Bai

(1963) AIR 1963 Madh Pra 5 (V 50)

=1962 MP LJ 987, Tulsa v.

Pannalal

14

A. R. Naoker, for Appellant, P. D. Gupta, for Respondent.

S. M. N. RAINA, J.:— This is an appeal by the husband whose petition for restitution of conjugal rights has been dismissed by the District Judge, Gwalior.

2. The petitioner aged about 30 years is a painter by profession. He was married to the respondent on 17-6-49. The parties are Hindus and the marriage was according to the usual Hindu rites. After the marriage the parties lived together in Lashkar.

3. The case of the petitioner-appellant is that on 15-12-1951 the respondent went away and did not return. He served the respondent with a notice on 7-12-1964 calling upon her to come and live with him but she refused to accept the notice. Thus, according to him the respondent has withdrawn herself, from his society without any reasonable excuse. He, therefore, claimed a decree for restitution of conjugal rights.

4. The respondent contested the suit on a number of grounds. She alleged that the marriage was liable to be annulled as she was a minor at the time of her marriage and the consent of her father was obtained by fraud. She further alleged that it was the petitioner, who had deserted her and that he had also treated her with such cruelty as to give rise to an apprehension in her mind that it would not be safe for her to live with him. She also raised certain other pleas with which we are not here concerned and contended that the petitioner was not entitled to a decree for restitution of conjugal rights.

5. The learned trial Judge held that it has not been proved that the marriage was vitiated by fraud, or that the respondent was treated with cruelty. He further held that it was not proved that the petitioner had deserted her. On other points he held in favour of the petitioner. But he dismissed the petition on the ground that it was inordinately delayed and there was no possibility of the parties making a happy home because wife (respondent) was not willing to live with the husband (petitioner) and efforts at conciliation had failed.

6. The learned counsel for the respondent questioned the finding of the trial Judge on the issue relating to cruelty. We have carefully gone through the evidence on this point and we think that the finding is correct. The burden of proving illtreatment was on the respondent. Her version is that she never lived with the petitioner and even the marriage was not consummated. If so there would be no occasion for the appellant to illtreat her. As we shall point out later her con-

tention that she never lived with the appellant does not appear to be correct. But on the basis of her own version no inference of illtreatment can be drawn.

7. The only illtreatment about which she spoke in the witness-box is that the petitioner used to visit her and pressed her to accompany him and this gave rise to quarrels. She also asserted that he used to bring with him goondas and also used to beat her. There can be no doubt that the respondent, who does not appear to have much regard for truth was trying to exaggerate and distort facts in order to give a new colour to the ordinary incidents at which the appellant seems to have persuaded her to accompany him. It is significant that the respondent's father stated that on certain occasions the appellant had attempted to take the respondent with him by physically dragging her. Apparently, his knowledge is based on what he was informed by the respondent, because none of these incidents took place in his presence. But it is significant that he did not allege that the appellant had obtained the assistance of the goondas or assaulted his wife.

8. Yashwantrao (P. W. 2) who is the brother of the respondent says that he once witnessed a quarrel in which the appellant asked the respondent to accompany him and the quarrel took place because she was unwilling. Jaisingh Rao (D. W. 4) no doubt asserted that on one occasion he had seen the petitioner assaulting Tarabai, but he was rightly disbelieved by the trial Judge. He appears to be an over-zealous witness having scant regard for truth. The appellant on his part denied using force against the respondent. It is significant that he was not even cross-examined on this point.

9. Thus, all what we can gather from the evidence on record is that the petitioner on certain occasions persuaded the respondent to accompany him and even pressed her for the same, and this gave rise to unpleasantness because she was unwilling to go with him. Such a conduct on the part of the husband is perfectly justified and can by no stretch of imagination be treated as cruelty. We, therefore, confirm the finding of the trial Judge on this point.

10. The other findings of the trial Judge against the respondent were not questioned before us and it is therefore not necessary to deal with them.

11. The only point that remains for consideration is whether the trial Court was justified in disallowing the petition on the ground of delay and certain other considerations referred to above. It is true that S. 23 of the Hindu Marriage Act lays down that the relief shall not be decreed unless the Court is satisfied that there has not been any unnecessary or improper

delay in instituting the proceedings. But in order to disentitle the petitioner to the relief on this ground it has to be shown that the delay was both unnecessary and improper. For this purpose we must take into account the conduct of the parties to see if the delay was really culpable.

12. In the present case we do not find that there was such unreasonable delay in the presentation of the petition as may disentitle the appellant to claim restitution of conjugal rights. From the evidence on record it is clear that Mst. Chhotibai (since dead) was the adoptive mother of the appellant and it was she, who had brought about this marriage. She died about 4 years before the institution of the suit and according to Parwatrao (D.W. 1), father of respondent Tarabai continued to live with Chhotibai until she died. Now while Tarabai was living with her mother-in-law there could be no question of the petitioner instituting any proceedings for restitution of conjugal rights because he was apparently free to go to his mother and enjoy the society of his wife.

13. The learned counsel for the appellant urged that the date 15-12-1951 in paragraph 3 of the plaint is incorrect and that it should have been 15-12-1961. There is some substance in this contention, but the proper course for the appellant was to have the mistake rectified by a suitable application for amendment. However, in this case we find that even the respondent admitted that she lived with Chhotibai until her death. It further appears from the evidence adduced by the respondent herself that after the death of Chhotibai the appellant made several attempts to bring the respondent with him and this even led to some unpleasantness, because she was reluctant to accompany him. In these circumstances, we find that there was no unreasonable delay on the part of the petitioner in filing this petition.

14. The next point for consideration is whether the extreme reluctance of the respondent and her assertion that she cannot live happily with the appellant should be taken into consideration, and on this ground the appellant should be denied the relief prayed for by him. The learned trial Judge in paragraph 20 of the judgment observed as under:—

"Moreover, as I see it, the wife does not at all like to live with her husband. The efforts to bring about a conciliation have failed. (Order-sheet dated 15-9-65). When she appeared in Court, she again declined to go to her husband. She is too smart for agreeing to live with her poor artist husband. There is, thus, no possibility of their ever making happy home. In these circumstances, a decree for restitution of conjugal rights would not be justified."

We must observe that the approach of the learned Judge was erroneous and apparently based on a misapprehension of law. A petition for restitution of conjugal rights cannot be dismissed merely on the ground that there was no possibility of their ever making a happy home in the absence of any positive evidence to show that the petitioner himself was responsible for creating a situation like this. Under sub-section (1) of Section 9 of the Act, the relief of restitution of conjugal rights can be decreed, if the court is satisfied that the respondent has, without reasonable excuse, withdrawn from the society of the petitioner. The words 'reasonable excuse' have not been defined. Any excuse which falls within the purview of sub-section (2) of Sec. 9 would certainly be a reasonable excuse, but there may be other excuses which though they do not strictly fall within the purview of sub-section (2) can still be considered as a reasonable excuse so as to disentitle the petitioner to the relief [vide *Tulsa v. Pannalal*, AIR 1963 Madh Pra 5].

15. Thus, if the evidence shows that the petitioner (husband) is guilty of misconduct, which though does not fall within the purview of sub-section (2), is such as to furnish a reasonable excuse to his wife to withdraw herself from his society, the petition may be dismissed, and in this connection the court may examine the conduct of the husband to see if there is any possibility of the parties living together happily.

16. In *Baburao v. Mst. Sushila Bai*, AIR 1964 Madh Pra 73, it was observed as under:—

"Even if it were possible to reach a different conclusion with regard to cruelty, we are satisfied that the relations between the parties have come to such a pass that they can no longer live happily together and it is in the interest of the happiness, health and safety of the wife that she is not forced to be in the company or society of the petitioner by a decree of the restitution of conjugal rights."

The aforesaid observations were made with reference to the misconduct of the husband. In that case there was positive evidence to show that the wife used to be habitually beaten by the husband and the latter even neglected to provide her with food. The husband was addicted to drinking. In the aforesaid circumstances it was held that the attitude of the husband amounted to legal cruelty and constituted a ground for refusal of the decree for restitution of conjugal rights. It was further held that even if it was possible to reach a different conclusion with regard to cruelty the relations between the parties had come to such a pass that they could no longer live happily together,

and, therefore, it was in the interest of happiness, health and safety that she should not be forced to be in the company or society of the husband.

17. But if the husband is not guilty of misconduct, a petition cannot be dismissed merely because the wife does not like her husband or does not want to live with him, because he is too poor or is otherwise not fit to be a proper life companion for her. Once a marriage has been solemnised the husband is entitled to the society of his wife and he cannot be denied such society merely because she does not like him, and for reasons of her own does not feel happy with him.

18. Since in this case it has not been proved that the appellant has been guilty of any misconduct and it appears that the respondent has withdrawn herself from the society of the appellant without any reasonable excuse, he is entitled to a decree for restitution.

19. The appeal is, therefore, allowed and the petitioner is hereby granted a decree for restitution of conjugal rights. However, taking into account all the facts and circumstances of this case we hereby direct that the parties shall bear their own costs in both the courts.

Appeal allowed.

AIR 1970 MADHYA PRADESH 39 (V 57 C 12)

P. V. DIXIT, C. J. AND G. P. SINGH, J.

Nanhelal, Petitioner v. Asstt. Registrar, Co-operative Societies, Narsinghpur and others, Respondents.

Misc. Petn. No. 505 of 1966, D/- 6-2-1969.

(A) Co-operative Societies — M.P. Co-operative Societies Act, 1960 (17 of 1961), S. 63(1) — Word 'caused' is used in S. 63(1) in sense of 'causa causans' meaning effective cause — Held, lack of supervision or control over employees on part of petitioner (President of Society) may have facilitated misappropriation or misconduct but it was not real effective cause of loss — Effective cause was misappropriation or misconduct of employees — Similarly, delay on part of petitioner to report to authorities about misappropriation could not be said to be cause of loss to society. (Para 3)

(B) Co-operative Societies — M.P. Co-operative Societies Act, 1960 (17 of 1961), S. 63(1) — Liability under S. 63(1) arises when loss is caused by gross negligence and not merely by ordinary negligence — Gross negligence connotes higher degree of negligence — It is not arising merely from oversight or mistake of

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some culpable default: (1869) L.R. 2 PC 317, Ref. (Para 4)

Cases Referred: Chronological Paras (1869) LR 2 PC 317=38 LJ PC 25.

Giblin v. McMullen

4

M. Adhikari, for Petitioner; Ku. Rama Gupta, Govt. Advocate, for Respondents.

SINGH, J.:— The petitioner was the President of the Tahsil Weaver's Co-operative Society, Narsinghpur. On 10th September, 1962 the Assistant Registrar, Co-operative Societies issued a notice under Section 63(1) of the Madhya Pradesh Co-operative Societies Act, 1960 calling upon the petitioner to show cause why an amount of Rs. 4,493-37 paise be not recovered from him. After the petitioner submitted his reply to the show cause notice, the Assistant Registrar by his order dated 15th June, 1964 held him liable to the extent of Rs. 1,597-01 paise and ordered him to pay the same. The petitioner then went up on appeal to the Board of Revenue, which was dismissed as barred by limitation. The petitioner by this petition under Articles 226 and 227 of the Constitution seeks a writ in the nature of certiorari to quash the order of surcharge made by the Assistant Registrar against him.

2. In the final order, by which the Registrar held the petitioner liable, the findings are that though the loss to the Society was caused by the acts of misappropriation and misconduct committed by the employees of the Society, the petitioner was liable for his negligence in not exercising proper supervision and control over them and in not making a reference to the departmental authorities soon after the misappropriation or misconduct was brought to his notice. It will thus be seen that the petitioner was not surcharged for any act of his, which may have itself resulted in loss to the Society, but for the loss arising from acts of misappropriation and misconduct of the employees of the Society.

3. The order of surcharge is supported by the learned counsel for the respondent under Section 63(1) of the Act on the ground that the petitioner "caused deficiency or loss by gross negligence" within the meaning of these words as they occur in that section. In our opinion, however, when the petitioner himself was not directly responsible for the loss, it cannot be said that he caused any loss to the Society. The word "caused" as it is used in Section 63(1) must be understood in the sense of "causa causans" meaning thereby the real effective cause (see Stroud's Judicial Dictionary p. 423, Vol. I). In the instant case, on the findings, the loss to the Society was caused by the misappropriation or misconduct of its employees. Lack of supervision or control over the employees on the part of the

petitioner may have facilitated misappropriation or misconduct, but it cannot be said that it was the real effective cause of the loss. The effective cause was the acts of misappropriation or misconduct. For the same reason, delay in making the report cannot be said to be the cause of the loss to the Society. On the findings of fact recorded by the Assistant Registrar, it could not have been reasonably inferred that the petitioner was liable for causing any loss to the Society by his negligence and the order against the petitioner cannot be upheld.

4. There is yet another defect in the impugned order. There is no finding that the petitioner was guilty of gross negligence; the finding merely is that the petitioner was guilty of negligence. There is a distinction between negligence and gross negligence, although the exact dividing line is difficult to demarcate. "Gross negligence" connotes higher degree of negligence; it is negligence not arising merely from some want of foresight or mistake of judgment but from some culpable default; see Giblin v. McMullen, (1869) LR 2 PC 317 at p. 337. In Black's Law Dictionary the expression is defined as follows:

"The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness."

The liability under Section 63(1) arises when loss is caused by "gross negligence" and not merely by ordinary negligence. In the absence of a finding that the petitioner was guilty of gross negligence, the order of surcharge cannot be sustained.

5. The petition is allowed. The order of the Assistant Registrar dated 15th June, 1964 in Surcharge Case No. 5 of 1962 in so far as it relates to the petitioner is hereby quashed. There will be no order as to costs of this petition. The amount of security deposit shall be refunded to the petitioner.

Petition allowed.

AIR 1970 MADHYA PRADESH 40
(V 57 C 13)

K. L. PANDEY AND A. P. SEN, JJ.

Indermal Tekaji Mahajan, Appellant v. Ramprasad Gopilal and another, Respondents.

First Appeal No. 150 of 1967, D/- 20-1-1969, from decree of fourth Addl. Dist. J., Indore, D/- 29-9-1967.

(A) Civil P.C. (1908), S. 21 — Held, that, as no prejudice was caused to appel-

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lant by reason of the fact that suit was tried at wrong place, conclusion of trial Court that it had jurisdiction to try suit was not assailable. (Para 6)

(B) Negotiable Instruments Act (1881), S. 118 — Presumption under — Can be rebutted by direct or circumstantial evidence or even presumption of law or fact: AIR 1961 SC 1316, Foll. (Para 7)

(C) Civil P.C. (1908), O. 12, R. 1 — Admission in written statement must be taken as a whole or not at all.

An admission in a written statement may be taken as a whole or not at all. There is, however, some misconception about the mode in which this principle should be used in order to operate against the defendant. The true principle is that if a written statement incorporates an admission of some facts favourable to the plaintiff and a denial of certain other facts favourable to him or an assertion of still other facts which are unfavourable to him, he (plaintiff) must, if he wants to take advantage of the admission, take not only the first set of facts as truly stated but also the second set of facts as so stated. But the principle is limited in application to facts and does not embrace within its ambit any plea of law raised by the defendant on the cumulative effect of the two sets of facts. (1868) 9 Suth W. R. 130 & (1868) 9 Suth W. R. 190 (FB) and AIR 1915 P.C. 2, Foll.

(D) Civil P.C. (1908), O. 7, R. 7—Where alternative case, which plaintiff could have made, but did not make in plaint, is admitted by defendant in written statement, it is permissible to grant to plaintiff relief on that basis: AIR 1951 SC 177, Foll. (Para 13)

(E) Civil P. C. (1908), O. 6, R. 2 — Variance between pleadings and proof — Rule that no amount of evidence can be looked into upon plea that was never made is based mainly on principle that no party should be prejudiced by change in case introduced by this method: AIR 1915 PC 89, Ref. (Para 14)

(F) Contract Act (1872), Ss. 2(d), 25 — Promise to perform existing contract with third person can be good and valid consideration for another contract. Case law discussed. (Paras 16 and 22)

Cases Referred: Chronological Paras
(1963) AIR 1963 Madh Pra 37 (V 50) = 1962 MP LJ 781, Gopal Co. Ltd., Bhopal v. Hazarilal Co., Bhopal 18
(1961) AIR 1961 SC 1316 (V 48) = 1961 Andh LT 601, Kundan Lal v. Custodian Evacuee Property, Bombay 7
(1960) AIR 1960 SC 115 (V 47) = 1960 MP LJ 1, Radha Prasad Singh v. Gajadhar Singh 8
(1951) AIR 1951 SC 120 (V 38) = 1950 SCR 781, Sarju Pershad v. Jwaleshwari 8

(1951) AIR 1951 SC 177 (V 38) = 1951 SCR 277, Firm Shrinivas Ram Kumar v. Mahabir Prasad 14, 15
(1949) AIR 1949 PC 32 (V 36) = ILR (1949) Mad 487, Veeraswami v. Narayya 8
(1945) AIR 1945 PC 35 (V 32) = 1945-1 Mad LJ 136, Virappa v. Periakaruppan 8
(1930) AIR 1930 PC 57 (1) (V 17) = 24 SLR 138, Siddik Mahomed Shah v. Mt. Saran 15
(1929) AIR 1929 PC 202 (V 16) = ILR 7 Rang 498, Netherlands-che Handel v. Chettiar Firm, R.M.P. 8
(1915) AIR 1915 PC 2 (V 2) = ILR 39 Bom 399, Motabhoy Mulla Esabhoy v. Mulji Haridas 13
(1915) AIR 1915 PC 89 (V 2) = 30 Mad LJ 444, Haji Umar v. Gustadji Muncherji Cooper 15
(1868) 9 Suth WR 130, Sooltan Ali v. Chand Bibee 13
(1868) 9 Suth WR 190 = Beng LR Sup Vol 904 (FB), Poolin Beharee v. R. Watson and Co. 13
(1866-67) 11 Moo Ind App 7 = 6 Suth WR 57 (PC), Eshanchunder Singh v. Shamachurn Bhutto 15
(1861) 158 ER 121 = 30 LJ Ex 225, Scotson v. Pegg 19, 21
(1860) 142 ER 62 = 9 CB NS 159, Shadwell v. Shadwell 19, 21
S. D. Sanghi, A. P. Tare, M. L. Jain and C. M. Kirtane, for Appellant; H. K. Maheshwari (for No. 1) and H. N. Vijaywargiva (for No. 2), for Respondents.

PANDEY, J.:— This appeal by the defendant 1 is directed against a money decree for Rs. 30,000/- together with interest and costs grounded upon a promissory note dated 10th September, 1962, which he had executed for that sum in favour of the defendant 2, who subsequently endorsed it in favour of the plaintiff.

2. The material facts which are not in controversy may be shortly stated. At Ujjain, the defendant 1, Indermal, had executed in favour of the defendant 2, Mohammad Hussain, the promissory note Ex. P. 1 dated 10th September, 1962 for an apparent consideration of Rs. 30,000/- repayable on demand and carrying interest at 6% per annum. On the back of that document, there is an endorsement in favour of the plaintiff, Ramprasad, which purports to have been made at Mhow in Indore Civil District within the jurisdiction of the lower Court. Upon demand having been made by the plaintiff for the amount due on the promissory note, the defendant 1 did not make any payment.

3. Ramprasad (Plaintiff) averred that the promissory note was executed for a cash consideration of Rs. 30,000/-, that it was endorsed in his favour at Mhow for consideration and that, being thus the

holder in due course, he is entitled to recover the amount due thereon. While the promisee Mohammad Hussain (defendant 2) accepted these averments, the promisor Indermal (defendant 1) resisted the claim on several grounds.

4. The defendant 1 denied that he received any consideration for the promissory note and pleaded that he executed that document in order to persuade the defendant 2 to sign the sale deed of Nazari Ali Mills, Ujjain, so that the sale proceeds thereof might be made available for satisfying the numerous creditors of those Mills. According to the defendant 1, the consideration for execution of the promissory note was thus against public policy and unlawful. Further, the amount due under the promissory note was, by agreement arrived at between the parties, adjusted towards the amount due to the defendant 1 under a decree passed against several persons including the defendant 2, who did not then return the promissory note on the pretext that it was lost. The defendant 1 further denied that the plaintiff was the holder of the promissory note in due course and contested his claim that it was duly negotiated or endorsed in his favour either at Mhow or for consideration.

5. Upon a consideration of the evidence led by the parties, the lower Court held inter alia that the promissory note was negotiated and endorsed at Mhow for a consideration of Rs. 20,000/- and, therefore, the Court at Indore had jurisdiction to try the suit but the plaintiff, being admittedly aware that the amount had already become due and had not been paid in spite of demand, was not a holder in due course. The promissory note itself was, however, found to have been executed by the defendant 1 for Rs. 30,000/- received by him in cash and it was further held that, even the consideration for that document, as pleaded by him in his defence, was valid and good in law.

6. In the memorandum of appeal, the defendant 1 raised ground No. 20 to challenge the lower Court's conclusion that it had jurisdiction to try the suit. His counsel, however, readily conceded before us that he was unable to show that any prejudice was caused by reason of the fact that the suit was tried at a wrong place, Indore, instead of Ujjain. That being so, the conclusion is, having regard to the provisions of Section 21 of the Code of Civil Procedure, not assailable. The further finding that the plaintiff was not a holder in due course was, in view of the evidence on record and the circumstances of the case, not challenged before us. The learned counsel for the defendant 1, however, vigorously attacked the following conclusions:

(i) That the promissory note was executed for a cash consideration of Rs. 30,000/-.

(ii) That even otherwise, it was, in the circumstances pleaded by the defendant 1 himself, supported by good and valid consideration.

(iii) That there was no adjustment or appropriation of the amount due on the promissory note towards payment of a debt owing by the defendant 2 and other persons.

(iv) That endorsement was made for consideration of Rs. 20,000/-.

7. The question whether the promissory note in this case was executed for a cash consideration of Rs. 30,000/- was debated at the bar at some length. In considering this controversy, we must bear in mind the statutory presumption arising under Section 118 of the Negotiable Instruments Act, 1881, and the legal position that the presumption may be rebutted by direct or circumstantial evidence or even presumption of law or fact. So, in *Kundan Lal v. Custodian, Evacuee Property, Bombay*, AIR 1961 SC 1316, Subba Rao J., who spoke for the Court, observed:

"To illustrate how this doctrine works in practice, we may take a suit on a promissory note. Under S. 101 of the Evidence Act, 'whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist'. Therefore, the burden initially rests on the plaintiff who has to prove that the promissory note was executed by the defendant. As soon as the execution of the promissory note is proved, the rule of presumption laid down in S. 118 of the Negotiable Instruments Act helps him to shift the burden to the other side. The burden of proof as a question of law rests, therefore, on the plaintiff, but as soon as the execution is proved, S. 118 of the Negotiable Instruments Act imposes a duty on the Court to raise a presumption in his favour that the said instrument was made for consideration. This presumption shifts the burden of proof in the second sense, that is, the burden of establishing a case shifts to the defendant. The defendant may adduce direct evidence to prove that the promissory note was not supported by consideration, that, if he adduced acceptable evidence, the burden again shifts to the plaintiff and so on. The defendant may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling, the burden may likewise shift again to the plaintiff. He may also rely upon presumptions of fact for instance those mentioned in S. 114 and other sections of the Evidence Act. Under S. 114 of the Evidence Act, 'The Court may presume the existence of any fact

which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case'. Illustration (g) to that section shows that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. A plaintiff who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a particular consideration, should produce the said account books, for he is in possession of the same and the defendant certainly cannot be expected to produce his documents. In these circumstances, if such a relevant evidence is withheld 'by the plaintiff, S. 114 enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff. This presumption, if raised by a court, can under certain circumstances rebut the presumption of law raised under Section 118 of the Negotiable Instruments Act. Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact." (Pages 1318-9)

8. In the course of arguments, we were also reminded that this is a Court of appeal and that we should be slow to interfere with the lower Court's findings of fact. In this connection, the counsel referred to us the oft-cited cases, namely, *Netherlandsche v. Chettiar Firm*, R. M. P., AIR 1929 PC 202, *Virappa v. Periakaruppan*, AIR 1945 PC 35, *Veeraswami v. Narayya*, AIR 1949 PC 32, *Sarju Pershad v. Jwaleshwari*, AIR 1951 SC 120, and *Radha Prasad Singh v. Gajadhar Singh*, 1960 MP LJ 1 = (AIR 1960 SC 115). The way in which the conclusions reached by the first Court on questions of fact should be approached and regarded is well settled and it is not necessary for us to dilate upon considerations which should be borne in mind in any examination of such conclusions in appeal. We consider it sufficient to say that, in this case, the proved circumstances not only shift the onus of proof in regard to payment of Rs. 30,000/- in cash as consideration for the promissory note, but they also contra-indicate and render improbable the conclusion reached on the point by the lower Court.

9. In proof of the circumstances in which Mohammad Hussain came in possession of Rs. 32,000/-, he produced the

undated Ikrarnama Ex. 2D-1. He admitted that it was executed on the same date (the date of the promissory note) by Fazl Hussain, Allahbux, Asgarbhai, Saifuddin and Ismail. The relevant portion of that document reads:

“कारोबार मोहम्मदअली ईसाभाई व नजरअली अला-
वकश पर कर्जा भी बहुत हो गया और सिवाय मिल के
वेचान के दूसरा कोई जरिया रहा नहीं जिससे अदायगी
हो कारोबार के सिलसिले में श्री मोहम्मद हुसेन भाई का
भी जाती रुपया व रुई नजरअली मिल में आया जिसका
मूल्य १२५००० किया गया इसमें से ३२००० रुपया
नगद वकत रजिस्ट्री दिलाया गया है। बाकी ९३०००
रुपया रहता है। नजरअली मिल के खरीदवास के पास
जरिये वय में से रुपया ३८८००० जिसके वावत झगडा
शासन से चल रहा है हम मुकोरान का मत है कि यह
रुपया देना नहीं पड़ेगा इसलिये बहुत कुछ कम हो जायगा।
मिल के बयानामे की रजिस्ट्री होते ही हम मुकोरान या
इन्द्रमल टेकाजी यह दोनों प्रकरण यानी मिल मजदूरो
का सुतालवा व सेल्स टैक्स मतालवे के सम्बंध में कोशिश
कर के झगडो का निकाल करवा देंगे कोई रकम इन
झगडो की तसफिये के बाद शेष रहेगी तो हम मुकोरान
उसमें से रुपया ९३००० सर्व प्रथम मार्फत सेठ इन्द्रमल
टेकाजी के सेठ मोहम्मद हुसेन वल्द नजरअली को देंगे
हमको उजर न होगा।”

These recitals unmistakably indicate that, in that document, Rs. 32,000/- was shown to have been given to Mohammad Hussain out of the proceeds of sale of Nazar Ali Mills. But, in the witness-box, he (Mohammad Hussain 2 D.W. 2) repudiated that suggestion, though he continued to accept that the amount was paid to him at the time of registration of the sale deed in respect of those Mills [Paragraph 27] and also in the office of the registering officer [Paragraph 8]. The recitals of the sale deed Ex. D. 1-12 dated 10th September, 1962, whereby the Nazar Ali Mills were sold, show that no part of the consideration of Rs. 12,75,000/- of that deed was received in cash by any of the vendors of Nazar Ali Mills, who executed Ex. 2D-1. It is true that Inayat Hussain, an executant of Ex. D. 1-12, received a sum of Rs. 65,000/- out of the consideration for that sale deed, but Mohammad Hussain admitted that he did not then receive any amount from Inayat Hussain [Mohammad Hussain 2 D. W. 2, Paragraph 8]. The position, therefore, is that five of the vendors of the Nazar Ali Mills, who had not received any part of the sale price of those Mills, executed Ex. 2D-1 showing that out of that price, a sum of Rs. 32,000/- was paid to Mohammad Hussain. None of these five executants

was examined by him to prove that the amount was, or would be, so paid. Further, when Mohammad Hussain was pointedly questioned on the point, he was obliged to state that either Fazal Hussain or Allabux paid to him the amount, Rs. 32,000/- [Mohammad Hussain 2 D. W. 2, Paragraph 8]. In regard to Ex. 2D-1 itself, which Mohammad Hussain had produced, he made varying, inconsistent statements including the one that he could not say in which year it was executed or indeed anything at all [Mohammad Hussain 2 D. W. 2, Paragraph 27].

Although all these statements indicated a virtual repudiation of that document, its purpose and effect the learned Judge of the lower Court observed in paragraph 14 of his judgment that it showed that Mohammad Hussain had received on the occasion, like Indermal (defendant 1) and Inayat Hussain, a sum of Rs. 1,32,000/- out of the amount due to him from the Nazar Ali Mills and Rs. 93,000/- remained to be paid to him by the Mills. In so doing, the Judge failed to take into account unambiguous admissions made by Mohammad Hussain to the effect that he did not receive the amount out of the sale proceeds of Nazar Ali Mills, that not all the executants of Ex. 2-D-1 paid to him that amount and that either Fazal Hussain or Allabux did so. Even apart from the consideration that neither Fazal Hussain nor Allabux was likely to personally discharge any part of the debt due from the Nazar Ali Mills, there is the fact that these two persons were not examined presumably because they would not have supported Mohammad Hussain either in regard to the payment or their ability to make it. Nay, Jagannath and Nathulal, who attested the promissory note and in whose presence the consideration of Rs. 30,000/- was said to have been paid in cash, were also not examined. It is reasonable to presume that they too would not have supported payment of Rs. 30,000/- in cash consideration for the promissory note.

This is not all. Admittedly, Mohammad Hussain was impecunious for the last 9 years in debts and in no position to lend money. Indeed, even on 10th September, 1962, he needed money [Mohammad Hussain 2 D. W. 2, paragraph 8]. Thus he was not in a position to advance any loan. On the other hand, Indermal was in affluent circumstances and had received on the same day a sum of Rs. 3,25,000/- in payment of the amount due to him from the Nazar Ali Mills. In these circumstances, it was extremely unlikely for him to borrow for investment "as capital for his business" a sum of Rs. 30,000/- on interest terms from Mohammad Hussain. Further, if Mohammad Hussain had advanced the amount in cash on interest

terms, it was improbable that he would have endorsed for a consideration of only Rs. 20,000/- the promissory note on which, on the date of endorsement, a sum of Rs. 34,725/- inclusive of interest was due from an admittedly solvent party. Finally, when Indermal stated in his notice Ex. P. 6 dated 5th June, 1965, that there was no valid consideration for the promissory note, the plaintiff, who claimed in the witness-box to have been duly informed that it was for cash consideration, would not have remained altogether silent about it in his reply Ex. P. 7 dated 17th June, 1965.

10. It may be, as observed by the lower Court, that Manaklal 1 D. W. 2, Shrawanlal 1 D. W. 3, Udham 1 D. W. 4 and Hakimuddin 1 D. W. 7 are not disinterested and their evidence is not dependable otherwise also, but we do not propose to take a different view about their credibility. We consider this question in the light of inherent probabilities and the weight of evidence. In paragraph 15 of the judgment of the lower Court, it has referred to the subsequent conduct of Indermal lest we think that that conduct is not inconsistent with the promissory note being without any cash consideration. In our opinion, the fact that Mohammad Hussain did not receive any part of the consideration of the sale of the Nazar Ali Mills as sought to be shown by Ex. 2D-1 dated 10th September, 1962 and the presumption arising from the fact that he did not examine the person who he claimed gave him Rs. 32,000/- to enable him to advance a loan of Rs. 30,000/- to Indermal rebutted the presumption under Section 118 of the Negotiable Instruments Act, 1881, and shifted the onus of proof.

Further, having regard to the considerations set out in the foregoing paragraph, we are also of opinion that this shifted onus of proving, as alleged, that the consideration for the promissory note was a cash advance of Rs. 30,000/- was not discharged by the prevaricating, suppressive and unsupported evidence of Mohammad Hussain 2 D. W. 2. In short, we conclude, differing from the lower Court, that the consideration for the promissory note was not a cash advance of Rs. 30,000/-. We may, however, add that this conclusion does not affect the claim grounded on the promissory note because, as we would show in the sequel, it was otherwise supported by good and valid consideration.

11. In paragraph 13(5) of his written statement, Indermal (defendant 1) pleaded that there was no consideration for the promissory note or that such consideration, even if regarded as existing technically, was illegal and opposed to

public policy on the following averments. The Nazar Ali Mills, which was owned by Mohammad Hussain and 31 others of one Bohra family, was largely indebted. For recovery of a small sum due to Government, the Mills had been sold by public auction for Rs. 7,00,000/- only. Some disinterested persons intervened and got the sale set aside. Then the owners of the Mills decided to sell it and satisfy the claims of all its creditors. Mohammad Hussain too agreed to that course. Since there were numerous owners, they appointed six among themselves, including Mohammad Hussain, as agents for the purpose. There was a contract with two persons, Gendalal and Parasmal, for sale of the Mills for Rs. 12,50,000/- and a separate contract for sale of another property for Rs. 75,000/-.

Since the Mills were subject to charge for payment of several debts, the creditors too were called. Indermal, who too was a creditor, extended his full co-operation to facilitate the sale. There were two such meetings but, at the time of execution of the sale deed, Mohammad Hussain did not sign it on some pretext or another and thus the contract fell through. However, Mohammad Hussain subsequently agreed to extend full co-operation and also gave an assurance that he would sign the sale deed. Thereafter a new contract was made with Bachhraj Factories (Private) Limited to sell the Mills for Rs. 12,75,000/-. All agreed to it, but, at the time of execution of the sale deed, Mohammad Hussain said that, before signing it, he would, like other executors, take Rs. 60,000/- as commission over and above the agreed price. Then, at the instance of others, Indermal intervened and, by executing the promissory note dated 10th September, 1962 for Rs. 30,000/- in lieu of the commission demanded by Mohammad Hussain, induced him to execute the sale deed.

12. The lower Court framed issues 3 (a) and (b) to cover the plea of want of good and valid consideration for the promissory note. In support of this plea, Indermal stated in the witness-box inter alia that the sale of the Mills to Bachhraj Factories (Private) Limited was arranged through him, that, at the time of execution of the sale deed, Mohammad Hussain declined to sign it saying that he would do so only if Rs. 60,000/- be paid to him and that, in the end, it was settled between him (Indermal) and Mohammad Hussain that the former would pay Rs. 30,000/- to the latter who would then sign the sale deed. Continuing, Indermal stated that it was in pursuance of this agreement that he (Indermal) executed the promissory note without receiving any cash consideration and added that, before the contract for sale was made

with Bachhraj Factories (Private) Limited, Mohammad Hussain had promised not to ask for more money but, at the time of execution of the sale deed, he became obdurate and insisted on getting more money.

13. The learned counsel for Indermal attacked the conclusion of the lower Court that the passing of valid consideration could be spelled out of the plea contained in paragraph 13(5) of his written statement mainly on the ground that it was not permissible to dissect a pleading and to found a conclusion, as was done by the lower Court, only that part of it which was favourable to Mohammad Hussain. The principle no doubt is that admission in a written statement may be taken as a whole or not at all. There is, however, some misconception about the mode in which it should be used in order to operate against the defendant. It is, therefore, necessary to refer to two leading cases bearing on the point. Long ago, Sir Barnes Peacock laid down in *Sooltan Ali v. Chand Bibee*, (1868) 9 Suth WR 130, that a written statement was not a pleading in confession and avoidance whereby a defendant was bound by the confession and compelled to prove the avoidance and that, if used against the defendant, the whole statement must be taken together. Giving an instance of application of the principle, Sir Barnes Peacock devised a hypothetical illustration:

"Suppose a man should be sued for goods sold and delivered and should state and swear to the statement that the goods were bought and delivered to him in a shop by a person whom he did not know and that he paid for them at the time.

If that statement were true, he could not honestly state that he had never bought the goods, and if the statement that he had bought them, was to be taken against him without also taking his statement that he paid for them at the time, the greater injustice might be done, for he would be unable to compel the attendance of the man who sold the goods, inasmuch as he was unknown to him, but if the plaintiff being unable to read one part of the statement as evidence against the defendant without reading in his favour what he said as to payment, the plaintiff would have to cite the man who sold the goods for the purpose of proving his case, and then if the witness should speak the truth, the statement would make out his defence by eliciting from the witness on cross-examination the fact that the defendant had paid for the goods at the time."

This view was repeated by Sir Barnes Peacock in a subsequent Full Bench case in *Poolin Beharee v. R. Watson and Co.* (1868) 9 Suth WR 190 (FB). The same principle was laid down by the Judicial Committee in *Motabhoj Mulla, Essabhoj*,

v. Mulji Haridas, AIR 1915 PC 2. In that case, Lord Dunedin observed:

"It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected, and if it is made subject to a condition, it must either be accepted subject to the condition or not accepted at all. Therefore the admission that the promissory note was to be held as satisfied on 30th January by a new debt on the part of Hyderally, provided that security was found for the whole debt by that date cannot be treated as an admission that in any case the promissory note was to be held as satisfied by 30th January." (Page 4)

It is plain that the principle illustrated above is that, if a written statement incorporates an admission of some facts favourable to the plaintiff and a denial of certain other facts favourable to him or an assertion of still other facts which are unfavourable to him, he (plaintiff) must, if he wants to take advantage of the admission, take not only the first set of facts as truly stated but also the second set of facts as so stated. But the principle is limited in application to facts and does not embrace within its ambit any plea of law raised by the defendant on the cumulative effect of the two sets of facts. We would show in the following paragraphs that the conclusion reached by the lower Court can be supported on this basis.

14. It is now well established that where an alternative case, which the plaintiff could have made, but did not make in the plaint, is admitted by the defendant in his written statement, it is permissible to grant to the plaintiff relief on that basis. So, in *Firm Shrinivas Ram Kumar v. Mahabir Prasad*, AIR 1951 SC 177, Mukherjee J. (as he then was) held:

"The rule undoubtedly is that the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings." (Pages 170-80)

15. In this case, the matter does not rest there. As we indicated earlier, the

facts alleged by Indermal in paragraph 13 (5) of his written statement as constituting want of consideration and the consideration being unlawful or opposed to public policy were put in issue and the burden of proving those facts was rightly placed on Indermal. Examining himself in support of those issues, he disclosed in his evidence that, before the contract was made, Mohammad Hussain had promised not to ask for more money but after the bargain was made through him (Indermal), Mohammad Hussain did so. There is a variation between this evidence and the pleading to the effect that all (presumably including Mohammad Hussain) had agreed to the contract and then Mohammad Hussain turned back and asked for more money. The rule no doubt is that no amount of evidence can be looked into upon a plea that was never made: *Siddik Mahomed Shah v. Mt. Saran*, AIR 1930 PC 57 (1). But that rule is based mainly on the principle that no party should be prejudiced by the change in the case introduced by this method. In *Eshenchunder Singh v. Shamachurn Bhutto*, (1866-67) 11 Moo Ind. App 7 (PC), Lord Westbury, in delivering the judgment of the Board, observed:

"It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove..... They desire to have the rule observed, that the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, shall not be departed from....."

These observations were, however, explained by the Board in *Haji Umar v. Gustadji Muncherji Cooper*, AIR 1915 PC 89. Viscount Haldane, who delivered the judgment of the Judicial Committee, observed that the principle was not to be applied in an abstract way and added:

"In applying such a principle the whole of the circumstances must be taken into account and carefully scrutinised. The question is in ultimate analysis one of circumstances and not of law." (Page 92) We have already noticed in the case of AIR 1951 SC 177 (supra) an example of departure from the rule which was permitted because, in the facts of that case, the question of surprise could not possibly arise and no injustice could possibly result to the defendant. Similar considerations persuade us to take the view that Indermal could not be prejudiced by his own evidence given on the issues he had undertaken to prove, though that evidence is in one respect at variance within his pleading on the point. If, as disclosed by the evidence, Mohammad Hussain had promised, before the contract was made,

that he would not ask for more money, that assurance could not prevent him from exercising his freedom of contract by not accepting the terms of the bargain subsequently settled through Indermal and demanding a larger price for the shares represented by him in the transaction. But we do not propose to rest our decision on this narrow ground. We would show hereafter that the ultimate result is not different even if we consider cumulatively all the facts pleaded in paragraph 13(5) of Indermal's written statement.

16. Shri Sanghi, learned counsel for Indermal, suggested that the contract for sale of Nazar Ali Mills was really a tripartite contract to which the creditors, including Indermal, were parties. We do not find anything in paragraph 13(5) or elsewhere in his written statement to show that the creditors too were parties to the contract which was made with Bachharaj Factories (Private) Limited. The facts as pleaded in paragraph 13(5) taken together do, however, show that all the owners of the Nazar Ali Mills, including Mohammad Hussain, had agreed to the contract for sale of the Mills with that Company but, at the time of execution of the sale deed, Mohammad Hussain insisted on taking a sum of money as commission over and above the agreed price and, in lieu of the commission thus demanded, Indermal agreed to pay Rs. 30,000/- for which he executed the promissory note. In short, therefore, Indermal, a third party, who was looking forward to recovering from the sale price a large sum of money upon completion of the sale, executed the promissory note and thereby induced Mohammad Hussain to perform his part of the executory contract for sale, which he was already bound to perform under the contract with Bachharaj Factories (Private) Limited. The question is whether the promise to perform an existing contract with a third party can be a good and valid consideration for another contract.

17. The definition of consideration in Section 2(d) of the Indian Contract Act comprehensively provides that when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or promises to do or abstains from doing, something, such act or abstinence or promise is called the consideration for the promise. It will be readily seen that, according to this definition, the fresh promise, which Mohammad Hussain gave to Indermal, for fulfilling his part of the executory contract for sale is the consideration for the promissory note. Sir Frederick Pollock and Sir D. F. Mulla in their commentary on the Indian Contract and Specific Relief Act (Eighth Edition, pages 209-10) observe:

"If A is already bound to do a certain thing, not by the general law, but under a contract with Z, it seems plain that neither the performance of it nor a fresh promise thereof without any addition or variation will support a promise by Z, who is already entitled to claim performance. For Z is none the better thereby in point of law, nor A any worse. But what if M, a third person not at present entitled to claim anything, offers a promise to A, in consideration of (a) A's performance of his obligation to Z, or (b) A's promise to M to perform that obligation? These questions have given rise to great difference of learned opinion in England and America. They do not seem to have been considered by Indian Courts. Such English authority as there is favours the opinion that the performance is a good consideration; but the reasons given are not very clear, and seem that both performance and promise must be good consideration in such a case, or neither. It is submitted, however, that on principle this assumption is not tenable. The test is whether there is any legal detriment to A, the supposed promisee. Now A's performance of what he already owes to Z is no detriment to him, as has been pointed out, and indeed the resulting discharge of his liability seems rather to be an advantage; and therefore it is no consideration for a new promise by any one. But A's promise to M to do something though he may have already promised Z to do that same thing, is the undertaking of a new obligation to a new party. There is no reason why it should not be made binding by M's counter-promise, as in any other case of a contract by reciprocal promises, unless the law forbids the same performance to operate in discharge of two distinct contracts. There is no positive authority for any such rule of law, and when we bear in mind that in a contract by reciprocal promises, the promises are the consideration for each other, and not the performance, no such rule appears to be demanded or warranted by principle."

18. In Gopal Co. Ltd., Bhopal v. Hazarilal and Co., Bhopal, 1962 MP LJ 781 = (AIR 1963 Madh Pra 37), a Division Bench of this court had to consider whether the promise to do a thing which the promisee was already bound to do under a contract with a third party could be good consideration to support a contract. The facts of that case were these. The plaintiff had entered into a contract with a textile mill for purchase of some bales of cloth. The defendant, which was the sole selling agent of the mill, signed the contract, as guarantee broker. After taking part delivery of the first consignment, the plaintiff refused to take further delivery of the goods mainly because it would be put to loss owing to fall in the

price. The defendant, which was the guarantee broker as already indicated, induced the plaintiff to take delivery of the remaining part of the first lot by offering to purchase some bales from the plaintiff at the contract price or to pay to him at his option a sum of Rs. 25,000/-. The plaintiff accepted the offer, took delivery of the goods and subsequently brought a suit to recover from the defendant Rs. 25,000/- with interest and, in the alternative, claimed the loss which it had suffered on the bales agreed to be purchased by the defendant. The claim was resisted inter alia on the ground that the agreement to pay Rs. 25,000/- was without consideration and unenforceable because it was nothing more than a gratuitous offer for something which the plaintiff was already bound to do under the contract with the textile mill. The Division Bench rejected that contention and held that there was good consideration to support the contract relating to payment of Rs. 25,000/-. In doing so, the Division Bench referred inter alia to the English law and particularly to the two leading cases on the point.

19. In Halsbury's Laws of England, Simonds Edition, Volume 8, page 117, the law is thus stated:

"The fact, moreover, that the promisee is already under a legal liability to some third person to perform the act does not prevent his promise to perform it at the request of the promisor from constituting a valid consideration."

One of the leading cases mentioned at the foot-note is *Shadwell v. Shadwell*, (1860) 142 ER 62. In that case, an uncle wrote to his nephew, who was already engaged to be married, as follows:—

"I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you 1501 yearly during my life and until your annual income derived from your profession of a Chancery Barrister shall amount to 600 guineas."

The plaintiff married Miss N. He never earned as much as six hundred guineas. The annuity fell into arrears; the uncle died and the plaintiff sued his executors. In regard to the question whether there was consideration for the promise to pay the annuity, the majority of the judges answered in the affirmative. They observed that there was benefit to the promisor because the marriage was an "object of interest with a near relative" and a detriment to the promisee because he may have made the most material changes in his position and have incurred pecuniary liabilities resulting in embarrassment, which would be in every sense a loss if the income which has been promised should be withheld". The other leading

case mentioned at the foot-note is *Scotson v. Pegg*, (1861) 158 ER 121. There Scotson promised to deliver to X, or to his order a cargo of coal then on board a ship. X made an order in favour of Pegg. Subsequently, Pegg made an agreement with Scotson that if the latter delivered the coal to him, he would in return unload and discharge the coal at a fixed rate each day from the date when the ship was ready for discharge. This he failed to do, and when sued by Scotson, pleaded that there was no consideration for the promise because Scotson was already liable to deliver the coal under the contract with X and had, therefore, promised no more than what he was bound to perform in any case. The Court held that there was consideration and Pegg was liable. Wilde B. observed:

"If a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding."

20. Pollock has considered the question whether the promise in such a case is valid consideration in his treatise on Principles of Contract, Tenth Edition, at pages 183 to 187 and concluded:

"What is here mentioned is that a promise made for valuable consideration, and otherwise good as between the parties, is not the less valid because the performance will operate in discharge of an independent liability of the promisor to a third person under an independent contract already existing. This was the opinion of W. H. Leake, a most accurate lawyer, and of Prof. Langdell of Harvard." (Page 186-7)

21. Referring to the two cases, (1860) 142 ER 62 (supra) and (1861) 158 ER 121 (supra), Anson observes:

"But it seems reasonable to hold that they establish that the performance of an existing duty to a third party is a good consideration. Indeed, this is the interpretation which has generally been adopted." (Page 99)

"There is, in fact, very little reason why either the promise or the performance of an existing contractual duty to a third party should not be a good consideration. The promisor gets a benefit for which he bargains, something to which he was not previously entitled and which he would not otherwise have received. Although consideration is sometimes thought of only in the sense of a detriment to the promisee, this overlooks the fact that it may also consist of a benefit conferred on the promisor as the result of a bargain made between them. Further, there are no sound reasons of public policy, as there might be, say, in the case of the performance of an existing duty to the

(1 of 1891), S. 3 (22))—(General Clauses Act (1897), S. 3 (42)).

In a case where the Board took the landed goods into its custody for delivery to the consignee and in respect of which it was charged with negligence, the Claimant argued that the Board was not a 'person' within the meaning of Sec. 110 of the Madras Port Trust Act and could not therefore, claim protection under that provision. Particular emphasis was laid on Sections 41 and 41-A in support of the argument that the Act made a distinction between a person and the Board.

Held, overruling the above plea, that the word 'person' in Section 110 was of sufficient amplitude to include the statutory body, the Board, created under the Act. (Para 17)

Under Section 6, the Board is a body corporate with perpetual succession and a common seal and shall sue and be sued in the name of the Trustees of the Port of Madras. Section 3 (22) of the Madras General Clauses Act, 1891, defines the word 'person' so as to include any company or association of individuals whether incorporated or not. Section 104 of the Madras Port Trust Act clearly contemplates the possibility of the word 'person' including the word 'Board' where the context permits. Judgment in ILR (1961) Mad 877 by Ganapathia Pillai, J. Affirmed. (Para 17)

(D) Madras Port Trust Act (2 of 1905), Ss. 110, 39 and 40 — Suit by insurer as subrogee — Protection under S. 110 can be claimed against — Fact that Board was not obliged to perform the several acts, held, could not affect the position.

In a suit by the Insurer as a subrogee on his rights acquired by subrogation against the Port Trust Board and based upon the liability incurred by the Board by its neglect of duty as a bailee, the Board claimed protection under Sec. 110 of the Madras Port Trust Act, and pleaded that the suit filed after 6 months from the accrual of the cause of the suit (i.e., loss due to damage to goods) was barred under that provision. The insurer argued that the suit by him in that regard could not be considered to be for anything done or purported to have been done in pursuance of the Act and was therefore, out of the purview of Section 110.

Held, that the action being in respect of a matter covered by Section 110, the protection of that section was not taken away by reason of the fact that the suit was not by the owner or consignee of the goods but by the insurer. The liability of the Board for damages was its neglect of duties as a bailee and the insurer's claim in substance was to enforce that liability. The substantial cause for the suit was the same whoever figures as the plaintiff—whether it be the consignee or

the insurer. The juridical basis of the insurer's rights on his paying the assured confirms the above view. (Para 20)

That the insurer claimed by subrogation, might give him only the locus standi to maintain the action. But the liability of the Board was not by virtue of the subrogation. The liability arose by virtue of its having handled the goods of the assured and stacked them negligently pending delivery to the consignee. Clearly its handling and stacking was in performance of functions under Section 39 of the Act. Section 40 specifically provided that the responsibility of the Board for the loss, destruction or deterioration of goods which it had taken charge of would be that of a bailee. (Para 18)

Nor could protection under Section 110 be taken away on the ground that the Board was free to undertake or not the services and the performance of the services on the requirement of the owner could not be construed to be anything done or purported to be done in pursuance of the Act. It was undeniable that it was in pursuance of the powers given under the Act the services were undertaken. The language of Section 110 was of sufficient amplitude to cover even the class of functions for which no duty was cast by Section 39 (1) but only power was given to undertake them. Further, the duty undertaken by the Board or its act which had given rise to the cause of action need not necessarily be an obligatory one. Once the Board assumed functions under the Act whether optional or obligatory, it could call in aid the protection afforded by Section 110. AIR 1965 Mad 133 at pp. 135, 136 & AIR 1966 Cal 190, Foll.; (1941) 1 All ER 66 at pp. 70, 72 and 76 & (1952) AC 452, Rel. on; Judgment in ILR (1961) Mad 877 by Ganapathia Pillai, J. Affirmed. (Paras 19 and 20)

(E) Madras Port Trust Act (2 of 1905), Ss. 110, 111, 39 and 40 — Protection under — Omission to perform statutory duty also covered — (Madras General Clauses Act (1 of 1891), S. 3 (2)).

Breach of statutory duty as well as an omission to perform a statutory duty would both fall under the protection given by the provisions of Section 110. Sections 110 & 111 go together. While Section 110 deals with notice and limitation of suits or other proceedings, Section 111 saves the liability of the Board for acts of default of its employees in certain circumstances. (Para 18)

The services which the Board has to perform and could perform statutorily under the statutory powers and duties cannot be dissociated from its omissions and failures in relation to the goods. Any action which is called for will properly be covered by the words 'anything done or purporting to be done in pursuance of this Act'. Under the Madras General

Clauses Act, words which refer to the acts done extend also to illegal omissions. AIR 1937 PC 306, at p. 310, Foll. Judgment in ILR (1961) Mad 877 by Ganapathia Pillai, J. Affirmed.

(Para 18)

(F) Madras Port Trust Act (2 of 1905), S. 110 — Suit by owner or insurer as subrogee stands on same footing — Time begins to run from date of loss — Plea that in the case of an insurer, it commences from the time he pays the assured overruled. Judgment in ILR (1961) Mad 877 by Ganapathia Pillai, J. Reversed — (Marine Insurance Act (1963), S. 79) — (T. P. Act (1882), Ss. 92, 130-A, 135-A) — (Limitation Act (1908), Art. 120).

The claims against the Port Trust Board in actions falling under Section 110 of the Madras Port Trust Act, whoever figures as the plaintiff, whether it be the assured or the insurer, must be within six months from the accrual of the cause for the claim by the assured against the Board. There can be no fresh start under Section 110, on the insurer getting subrogated to the rights of the assured. The argument that the insurer gets the right to sue only on payment to the assured and hence the date of such payment should be taken as the time when limitation commences cannot be upheld. (Para 26)

The question for consideration is not when the insurer acquired his right to sue. That would be relevant when limitation begins to run from when the right to sue accrued as in Art. 120 of the Limitation Act, 1908. From the language of Section 110 which provides a special period of limitation, the question as to when time begins to run in favour of the person sought to be sued should be found out. Section 110 provides for two things as a pre-condition to suits contemplated thereunder: (1) one month's previous notice in writing of the intended suit and of the cause thereof; and (2) the suit shall not be commenced after six months from the accrual of the cause of such suit. The starting point for limitation is the accrual of the cause of the suit. The expression "such suit" refers to the suit described earlier, that is, the suit for anything done or purported to have been done in pursuance of the Act. It is the cause of that suit that has to be set out in the notice and it is from the accrual of that cause, the period of six months starts running. When there is a special period of limitation and it gives its own starting point, it has got to be applied notwithstanding any inconvenience that may arise from its literal application. (Paras 8 and 21)

Under Section 9 of the Limitation Act, the time which has once begun to run will as a rule continue to do so. No subsequent disability or inability to sue stops it. In view of the position of the subrogee in law and the rights he acquires by

subrogation, it is not correct to say that the subrogee is not affected by any rule of limitation which applies to the other person. (Para 22)

The doctrine of subrogation comes in where one person has a claim against another and a third person is in certain circumstances allowed to have the benefit of the claim and the remedy of enforcing it, although it has not been assigned to him. Section 79 of the Marine Insurance Act, 1963, has taken the place of Sections 130-A and 135-A of the T. P. Act. On the same lines, it provides that an insurer on payment to the assured steps into the shoes of the assured, and acquires all his rights and remedies, "as from the time of the casualty causing the loss."

In regard to the liability of the wrong-doer, that is, the person liable for the loss, on the language of these provisions it is plain that no different cause of action arises in favour of the insurer. Neither the character nor extent nor content of the original liability of the wrong-doer is changed or affected by the subrogation; and the insurer's rights and remedies date from the time of the casualty causing the loss. The principles of subrogation as applied to mortgages under Section 92 of T. P. Act apply. It confers on the insurer no greater rights. Nor does it provide him with further remedies than the assured himself had at the time he was paid off and the insurer got subrogated. Though there can be no subrogation without the assured being paid, the insurer has to establish that it is the negligent act of the party proceeded against that was the proximate cause of the damage to the property of the assured. Therefore, an insurer has no independent cause of action against the wrong-doer and no fresh period of limitation starts for the insurer on his paying the assured. He has no independent claim of his own against the person responsible for the loss and even though he has instituted the suit in his own name, he must be regarded as the assured himself. (Paras 6, 7, 22 to 24 & 26)

Under the Limitation Act plaintiff includes any person from or through whom he derives his title to sue. The particular definition may not apply here, but the insurer who derives his rights standing in the shoes of the assured, unless statute provides to the contrary, cannot claim a different period of limitation. The special law under Section 110 of the Madras Port Trust Act, makes no distinction as to who happens to be the plaintiff. (Para 25)

The reason providing for a shorter period of limitation under Section 110 is that there may be difficulties in public authorities whose officers will be changing or retiring, in preserving and securing evidence if actions are unduly delay-

ed. The protection accorded to the Trustees of the Port Trust having regard to the volume and variety of work they have to handle is not unusual as to warrant liberal construction of S. 110. AIR 1965 Mad 133 at pp. 135, 136 (Obiter) & (1891) 139 US 154 = 35 Law Ed 155 & (1877) 3 AC 279 at p. 293 & AIR 1964 Mad 269 at p. 274 (FB), Foll.; Judgment in ILR (1961) Mad 877 by Ganapathia Pillai, J. Reversed. (Paras 8 & 21)

Cases Referred: Chronological Paras

- (1966) AIR 1966 Cal 190 (V 53) = 69 Cal WN 881, Commr. for the Port of Calcutta v. Kaitan Sons & Co. 19, 20
- (1965) AIR 1965 Mad 133 (V 52) = 1962-2 Mad LJ 29, Madras Port Trust v. A. M. Safiulla and Co. 4, 6, 14, 17, 19, 20, 21
- (1964) AIR 1964 Mad 269 (V 51) = (1964) 1 Mad LJ 161 (FB), Valliamma Champaka v. Sivathanu Pillai 26
- (1960) C. S. Nos. 4, 5, 6 of 1957, D/- 1-4-1960 = ILR (1961) Mad 877, Home Insurance Co. Ltd. v. Trustees of the Port of Madras 9, 11, 12, 13, 17
- (1959) AIR 1959 Mad 555 (V 46) = (1959) 2 Mad LJ 122, Mamundi v. Somasundaram 26
- (1958) 62 Cal WN 539 = ILR (1958) 1 Cal 544, Alliance Assurance v. Union of India 25
- (1952) 1952 AC 452 = 1952-2 All ER 219, Firestone Tyre & Rubber Co. v. Singapore Harbour Board 19 and 20
- (1941) (1941) 1 All ER 66 = 164 LT 386, Griffiths v. Smith 19, 20
- (1937) AIR 1937 PC 306 (V 24) = ILR (1938) 1 Cal 440, Calcutta Port Commr. v. Corporation of Calcutta 18, 19, 20
- (1895) 1895 AC 632 = 72 LT 785, Brabant & Co. v. Thomas Mulhali King 16
- (1891) 139 US 154 = 35 Law Ed 155, St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co. 23
- (1877) 3 AC 279 = 38 LT 1, Simpson & Co. v. Thompson Burrell 25
- V. V. Raghavan and N. Nagarajan, for Appellant; V. Thyagarajan for King and Partridge, for Respondent.

ANANTANARAYANAN C. J.: I have had the advantage of reading the judgment just delivered by my learned brother. I entirely agree with him, not merely on the conclusion that the appeals ought to be allowed, but also on the grounds upon which that conclusion has to be based.

2. It may, hence, appear somewhat superfluous that I should write a separate judgment, however, condensed. But I

am impelled to do so, for an important reason. It is possible to present the central argument that Mr. V. Thyagarajan has sought to put forward, in these appeals, as the horns of a dilemma. Presented in that form, the argument has the merit of great plausibility, at least on the first scrutiny. It is for this reason that I propose to tersely examine the links, in the logical chain of this argument, and to demonstrate that our conclusion follows as the correct one, even conceding the plausibility.

3. The process of reasoning is best expressed, I think, in the following form. Is there a suit known to law by an insurer, as in this case, who has, partially or wholly, reimbursed the assured on a contract of indemnity, or Marine Insurance, in respect of loss or injury to the goods, and who seeks to recover from the wrongdoer, to a proportionate extent, as one who is subrogated to the rights of the party originally damnified? Certainly, such a suit is known to law, and is a well-known instance of the application of the equity doctrine of subrogation to Marine Insurance. It was originally expressed in Sections 130-A and 135-A of the Transfer of Property Act, and this concept is now embodied in Section 79 of the Marine Insurance Act, 1963, which repeals those sections of the Transfer of Property Act. We must here emphasise that, though the content of the claim or action by the subrogee is identical with, and cannot be different from, the rights of the assured, to whom the insurer is subrogated, nevertheless, the insurer can claim to be subrogated, only proportionately to the extent to which he has compensated the assured for loss or damage to the goods. These principles are not in controversy.

4. Next, to follow the argument of Mr. Thyagarajan a little further, what would comprise the bundle of rights known as the cause of suit, or "cause of action" for the subrogee to recover from the wrongdoer damages to the proportionate extent? It is here that the classical definition of Lord Esher becomes significant, that the cause of action is 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court'. Mr. Thyagarajan argues, is it not necessary for the insurer-plaintiff to prove, in an action of that kind, that he paid compensation to the assured to the extent to which he claims relief against the wrongdoer, standing in the shoes of the assured, as he does, upon the equity principle of subrogation? The answer is certainly in the affirmative.

Mr. V. V. Raghavan for the Board of the Port Trust of Madras does not dispute, for example, that if a suit were brought forward by the insurer against the Board, without this vital link being averred and

proved, that would be a fatal bar to the suit. Here Mr. Thyagarajan rightly contends that the depth of the implications of this issue was not measured in Madras Port Trust v. A. M. Safiulla & Co., (1962) 2 Mad LJ 29 at p. 32 = (AIR 1965 Mad 133 at p. 135) when Jagadisan, J., observed in that judgment:

"The fact that the subrogee gets a complete cause of action only after payment to his assignor cannot give an extended period of limitation to the subrogee by computing the period of six months from the date of subrogation. The recognition of a fresh starting point of limitation in favour of the subrogee from the date of subrogation may lead to the anomaly of reviving barred claims". The learned Judge was careful to qualify these opinions, by observing that he was not finally deciding the matter; it was left open and the observations have to be construed as obiter.

5. The real point of Thyagarajan is this; and that inevitably confronts the opposer with the seeming horns of a dilemma. A suit of this character is known to law, and, indeed, it has been explicitly recognised. But such a suit does not lie, until the cause of action for the insurer to sue the third party wrongdoer is perfected or made complete, by payment to the assured by the insurer. That may take place on the last date of the period of six months, from the date when the loss or damage accrued. If that is the date of limitation reckoned from "the accrual of the cause of such suit or other proceeding," occurring in Section 110 of the Madras Port Trust Act (2 of 1905), then it would logically follow that such a suit could not be instituted at all by the insurer; he would be wholly deprived of his equitable remedy as a subrogee. Hence, this construction of Section 110 is itself anomalous, and ought not to be adopted.

The other horn of the dilemma is that if, on the contrary, we hold that the insurer also is bound to bring the suit within six months from the date of occasion of loss or damage, it would be far more reasonable to suppose that Sec. 110 applied only to suits by the person originally damaged, and did not at all include suits by the insurer-subrogee within its scope. Article 120 of the Indian Limitation Act, 1908, the residual article, would apply, and these suits would be perfectly within time.

6. But, on deeper scrutiny, I think that it could be shown that this dilemma does not really exist, and that the view that we have adopted, which is briefly stated, in the obiter observations of Jagadisan, J., in (1962) 2 Mad LJ 29 at p. 32 = (AIR 1965 Mad 133 at p. 135), is the correct one. The

real answer must be, firstly, that such a suit is certainly known to law, but, secondly, that such a suit must nevertheless be filed within the special period of limitation prescribed for all such suits under Section 110 of the Madras Port Trust Act. One ground of justification for this view, has been referred to by my learned brother. The content of the rights of the subrogee cannot differ substantially from the rights of the assured, who was originally damaged by the negligence of the Port Trust authorities. The simple reason is that the insurer steps into the shoes of the assured, by virtue of the doctrine of subrogation as applied to Marine Insurance. He may be subrogated proportionately or wholly, but his right is derivative, and identical with the right of the assured, to recover against the Port Trust for loss or damage. If the Port Trust is not liable to the assured, upon an application of any principle or, on the facts, ipso facto it is not liable to the insurer-subrogee. It is for this reason that, if the Port Trust can rely upon Sec. 110 for a plea of limitation, with regard to any action by the assured, who originally sustained the loss, brought more than six months from the date of the damage or injury, it can equally plead that an action by the subrogee not brought within the same period of limitation, would be barred. It cannot be that the Port Trust is entitled to have the suit by the party that originally sustained the loss, if brought, dismissed upon a ground of law (here, limitation), but that the same argument is not available as against the insurer-subrogee.

7. But it might be conceivably argued, and Mr. Thyagarajan does press this, that on the ground of the very process of reasoning exhibited above, we should hold that Section 110 does not apply to the suit by the insurer-subrogee; it is the residual Art. 120 of the Limitation Act that would apply. Here, I think, the answer is to be sought in the intentment behind Section 110, as a legislative provision designed to secure public authorities, like the Madras Port Trust, from being confronted with claims so belated that it would be unduly onerous for the public authority to defend itself against such claims. My learned brother has attempted to show how the other argument, based on Sections 39 (1) (a) to (d), 39 (2) and 41-A of the Madras Port Trust Act, cannot be considered as valid, when it is sought to be pressed to justify the conclusion that Section 100 will not apply to facts of this kind, because the duties were voluntarily assumed by the Board, or because the language of Section 110 would not include omissions in respect of acts, as contrasted with positive performance. I find myself in entire agreement with his conclusions on that aspect.

8. But, this apart, the true intendment of Section 110 is a protection afforded to the statutory authority, like the Port Trust, even at the risk of some inconvenience or difficulty to a party situated like the insurer-subrogee. This can be illustrated acutely by pointing out the consequence of an opposite view. An accident causing loss or damage may occur, and the settlement of claims as between the assured and the insurer may be protracted; if the insurer-subrogee is to have the period of limitation reckoned only from the date of payment, conceived as an essential part of his 'cause of action', it may be impossible for the Board to defend itself, owing to the obliteration of evidence or knowledge of the facts. The provision is a statutory safeguard, designed in the interests of public bodies like the Port Trust, performing these difficult duties, and undertaking heavy responsibilities as bailees and ware-house-providers. Since all the parties are presumed to know the law, the intention is that insurers, who are parties to a policy of Marine Insurance, which is a contract of indemnity, should be careful to see that, if they desire to sue the Board, as standing in the shoes of the assured, they are able to demonstrate a total right to do so, including payment, in whole or in part, to the assured, within a period of six months from the date of injury or loss, and to file a suit within that period. In this interpretation, the words "from the accrual of the cause of such suit or other proceeding" occurring in Section 110, must be related to the earlier words defining the suit referred to, as a claim against the Board or person "for anything done, or purporting to have been done, in pursuance of this Act". The cause of such suit is, necessarily, the occasion of loss or damage, whether it is the party originally damaged who is suing, or an insurer who has compensated him and who sues as subrogee. It equally follows that this provision is designed to secure for the Port Trust a protection from any such claim under any other provision concerning limitation, such as Art. 120 of the Limitation Act.

9. For these reasons, I agree in the judgment and conclusions of my learned Brother.

10. NATESAN, J.: These appeals from the decision of Ganapathia Pillai, J., in the Original Civil Jurisdiction of this Court which raise common questions of fact and law, are between the same parties and were heard along with another suit, C. S. No. 4 of 1957 (Mad), also between the very same parties. That suit was dismissed as barred by limitation and the suits now under appeal having been decreed, the defendants, the Trustees of the Port Trust of Madras (hereinafter referred to as the Board) have preferred

these appeals. The Home Insurance Company Ltd., a company incorporated in the United States of America, was the plaintiff in the three suits and is the respondent in the appeals before us. We may first set out certain material facts.

11. Messrs. Fimberg and Trading Company, Dallas, Texas, in the United States of America consigned to Messrs. Baijnath Ganghadar and Company Ltd., Bombay, (hereinafter referred to as the assured) 750 bundles of high density American cotton in three consignments, by the steamer "s. s. Queen City", which arrived in Bombay on 31st January, 1952. In due course the goods were transhipped to "s. s. Jalapankshi" for carriage to Madras and the goods arrived at the Madras Port on 27th April, 1952. The three consignments of cotton had been insured with the respondent (hereinafter referred to as the insurer) under three policies of insurance, one a consignment of 500 bales, another a consignment of 200 bales, and the third consignment being 50 bales. The landing of the cotton at the Madras Port commenced on 29th April, 1952, and it was completed on 4th May, 1952. Applications for the clearance and survey of the goods on behalf of the assured were filed in the office of the Board on 12th May, 1952. On the 18th May, 1952, and on the following three days there was heavy rain in Madras as a result of which the goods got drenched and were considerably damaged. Thereupon the assured made claims on the insurer in a sum of Rs. 41,537-4-0 in respect of the consignment of 500 bales, the subject-matter of C. S. No. 4 of 1957, Rupees 13,215-14-0 in respect of the 250 bales in C. S. No. 5 of 1957 (Mad) (the subject of appeal in O. S. A. No. 28 of 1961) and Rs. 3,339-1-0 in respect of the 50 bales in C. S. No. 6 of 1957 (Mad) (the subject of appeal in O. S. A. No. 37 of 1961). The insurer, after satisfying himself that the claims were valid, paid the assured their claims and filed the aforesaid three suits against the Board on the basis that the insurer had become subrogated to the rights of the assured.

12. It was contended for the insurer, that the Board, after duly receiving the goods into its custody on landing, was in the position of bailee of the goods and had been grossly negligent in not properly storing the bales and protecting them from the weather as any prudent owner of the goods would have done in the circumstances. The insurer had paid the assured in respect of the claim relating to C. S. No. 4 of 1957 (Mad) on the 18th September, 1952, the claim in respect of C. S. No. 5 of 1957 (Mad), on 7th November, 1952, and the claim in respect of C. S. No. 6 of 1957 on 31st October, 1952. The suit C. S. No. 6 of 1957 (Mad) was

filed on 29th April, 1953 and C. S. Nos. 4 and 5 of 1957 (Mad) were filed on 4th July 1953, the Court being closed between 4th May 1953 and 3rd July, 1953. The defence by the Board to the action was two-fold: (1) on the merits it was contended that there was no negligence on the part of the Board in taking care of the goods, that the general practice was to stack compressed American cotton in the open, that that practice was followed in the present case, that it was only during the rainy season that the bales used to be covered by tarpaulin, and that the rain on 18th May, 1952, was unusual and non-seasonal. Certain difficulties in the matter of storage of the goods were pleaded. Consignees were charged with delay in clearing their consignments when there was too much congestion in the port due to heavy arrivals of bales of American cotton. (2) It was contended that the claims were barred by limitation. This defence was rested on Section 110 of the Madras Port Trust Act, 1905 (hereinafter referred to as the Act) which provides a special period of six months for action against any person for anything done or purported to have been done in pursuance of the Act from the accrual of the cause of the suit.

13. On the question of negligence, the learned Judge, after a close analysis of the evidence and having regard to the law governing the matter, held that the Board did not take care of the goods in the manner expected of a bailee, and that it continued to be negligent even after the 18th of May when rain had fallen. He has taken the view that the Board cannot be held to have discharged the burden of proof that was laid on it to show that it had taken all the care incumbent upon a bailee. On the question of limitation it was contended for the insurer that if Section 110 of the Act were to apply, anything done or purported to have been done must be under a statutory duty, and that in the present case it was only a voluntary assumption of an obligation which no doubt the Act permitted. It was pointed out that it was only a case of breach of contract by a public authority which had authority to enter into a contract but not under a duty to do so. It was said that under the provisions of the Act no statutory duty was cast upon the Board in respect of the goods imported into the Port either for accepting the goods as a bailee or storing them as warehouse-man. The further plea was that Section 110 of the Act spoke only of an action against any 'person' and the Board was not a 'person' as contemplated in the Act. There was a further ground urged against accepting the applicability of Section 110 to the present case. It was submitted that Section 110 contemplated only action in

respect of things done or purported to be done and not in respect of omissions. It was said that the negligence of duty by a bailee could not be construed to be anything done or purported to have been done in pursuance of the Act. On these contentions it was urged for the insurer that the Board could not avail itself of the protection of S. 110 of the Act.

It was further argued that as the insurer's claim was as subrogee the cause of action for the suits arose only on payment and the suits within six months of the payment would be within time even if they were beyond six months after the damage or negligent act of the Board. There was also a submission that only Art. 120 of the Indian Limitation Act, 1908 applied and not the special period of limitation provided under Section 110 of the Act. The learned Judge, on an examination of the relevant provisions of the Act and the authorities placed before him, rejected the insurer's contention that Section 110 of the Act would not apply to the case. He held that the period of limitation provided in Section 110 would apply. But the learned Judge accepted without much discussion the argument that the cause of action for the suits under Sec. 110 of the Act arose only when the subrogee made the payments. In that view, the learned Judge, while dismissing C. S. No. 4 of 1957 (Mad) as barred by limitation (there is no appeal preferred against that decision) decreed C. S. Nos. 5 and 6 of 1957 (Mad) in favour of the insurer as in time. These two suits had been filed within six months of the payment by the insurer to the assured, the payment being within six months of the occurrence of damage.

14. Before us learned Counsel for the Board questions the tenability of the view of the learned Judge that the cause of action for a subrogee for purposes of limitation is different from the one available to the assured. The reasoning of the learned Judge is that for completing the cause of action for the insurer, besides the damage, there must be payment. The learned Judge observes that none can dispute that the cause of action for a subrogee is not the same as the cause of action for the person to whose rights he has become subrogated, because in addition to the facts which constitute the cause of action for the latter the subrogee must allege and prove payment of money which the Board was bound to pay. The learned Judge states that while the content of the rights claimed by the subrogee, meaning thereby the relief obtainable, is determined by the content of the right to which he gets subrogated, on the question of limitation the subrogee is not affected by any rule of limitation which applied to the assured. It is the

validity of this assumption that is substantially put in issue in these appeals by Mr. V. V. Raghavan, learned Counsel for the Board.

Of course Counsel for the Board would also question the finding of the learned Judge on the question of negligence and learned Counsel for the insurer would maintain the decree with the plea which no doubt has been overruled by the learned Judge, that Section 110 gave no protection to the Board and it could not be availed of by the Board at any rate with reference to the suit claims. We may immediately state that we are in entire agreement with the learned Judge on his finding on the question of negligence and his view as to the applicability in general of Section 110 of the Madras Port Trust Act. The further question arising in the actual application of Section 110, when limitation starts to run against the insurer on subrogation to the rights of the assured is a question of some considerable importance and requires careful consideration. Learned Counsel are agreed before us that except for obiter dicta by a Division Bench of this Court in (1962) 2 Mad LJ 29=(AIR 1965 Mad 133), the matter is *res integra*. It will be convenient in the circumstances to first deal with the contention raised by Counsel on either side on the question on which we are in agreement with the learned trial Judge.

15. First to take up the question of negligence of the Board in respect of the goods, there can be no dispute that the Board took charge of the goods under Section 39 of the Madras Port Trust Act and the responsibility of the Board for the loss, destruction or deterioration of the goods of which it has taken charge under Section 40 of the Act is that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act. The Board as a bailee is bound to take as much care of the goods bailed to it, as a man of ordinary prudence under similar circumstances takes care of his own goods. It is a settled principle of law that in a case governed by the provisions of Sections 151 and 152 of the Indian Contract Act the loss or damage of the goods entrusted to the bailee is *prima facie* evidence of his negligence. The burden of proof is therefore, on the bailee to disprove negligence when damage or loss is established.

In the present case rain occurred first on the night of the 18th May, 1952. Immediately on the 19th May 1952, the agents of the consignor, Messrs Best and Co., wrote a letter, Exhibit P-26 to the Board giving notice of the claim for damages caused to the cotton bales by rain. They pointed out that the bales were stored in the open in the Harbour

premises uncovered by tarpaulin. No doubt rain in summer about the middle of May is not common in Madras. But in the present case the log book maintained by the Board for May, 1952 shows that even on 17th May, the Port Trust received a telegram from the Madras Observatory which led the Port Trust to continue hoisting distant cautionary signal. The signal had been hoisted even on the previous day as a result of then prevailing weather conditions. Showers occurred both on the morning and afternoon of the 19th May also. On the 20th of May the Board received advice from the Madras Meteorological Office to replace the distant cautionary signal by local cautionary signal. It is needless to refer in detail to the weather conditions during the relevant period, on the 18th May, and on the three subsequent days found in the log book. There had been showers and winds with squalls of high velocity. The evidence on record shows that on the 16th of May itself the weather conditions began to show indications of the coming summer storm. Even after the rain on the 18th May and the letter by the consignor's agents, Messrs Best & Co., the Board had not taken steps to prevent further damage to the goods. No attempt was made to requisition and cover the bales of cotton with tarpaulin to avoid further soaking by rain.

16. In this connection reference may be usefully made to the decision of the Privy Council in *Brabant & Co., v. Thomas Mulhali King*, 1895 AC 632 at p. 640. In that case an action was commenced for damages for the loss and destruction of certain cases of dynamite and other explosive goods which had been stored in the Government Storehouse at Brisbane. They had been stored in sheds near the water-edge and the Government was charged with neglect, in that they stored the goods at too low a level, and further they failed to take reasonable and proper measures to save the goods or part thereof on the advent of the floods. Setting the principles, the Privy Council observed:

"Their Lordships can see no reason to doubt that the relation in which the Government stood to the appellant-company was simply that of bailees for hire. They were, therefore, under a legal obligation to exercise the same degree of care towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality: and that obligation included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were

imminent or had actually occurred". In the light of the above principles, on the facts we have no hesitation in agreeing with the learned Judge that the Board did not take care of the goods in the manner expected of a bailee and it continued to be negligent even after the 18th of May when rain had fallen.

17. Next we shall consider the applicability of Section 110 in general to a case of negligence of the Board with reference to the goods landed which the Board has taken into its custody for delivery to the consignee. In our view, not much discussion of the law is called for on this aspect of the case, as the matter in so far as this Court is concerned is concluded by the Division Bench Judgment of this Court in (1962) 2 Mad LJ 29 = (AIR 1965 Mad 133), already referred to. The question directly arose in that case even as it required consideration by the learned trial Judge in this case with reference to C. S. No. 4 of 1957 (Mad). In fact, the Division Bench refers with approval to this part of the judgment now under appeal. Section 110 which provides for notice and limitation of suits or other proceedings runs thus:

"No suit or other proceeding shall be commenced against any person for anything done, or purporting to have been done, in pursuance of this Act without giving to such person one month's previous notice in writing of the intended suit or other proceeding, and, of the cause thereof, nor after six months from the accrual of the cause of such suit or other proceeding".

The application of this section was opposed on two grounds: (1) that the Board was not a 'person' for claiming protection under this section, (2) that the action being by the insurer as a subrogee on his rights acquired by subrogation against the Board and based upon the liability incurred by the Board by its neglect of duty as a bailee, the suit could not be considered to be for anything done or purported to have been done in pursuance of the Act.

Mr. V. Thyagarajan, learned Counsel for the insurer, referred to several sections in the Act where the Board has been referred to and dealt with distinctly as such and sections where the word 'person' has been used which could not refer to the Board at all. Particular emphasis was laid on Sections 41 and 41-A which according to learned Counsel brought out clearly the distinction which the Act has made between a person and the Board. But under Section 6, the Board is a body corporate with perpetual succession and a common seal and shall sue and be sued in the name of the Trustees of the Port of Madras. Section 3 (22) of the Madras General Clauses Act, 1891 defines

the word 'person' so as to include any company or association of individuals whether incorporated or not. Sec. 104 of the Madras Port Trust Act clearly contemplates the possibility of the word 'person' including the word 'Board' where the context permits. There can be no doubt that the word 'person' in Section 110 is of sufficient amplitude to include the statutory body, the Board created under the Madras Port Trust Act.

18. On the second aspect urged in regard to the application of S. 110, to appreciate precisely how the liability arose, we have to look at the charge made against the Board. That the insurer claims by subrogation, may give him only the locus standi to maintain the action. But the liability of the Board is not by virtue of the subrogation. The liability arose by virtue of its having handled the goods of the assured and stacked them negligently pending delivery to the consignee. Clearly its handling and stacking was in performance of functions under Section 39 of the Act. Section 40 specifically provides that the responsibility of the Board for the loss, destruction or deterioration of goods which it has taken charge would be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act. While the Act does not make it obligatory on the part of the Board to undertake the several services contemplated under Section 39, by Section 39 it certainly empowers the Board to provide all reasonable facilities according to its powers for the services mentioned in Cls. (a) to (d) of Section 39 (1). The Board is also empowered to undertake those services. The Board shall under S. 39 (2) if required by the owner, perform in respect of goods all or any of the services mentioned in Cls. (a), (b) and (d) of sub-s. (1) of S. 39. Of course the Board could not be compelled to perform any service which it has relinquished under the provisions of Sec. 41-A. Sub-section (3) of S. 39 provides that the Board shall, if required, take charge of the goods for the purpose of performing the services and shall give a receipt in the prescribed form and to the effect prescribed by the Central Government. Among the services enumerated, Cl. (b) refers to receiving, removing, shifting, transporting, storing, or delivering goods brought within the Board's premises. First, the contention that mere negligence or omission in the performance of a duty undertaken—may be under the powers conferred by the statute—will not be protected by Section 110, does not call for any serious discussion. Sections 110 and 111 go together. While Section 110 deals with notice and limitation of suits or other proceedings, Section 111 saves the liability of the Board for acts of default of its employees in certain circumstances. In our view

breach of statutory duty as well as an omission to perform a statutory duty would both fall under the protection given by the provisions of Section 110. The Board under the Act is to take due care of the goods awaiting delivery to the consignee. Section 40 of the Act imposes the responsibility of a bailee on the Board for the loss, destruction or deterioration of the goods it has taken charge of. It is a responsibility which the Board undertakes pursuant to the Act. The Board's default in delivering the goods is closely connected with what the Board has to do in the matter of receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises. The services which the Board has to perform and could perform statutorily under the statutory powers and duties cannot be dissociated from its omissions and failures in relation to the goods. Any action which is called for will properly be covered by the words 'anything done or purporting to be done in pursuance of this Act'. Under the Madras General Clauses Act, 1891 words which refer to the acts done extend also to illegal omissions.

On this question we have the weighty authority of the Judicial Committee which had to construe the corresponding provision in Section 142 of the Calcutta Port Act, 1890, which runs in these terms:

"No suit shall be brought against any person for anything done or purporting or professing to be done in pursuance of this Act, after the expiration of three months from the day on which the cause of action in such suit shall have arisen". The Judicial Committee observed in *Calcutta Port Commissioner v. Corporation of Calcutta*, ILR (1938) 1 Cal 440 at p. 449 = (AIR 1937 PC 306 at p. 310) thus:

"The respondents argued that the Indian statute fell to be strictly construed, and that while it protects against a claim based on breach of statutory duty, it does not protect against an omission to perform a statutory duty. Their Lordships are unable to accept either argument. The argument is unsupported by authority, or from any other source".

19 & 20. Nor can protection under Section 110 be taken away on the ground that the Board is free to undertake or not the services and the performance of the services on the requirement of the owner cannot be construed to be anything done or purported to be done in pursuance of the Act. May be it is optional for the Board to undertake the services and may be the owner's request has to be there to make it obligatory; but it is undeniable that it is in pursuance of the powers given under the Act the services are undertaken. Section 110 speaks of anything done 'in pursuance' of the Act. The language is of sufficient amplitude to

cover even the class of functions for which no duty is cast by Section 39 (1) but only power is given to undertake them.

In *Griffiths v. Smith*, (1941) 1 All ER 66 at pp. 70, 72 and 76, the question was whether the English Public Authorities Protection Act, 1893, would protect the managers of a non-provided school who were found to be a public authority under the Act, from an action for damages by an invitee to an exhibition in the school, who was injured through the collapse of a floor due to want of repair. Section 1 relied upon ran as follows:

"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution, or intended execution of any Act of Parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provision shall have effect: (a) the action, prosecution, or proceedings shall not lie or be instituted unless it is commenced within 6 months next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof"

Posing for consideration the question whether the neglect or default proved against the managers could be considered to be in the execution of their statutory duty or authority, Viscount Simon, L. C. said that the question must be answered in the affirmative. The Lord Chancellor said:

"The real question is whether the managers, in authorising the issue of invitations to the display on the school premises after school hours, should be regarded as exercising their function of managing the school..... It would be within the discretion of the managers to decide whether they would approve such a display or whether they would not. The point is, however, that they did approve it, and that they did so in the course of carrying on this public elementary school and of exercising the powers of management conferred upon them by the Education Act."

Viscount Maugham in his speech said:

"It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as power to carry on a trade. The words in the section are 'public duty or authority', and the latter word must be taken to have its ordinary meaning of legal power or right and does not imply a positive obligation".

With great appositeness we may refer also to the decision of the Judicial Committee in *Firestone Tyre and Rubber Co.*

v. Singapore Harbour Board, 1952 AC 452, where in an action for damages for short delivery of goods landed in Singapore Harbour by the Singapore Harbour Board which under the Singapore Ports Ordinance was authorised to carry on the business of wharfingers and warehousemen and was carrying on for the benefit of the public within the statutory powers, the applicability of the Public Authorities Protection Ordinance which is similar to the language to the English Public Authorities Protection Act was considered. True the relevant sections in the English Public Authorities Protection Act, 1895 and the Singapore Ports Ordinance specifically contemplate protection even in respect of neglect or default in the execution of any act or public duty or authority. But the relevance of these citations is with reference to their interpretation of the words 'any act done in pursuance or execution, or intended execution', to show that the duty undertaken by the Board or its act which has given rise to the cause of action need not necessarily be an obligatory one. In 1952 AC 452 at p. 468, the Judicial Committee observed:

"The board, having constructed or become possessed of warehouses, which must be regarded as a normal and necessary adjunct to a port such as Singapore, could elect whether to let them out to others for periods less than three years (or with consent of the Governor for longer periods) or themselves to operate them as wharfingers and warehousemen and levy rates for the wharfage or storage of goods therein. Having chosen the latter alternative they did not thereby cease to function as a harbour board and undertake some purely subsidiary activity of a non-public nature. They were supplying facilities essential to the shipping community in one of the ways authorised by the Ordinance by which they were created a harbour board charged with the management and control of the port, and were thus fulfilling one of the main purposes for which they had been given statutory powers."

The Judicial Committee further said:

"Furthermore, as previously stated, the existence or non-existence of a contract is not a decisive test, and on the facts of the present case their Lordships are clearly of opinion that the question of contract is immaterial to their decision since, on any view, the board were exercising their permissive powers to perform a normal function of a harbour board and in so doing were providing a service essential to the shipping and commercial community of Singapore and accordingly, entitled to the protection of the Public Authorities Protection Ordinance." The language of Section 110 of the Madras Port Trust Act which we have to interpret is wider in its scope and quite plain

and emphatic. The protection of the section would be available in respect of anything done or 'purported to have been done' in pursuance of the Act. The Singapore Ordinance even as the English Act did not contain the words 'purported to have been done in pursuance of the Act.' It protected only acts done in pursuance of or execution or intended execution of any Act. Still the Privy Council said that the harbour board has the protection of the Ordinance as they were supplying facilities to the shipping community in one of the ways authorised by the Ordinance, which created the Board, and were fulfilling one of the main purposes to which they had been given statutory powers.

In ILR (1938) 1 Cal 440 at p. 448 = (AIR 1937 PC 306 at p. 309), referring to the words 'purporting or professing to act in pursuance of the statute' in Section 142 of the Calcutta Port Act, the Judicial Committee observed:

"Their Lordships regard these words as of pivotal importance. Their presence in the statute appears to postulate that work which is not done in pursuance of the statute may nevertheless be accorded its protection, if the work professes or purports to be done in pursuance of the statute."

No doubt Section 110 does not contain the word 'professing'. But that, in our view, cannot make any difference to the applicability of the observations of the Judicial Committee. Once, the Board assumes functions under the Act whether optional or obligatory, it can call in aid the protection afforded by Section 110. Apart from the decision of the Division Bench of our own Court in (1962) 2 Mad LJ 29 at pp. 33 and 34 = (AIR 1965 Mad 133 at pp. 135, 136) we have on this question the decision of a Division Bench of Calcutta High Court in Commissioner for the Port of Calcutta v. Kaitan Sons & Co., AIR 1966 Cal 190.

In (1962) 2 Mad LJ 29 at pp. 33 and 34 = (AIR 1965 Mad 133 at pp. 135, 136) also the charge against the Board was improperly stacking goods, without taking sufficient precautions to keep them safe from being drenched in rain, and this Court observed:

"The fulfilment of a statutory duty by the Board is not merely the literal obedience to the letter of the Act but is also the carrying on of things and matters which are incidental to and necessary for the proper and effective discharge of that duty..... We have no difficulty in holding that the defendants received and stacked the goods in the special platform in the Harbour premises purporting to discharge their statutory function in pursuance of the Act".

The fact that the suits now under consideration have been instituted by the

insurer cannot make any difference to the applicability of Section 110. The action being in respect of a matter covered by Section 110, the protection of that section is not taken away by reason of the fact that the suit is not by the owner or consignee of the goods but by the insurer. The liability of the Board for damages is its neglect of duties as a bailee and the insurer's claim in substance is to enforce that liability. The substantial cause for the suit is the same whoever figures as the plaintiff whether it be the consignee or the insurer. The indisputability of this position becomes manifest presently when we discuss the juridical basis of the insurer's rights on his paying the assured.

21. We shall now take up the really substantial point for consideration by us, the question when time begins to run for an action like the present one by the insurer as subrogee. In (1962) 2 Mad LJ 29 at pp. 33 and 34 = (AIR 1965 Mad 133 at p. 135) though obiter, it is stated:

"The subrogee's right is just the same as that of the person whose rights are subrogated. The subrogee steps into the shoes of his assignor and can have no higher rights than his assignor. The cause of action in a case governed by Section 110 gets barred after the lapse of six months subsequent to its accrual. The fact that the subrogee gets a complete cause of action only after payment to his assignor cannot give an extended period of limitation to the subrogee by computing the period of six months from the date of subrogation. The recognition of a fresh starting point of limitation in favour of the subrogee from the date of subrogation may lead to the anomaly of reviving barred claims".

Proceeding it is said:

"It is however, unnecessary to express any opinion on the question whether the subrogee may sustain a claim under Section 110 of the Act though such a claim is unenforceable by his assignor". It has therefore become necessary to examine the matter carefully somewhat at length.

Mr. V. Thyagarajan, learned Counsel appearing for the insurer, stressed that time would not run against a person who cannot act and the subrogee had no right of action till payment. Learned Counsel emphasised that the cause of action for the suit of the subrogee was his settlement with the assured, and that but for satisfaction of the claims of the assured by payments he could not file the suits. Reference was made to Lord Esher's definition of a cause of action as 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court'. But the question for consideration is not when the insurer acquired his right

to sue. That would be relevant when limitation begins to run from when the right to sue accrued as in Art. 120 of the Limitation Act, 1908. We have to consider the language of Section 110 which provides a special period of limitation, and find out therefrom, when time begins to run in favour of the person sought to be sued. Section 110 provides for two things as a precondition to suits contemplated thereunder: (1) one month's previous notice in writing of the intended suit and of the cause thereof; and (2) the suit shall not be commenced after six months from the accrual of the cause of such suit. The starting point for limitation is the accrual of the cause of the suit. The expression "such suit" immediately takes us to the suit described earlier, that is, the suit for anything done or purported to have been done in pursuance of the Act. It is the case of that suit that has to be set out in the notice and it is from the accrual of that cause, the period of six months starts running. When we are on a special period of limitation and it gives its own starting point, we are bound to apply that notwithstanding any inconvenience that may arise from its literal application.

Learned Counsel contends that an insurer may pay an assured his claim on the last day of the six months period since the neglect or damage complained of. It is said that in such a case the insurer would be left without the equitable remedy of reimbursement from the wrong-doer and this cannot be the intendment of the enactment. But there is no ambiguity in the section. The language is clear and the inconvenience suggested is not unsurmountable. Section 110 is modelled on the lines of similar provisions protecting public authorities from delayed actions. A shorter period of limitation in respect of actions against them is provided. In England prior to June, 1954 actions against public authorities were in general subject to a limitation period of one year. Now there is no difference. One may see some reason behind the rule providing a shorter period of limitation; there may be difficulties in public authorities whose officers will be changing or retiring, in preserving and securing evidence if actions are unduly delayed. We do not think that the protection afforded to the Trustees of the Port Trust having regard to the volume and variety of work they have to handle is anything unusual to liberally construe Section 110. It has been judicially noticed that insurance companies often protected themselves in their contracts providing a period of time for the subsistence of the rights of the assured against them, generally three months, from the rejection of the claim by the insurer. We cannot say that the Trustees have less need of the protection afforded by the statutory com-

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Learned Counsel contends that an insurer may pay an assured his claim on the last day of the six months period since the neglect or damage complained of. It is said that in such a case the insurer would be left without the equitable remedy of reimbursement from the wrong-doer and this cannot be the intendment of the enactment. But there is no ambiguity in the section. The language is clear and the inconvenience suggested is not unsurmountable. Section 110 is modelled on the lines of similar provisions protecting public authorities from delayed actions. A shorter period of limitation in respect of actions against them is provided. In England prior to June, 1954 actions against public authorities were in general subject to a limitation period of one year. Now there is no difference. One may see some reason behind the rule providing a shorter period of limitation; there may be difficulties in public authorities whose officers will be changing or retiring, in preserving and securing evidence if actions are unduly delayed. We do not think that the protection afforded to the Trustees of the Port Trust having regard to the volume and variety of work they have to handle is anything unusual to liberally construe Section 110. It has been judicially noticed that insurance companies often protected themselves in their contracts providing a period of time for the subsistence of the rights of the assured against them, generally three months, from the rejection of the claim by the insurer. We cannot say that the Trustees have less need of the protection afforded by the statutory com-

pulsion for acceleration of the proceedings that may be brought against them. It may also be in public interest that such claims are speedily settled. Whether any discrimination in this regard is justified or not, we have to interpret the section as it stands and apply the law.

22. It is a well-established principle of the law of limitation that time which has once begun to run will as a rule continue to do so. No subsequent disability or inability to sue stops it—see Section 9 of the Limitation Act, 1908. The learned Judge at the trial, when he observed that the subrogee is not affected by any rule of limitation which applies to the other person, overlooks the position of the subrogee in law and the rights he acquired by subrogation. The doctrine of subrogation comes in where one person has a claim against another and a third person is in certain circumstances allowed to have the benefit of the claim and the remedy of enforcing it, although it has not been assigned to him. Section 130-A of the Transfer of Property Act provides when and how a policy of marine insurance may be subrogated, and Section 135-A with the subrogation which we are concerned runs thus:—

“(1) Where a policy of marine insurance has been assigned so as to pass the beneficial interest therein, the assignee of the policy is entitled to sue thereon on his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(2) Where the insurer pays for a total loss, either of the whole, or, in the case of goods, of any apportionable part, of the subject-matter insured he thereupon becomes entitled to take over the interest of the insured person in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the insured person in and in respect of that subject-matter as from the time of the casualty causing the loss.

(3) Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the insured person as from the time of the casualty causing the loss in so far as the insured person has been indemnified by such payment for the loss.

(4) Nothing in Cl. (e) of Section 6 shall affect the provisions of this section”. By virtue of Section 135-A the insurer on payment to the assured steps into the shoes of the assured, and acquires all his rights and remedies, “as from the time of the casualty causing the loss”. The

bar of transfer of a mere right to sue is removed, and the remedies available to the assured get vested in the insurer on his paying the assured. Clearly the insurer gets himself substituted for the assured vis-a-vis the wrong-doer and the substitution takes effect from the time of the casualty causing the loss. In regard to the liability of the wrong-doer, that is, the person liable for the loss, on the language of these provisions it is plain that no different cause of action arises in favour of the insurer. Neither the character nor extent nor content of the original liability of the wrong-doer is changed or affected by the subrogation; and the insurer's rights and remedies date from the time of the casualty causing the loss.

These provisions found in the Transfer of Property Act, which apply to the cases on hand are now found in Section 79 of the Marine Insurance Act, 1963, which repeals Sections 130-A and 135-A of the Transfer of Property Act. We may here point out that Section 135-A of the Transfer of Property Act and Section 79 of the Marine Insurance Act, 1963 which replaced the former are just verbatim reproductions of Section 79 of the British Marine Insurance Act, 1906. Subrogation with reference to insurance as such, is not defined in the Transfer of Property Act; but we have the definition of subrogation in Section 92 of the Transfer of Property Act in relation to mortgages and its principles are well known. The effect of subrogation is to place the insurer in the shoes of the assured and enable the insurer to recover the amount from the person who ought to have paid. It confers on the insurer no greater rights. Nor does it provide him with further remedies than the assured himself had at the time he was paid off and the insurer got subrogated. Of course it is the payment to the assured that subrogates the insurer to the assured's rights against the wrong-doer. Without such payment there can be no subrogation. But the payment does not extinguish the liability of the wrong-doer or the other person responsible for the loss to the assured. Only the benefit of this liability, when subsisting enures to the benefit of the insurer. The insurer has to rest upon the cause for action which had accrued to the assured when he got himself subrogated. It may not be that in every case of loss a third party is liable to the assured, the assured might have acquired by contract absolute indemnity against loss and the insurer might not be able to recover anything from the third party for subrogation. The assured may have really no cause of action against the alleged wrong-doer, though the insurer has to pay him. Before the insurer can recover under the doctrine of subrogation, he will have to establish the cause of ac-

tion and liability of the wrong-doer for damages. He must establish that it is the negligent act of the party proceeded against that was the proximate cause of the damage to the property of the assured.

23. Contracts of insurance are considered really as contracts of indemnity and the principle of subrogation is applied to it being an equitable arrangement incidental to all contracts of indemnity and to payments on account of the indemnity. Subrogation is an equity rule and the equity of subrogation arises as the assured has concurrent remedies for relief from the loss against the person responsible for the loss, say on contract or tort, and also against the insurer on the contract of insurance, each independent of the other. And equity will not permit the injured to be doubly compensated by the insurer and the person liable for the loss. On payment to the assured by the insurer in terms of his policy the doctrine of subrogation steps in and vests in the insurer the rights the assured has against the person who has caused the loss. He succeeds to all the ways and means by which the assured may have reimbursed himself for the loss from the person responsible for the loss.

Arnould in his classic on Marine Insurance (British Shipping Laws Vol. 10, page 1193) states the position thus:

"..... it is entirely foreign to the spirit of contracts of indemnity that a person damnified should recover his loss more than once; it is, therefore, clear that if he has already recovered from a third party, there can be no liability under the contract of indemnity. On the other hand, if he has not previously recovered from such third party, but has the right to do so, there is no reason why such third party should be allowed to allege that his liability has been satisfied or reduced by a payment made by a stranger to him, under a contract with which he has nothing to do. The third party remains liable to the person indemnified just as if there had been no contract of indemnity. But the person indemnified can only take the sum recovered from the third party as trustee for the indemnifier, and similarly, if he has not himself received any sum to which he is entitled, he is bound to afford the latter all facilities for doing so. In practice, the commonest way in which the principle of subrogation is applied to insurance, is for the insurer to pay the claim of the assured, and then to institute proceedings in the name of the latter, but for his own benefit, against the party ultimately liable"—Para 1215.

In the Law of Insurance by Preston and Colinvaux, 2nd Edition, at page 128 we find the position stated thus:

"The right of 'subrogation' rests upon the ground that the insurer's contract is

in the nature of a contract of indemnity and that he is therefore, entitled, upon paying a sum for which others are primarily liable to the assured, to be proportionately subrogated to the right of action of the assured against them".

In Macgillivray on Insurance Law, 5th Edition, para 1882, the Learned Author points out that the right of subrogation is a corollary of the general principle that insurance is only a contract to indemnify the assured, that the insurer's right of subrogation arises whenever he pays a loss for which he is liable under his policy, and that it arises upon payment of a partial as well as upon payment of a total loss. The learned author states in para 1886:

"The legal right to compensation remains in the assured, and, therefore, unless there has been an express assignment of the legal right, actions at law brought for the benefit of the insurer are brought in the name of the assured. In Courts of Equity or of Admiralty the insurer has always been allowed to sue in his own name".

In Porter's Laws of Insurance, 8th Edition, at page 232 the position is stated thus:

"The insurer, having contracted to indemnify, could not insist on others being sued first who were primarily liable, or on consolidation of his action with others by the same assured against other insurers in respect of the same loss. The mere payment of a loss by the insurer does not afford any defence to a person whose fault has been the cause of the loss in an action brought against the latter by the assured. But the insurer acquired by such payment a corresponding right in any damages recoverable by the assured against the wrong-doer or other party responsible for the loss".

At page 237, the learned author points out:—

"An insurer suing the party through whose fault the loss occurred can only assert the right of the assured, and will be subject to any defence or equities which would be good against him. The insurer stands in no relation of contract or privity with such a party. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in right of the latter. Thus, where damage occurred through contributory negligence, that defence would be an answer to the action of the subrogated insurer. Again, if two ships of the same owner collided by the fault of one to the destruction of the other, the insurer could not sue the owner, since they claim under him".

24. Having regard to the universality of the subject under consideration we may point out that similar views are

expressed on the insurer's right of subrogation in the opinion of the Supreme Court of the United States of America in *St. Louis, I. M. and S. R. Co. v. Commercial Union Ins. Co.*, (1891) 139 US 154 = 35 Law Ed 155. It is thus seen that an insurer's rights are not higher than that of the assured and that he has no independent cause of action against the wrong-doer. In fact the claims under the assured standing in his shoes and asserting his rights. Only, on payment, pro tanto, without more, he gets substituted for the assured in relation to the person who is responsible for the loss and is answerable for the loss. And this substitution occurs without reference or leave of either that person or the assured.

In Stroud's Judicial Dictionary, 3rd Edition, volume 4, at page 2896, quoting Dixon on Subrogation, subrogation is defined thus;

'Subrogation' is the substitution of another person in the place of a creditor to whose rights he succeeds in relation to the debt subrogation differs from a transfer or assignment of a debt, and from delegation, in the circumstances that it does not, necessarily, depend upon the creditor, but may be made independently of him. It is, properly speaking, but a fictitious cession made to one who has a right to offer payment; it is not a true cession nor sale of a debt, but such as is conceded by law and may have effect by operation of law and the act of the debtor, even without the consent of the creditor from whom the debt proceeds".

25. Under the Limitation Act plaintiff includes any person from or through whom he derives his title to sue. The particular definition may not apply here, but the insurer who derives his rights standing in the shoes of the assured, unless statute provides to the contrary, cannot claim a different period of limitation. The special law with which we are concerned, Section 110 of the Madras Port Trust Act, makes no distinction as to who happens to be the plaintiff. As under the English law the insurer has to sue in the name of the assured, no question of different period of limitation could arise there. In fact an additional ground is sought to be raised in these cases in appeal that the suits by the plaintiff alone are not maintainable. Being taken for the first time and having regard to the nature of the objection we have not permitted the raising of the new point at this stage. For the insurer, the decision of the Calcutta High Court in *Alliance Assurance v. Union of India*, (1958) 62 Cal WN 539, is cited for the position that in view of Section 135-A of the Transfer of Property Act, there is no bar in this country to the institution of suits by the insurer in his own name. As

we have not heard any arguments on this question and as in the view we take of the other question, it is unnecessary to decide it, we are not expressing any considered views on it. In *Simpson and Co. v. Thompson Burrell*, (1877) 3 AC 279 at p. 293, it is observed by the House of Lords:

"In England, the action must be in the names of the ship owner, not of the underwriters. I think this material as showing that it is the personal right of action of the ship owner, the benefit of which is transferred to the underwriters. In other systems of jurisprudence, or it may be in our own as altered hereafter the assignee of such a right may be able to sue in his own name".

Sheldon in his *Law of Subrogation*, 2nd Edn. while defining Subrogation, says at page 3:—

"It is a legal fiction, by force of which an obligation extinguished by a payment made by the third person is treated as still subsisting for the benefit of this third person, who is thus substituted to the rights, remedies, and securities of another. The party who is subrogated is regarded as entitled to the same rights, and indeed as constituting one and the same person with the creditor whom he succeeds".

26. This being the true position of an insurer and the persona of the assured is continued in him for the purposes of recovery from the wrong-doer or person responsible for the loss, we fail to see how it can be claimed that a fresh period of limitation starts for the insurer on his paying the assured. He has no independent claim of his own against the person responsible for the loss and even though he has instituted the suit in his own name, he must be regarded as the assured himself—see Sheldon quoted above. The Board in this case, on expiry of the period of six months, can claim a complete defence to any action against it by the consignee or owner for any negligence or default in the due delivery of goods landed and taken charge of by it.

On what principle is this protection taken away on the insurer taking the place of the consignee or owner, when the substitution is without reference to the Board and when there is no new contract or fresh liability incurred by the Board on the substitution? The Board is not directly liable to the insurer and can be called upon to pay only what it may have to pay to the consignee or owner. General considerations and the principle of subrogation above discussed do not call for an interpretation of Sec. 110 to permit extending the period prescribed. This is not a case of contribution between joint tort-feasors or co-sureties or several insurers who have insured against loss from the same perils the same property where the liability is against the joint

tort-feasors or co-sureties or co-insurers inter se arises, for the first time on payment by one of the entire or more than their proportionate share of liability. Here what the insurer has to enforce is the very liability which the assured could have enforced, that is the primary liability. Only the insurer has taken his place. The cause for action against the defendant is of the assured. Time under Section 110 of the Act started running against the assured in favour of the defendant on the occurrence of the 'casualty causing the loss' in the language of Section 135-A of the Transfer of Property Act. In the light of the above discussion we have no hesitation in the circumstances in holding that the claims against the Board in actions falling under S. 110 of the Madras Port Trust Act like those now under consideration whoever figures as the plaintiff—whether it be the assured or the insurer—must be within six months from the accrual of the cause for the claim by the assured against the Board. There can be no fresh start under Section 110, on the insurer getting subrogated to the rights of the assured.

We may by way of analogy usefully refer here to the view of the majority of the Judges in the Full Bench case, Valli-amma Champaka v. Sivathanu Pillai, (1964) 1 Mad LJ 161 at p. 169 = (AIR 1964 Mad 269 at p. 274 (FB)), where the question of limitation on subrogation arising with reference to a redeeming co-mortgagor arose for consideration. At page 169 (of Mad LJ) = (at p. 274 of AIR) Ramachandra Iyer, C. J. observes:

"It is argued for the appellant that as the redeeming mortgagor becomes a mortgagee with respect to his co-mortgagors on redeeming the main mortgage, he should be deemed to become a mortgagee from that time, the period of fifty years prescribed by Article 136 of the Travancore Limitation Regulations should be reckoned from the date of payment and redemption. I cannot accept this contention. In a subrogation what the redeeming co-mortgagor obtains is a right to stand in the shoes of the mortgagee whom he had satisfied and, as pointed out in Mamundi v. Somasundaram, (1959) 2 Mad LJ 122 = (AIR 1959 Mad 555) if the person claiming subrogation wants to enforce his rights over the mortgage redeemed, he would be governed by the rules of limitation which would be applicable to the mortgage redeemed".

27. It is not contended that the suits under appeal would be in time if limitation commenced from the act of negligence of the Board complained of which resulted in damages. These suits, if they had been instituted by the assured himself, would have been barred by limitation and met successfully by the Board with the plea of limitation. It follows

that the decrees in the two suits in question have to be set aside and the suits dismissed. The appeals are therefore, allowed. On the question of costs the Board has been found responsible for the damages. It is succeeding only on the point of limitation and on that, the learned trial Judge has taken a different view. In the circumstances the parties will bear their respective costs in the trial Court. The appellants will be entitled to their costs in the appeals.

Appeals allowed..

AIR 1970 MADRAS 63 (V 57 C 19)

M. ANANTANARAYANAN C. J. AND
M. NATESAN J.

A. Mohambaram, Appellant v. M. A. Jayavelu and others, Respondents.

W. A. Nos. 179 and 190 of 1968, D/- 6-12-1968 from decision of Kailasam, J. in W. P. No. 436 of 1968.

(A) Constitution of India, Art. 226 — Quo Warranto — Requisites for the issue of — Office of Public Prosecutor is a public office — Importance of the office stated — (Criminal P. C. (1898), Ss. 4 (1) (t) and 493).

To sustain a quo warranto writ, the applicant has to satisfy the Court that the office in question is a substantive public office and that the incumbent whose position is questioned is holding the post without legal authority, that is, in appointing him the Government has contravened statutory provisions or binding rules. The office of Public Prosecutor is a public office and hence an appointment to that post can form the subject-matter of a petition under Art. 226 seeking a writ of quo warranto. (Paras 5 and 10)

The office of Public Prosecutor involves duties of public nature and of vital interest to the public. Provisions under Sections 417, 493, 422 and 494 of Criminal P. C. bring out the importance of that office. These show that Public Prosecutor is not a just an Advocate engaged by the State to conduct its prosecutions. The importance of the office from the point of view of the State and the community, is brought out in Section 494, Criminal P. C. which vests in the Public Prosecutor a discretion to apply to the Court for its consent to withdraw from the prosecution of any person. The consent, if granted, has to be followed by the discharge of the person or his acquittal as the case may be. AIR 1965 SC 491 at p. 494 & AIR 1957 SC 389 at p. 393 & AIR 1961 Mad 450 at p. 460 & AIR 1938 PC 266, Rel. on. (Paras 5 and 10)

(B) High Court Rules and Orders — Madras High Court Criminal Rules of

GM/HM/C709/69/TVN/D

Practice and Circular Orders, 1958, R. 45 — Rule valid and mandatory — Rules framed in exercise of power under Articles 227 and 309 of Constitution — Contravention fatal to appointment — On facts, held, Government had appointed a person as public prosecutor not nominated by the Collector — Order of appointment quashed — Mandamus to act upon nomination sent by collector and appoint writ petitioner accordingly refused — Government is not bound to accept nomination sent by Collector — Order in W. P. No. 436 of 1968 (Mad) by Kailasam, J. reversed on facts — (Constitution of India, Arts. 227, 309 and 226) — (Criminal P. C. (1898), Section 492).

Per Anantanarayanan, C. J.: It could not be seriously disputed that the preamble to the Criminal Rules of Practice, 1958, is conclusive that Art. 227 of the Constitution is the foundation for Rule 45 of the above Rules, particularly Art. 227 (2) (b), which invests the High Court with power to make and issue rules "for regulating the practice and proceedings of such Courts". Relevant part of the Proviso to Art. 309 of the Constitution could, equally, be regarded as the foundation of the Rule. (Para 6)

It cannot be urged that the State Government could appoint a public prosecutor whoever they liked, irrespective of the procedure laid down by Rule 45, or the nomination of the Collector, for the reasons that it was the appointing authority and that the Collector was a subordinate of the Government. The State was bound to conform to the rule of law so that its decision should be predictable, and in conformity with the principle. Arbitrariness in any such sphere, if countenanced or tolerated, would gravely jeopardise the rule of law and may even bring it to an end. AIR 1967 SC 1427 at p. 1434 & AIR 1968 Ker 244, Rel. on. (Para 7)

Per Natesan, J.: Tracing the rules as to appointment of Public Prosecutor from 1895 to the latest Criminal Rules of Practice and Circular Orders, 1958, it would be clear that the procedure relating to the appointment of Public Prosecutor relate to practice and proceedings of the Court. The Governor of Madras approving the rules forwarded by the High Court, purports to exercise the powers conferred by Article 227 of the Constitution and all enabling powers, Vide Article 227, Clause (2) and the related Proviso. The power to frame rules for regulating the practice and proceedings of Criminal Courts can properly include the qualifications of the person who has to function as Public Prosecutor in Criminal Courts. Rule 45 cannot be considered inconsistent with the provision of Section 492, Criminal P. C. vesting the power of appointment of Public Prosecutor

in the State Government. The rule does not, in the least, detract from the power of Government to appoint Public Prosecutor. It only sets out the procedure which the Government will follow in making the appointment. Notwithstanding the rule, the power to appoint Public Prosecutor still vests in the State Government and so the requirement of Art. 227 for validity of the rule that it shall not be inconsistent with the provision of any law for the time being in force, is fully satisfied. (Para 11)

Rule 45 can be sustained also under the Proviso to Art. 309 of the Constitution, under which the Executive too could make rules regulating the recruitment and the conditions of service of persons appointed to public posts. The fact that the Rule in question does not purport to have been made under the power conferred by Article 309 is immaterial since it is not decisive. But while approving the rules, the Governor had declared that it was done in exercise of the powers conferred by Article 227 of the Constitution and all other powers thereunto enabling. If the High Court under Article 227 may not properly frame a rule with reference to the appointment of Public Prosecutor as matter relating to practice and proceedings of Criminal Courts, the rule should be deemed to have been made under the proviso to Art. 309 which enables the Governor or such person as he may direct to make rules regulating the recruitment and the conditions of service to posts in connection with the affairs of the State. (Para 12)

Further, though the original rule regarding the appointment of Public Prosecutor which acquired statutory force by virtue of Section 96-B (4) of the Government of India Act, 1919, was not continued, that factor could be taken into consideration in examining the character of the present rule. The statutory force of the rule could not be devalued after the Constitution when the citizens were assured of the sovereignty of the Rule of Law. (Para 12)

The submission that rule is only for guidance of the Executive and non-adherence to the rule is not justiciable has to be rejected. Statutory rules cannot be described as or equated with administrative directions. The clear and unambiguous expression in Art. 309 of the Constitution that rules made by the Governor or such person as he may direct regulating the recruitment and the conditions of service of persons appointed, until provision in that behalf is made by or under an Act, shall have effect subject to the provisions of any such Act, must be given its full and unrestricted meaning. Having regard to the history of the rule regarding the appointment of Public Prosecutor, the rule must be held to have been made

under constitutional powers and so has statutory force, whether it is Art. 227 or the Proviso to Art. 309. (Para 12)

In this case, applications were called for the post of Government Pleader-cum-Public Prosecutor originally in vogue in the district. The District Bar Association sent names of 17 Advocates for consideration to the Collector. Thereafter, there was a proposal to appoint separate individuals for the posts. The Collector forwarded the list to the District and Sessions Judge to propose names for the posts separately on the assumption that there would be separate incumbents for the posts. The District and Sessions Judge furnished two distinct panels containing five names each for appointment to the two posts. The respondent's name whose appointment to the post of Public Prosecutor was impugned, was found only in the panel of names for the appointment of Government Pleader and that of the appellant (Writ-Petitioner) for the appointment of Public Prosecutor, each panel containing five names. The Collector in forwarding his nomination to the Government while agreeing with the panels given by the District and Sessions Judge, specifically recommended that the appellant (Writ Petitioner) who was then Additional Public Prosecutor be appointed Public Prosecutor. No alternative name was given by the Collector for the post. The Collector recommended that the present appointee (respondent) may be appointed as Additional Public Prosecutor which post would fall vacant by the appellant (Writ Petitioner) being appointed as the Public Prosecutor. Thus, while the Collector had not recommended the present appointee for either of the posts then vacant, the District Judge, who was consulted, recommended the present appointee only for the post of Government Pleader. So neither the authority that had to be consulted under the rule, nor the authority that had to nominate, recommended the present appointee for the post of Public Prosecutor.

Held, that the appointment made by the Government violated the mandatory provision under Rule 45 of Criminal Rules of Practice under which the appointment should be on the nomination of the Collector. This was so notwithstanding the fact that the Government was not bound to accept the nomination sent by the Collector. It might require the Collector to make a fresh nomination or call for a panel of names with his recommendation in consultation with the Sessions Judge. For appointment not to contravene the rule, it must be a nominee of the Collector that should be appointed for the post. However, the appointment would be by the Government which had to take the final decision. (Paras 13 & 16)

Though it was an administrative order, no absolute discretion lay with the Government for making the appointment. It had to be made in accordance with a rule and a procedure prescribed had to precede the appointment. An order contravening the rule and procedure prescribed was liable to be set aside. Rules made under statutory powers, unless they were constitutionally invalid, must be adhered to. Statutory rules which were functional in character were not made to be violated at the caprice of the Executive Authority concerned. There was no such thing as absolute or untrammelled discretion, the nursery of despotic power, in a democracy based on the rule of law. (Para 18)

However, the appellant (writ petitioner) was not entitled to the issue of a writ of mandamus directing the Government to appoint him to the post of Public Prosecutor on the ground that his name was the only one recommended by the Collector. The Government was not bound to appoint the person nominated by the Collector. He could only claim that he should be considered for the post. AIR 1961 Mad 450, Dist.; (1948) 1 KB 223 & AIR 1967 SC 1427 at p. 1434 & AIR 1968 Ker 244 & AIR 1953 Mad 392, 393, Rel. on; Order in W. P. No. 436 of 1968 (Mad) by Kailasam, J. Reversed (taking a different view of the facts). (Para 24)

(C) Constitution of India, Arts. 14 and 16 — Appointment — Discretionary orders by the Executive — Extraneous or improper matters — Consideration of — Discretion must be held exercised beyond authority.

If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of law they have not exercised that discretion. When considerations extraneous to the suitability of a person for appointment are taken into account in making an appointment, there is an abuse of discretionary power, and so the exercise of power exceeds the bounds of authority. The other aspirants for the office would have been left out of consideration on totally irrelevant grounds. In such a case Arts. 16 and 14 are violated. (Para 20)

The fact that an aspirant for office happened to be an active member of a political party in power by itself should not and could not disqualify him if otherwise suitable for being appointed to a post. (Para 21)

(D) High Court Rules and Orders — Madras High Court Criminal Rules of Practice and Circular Orders, 1958, R. 45 — Standing Orders of the Government relating to appointment of Law Officers in the mofussil — Standing Orders have no statutory force — Government can relax them in suitable cases.

Standing Orders of the Government regarding appointment of Law Officers in the mofussil are devoid of statutory force and remain merely as declarations—no doubt public and explicit declarations—but still only declarations by Government of their intention and line of conduct. Such Standing Orders have no legal sanction behind them and the Government may, in suitable cases in the exercise of discretion, relax the rules. Hence, the rule embodied in the Standing Order requiring 7 years' standing at the bar, for the appointment of a Law Officer can be relaxed by the Government in its discretion in a suitable case. AIR 1961 Mad 450, Foll. (Para 22)

(E) High Court Rules and Orders — Madras High Court Criminal Rules of Practice and Circular Orders, 1958, R. 45 — Object of the Rule.

Rule 45 of the Madras Criminal Rules of Practice and Circular Orders, 1958, provides that the State Government should appoint a Public Prosecutor on the nomination of the Collector who shall consult the Sessions Judge before submitting his nomination to the Government. The object of the provision is self-evident viz., that it intends to secure to the Government, the appointing authority, real assistance. The Collector, the executive head in the district, may be properly expected to offer his advice in the matter. He is required under the rule to act in consultation with the Sessions Judge, the appropriate authority, to give advice for the selection. The consultation which has to precede nomination by the Collector is obviously intended to secure a conference of two minds eminently fitted for the task. (Para 17)

(F) Words and Phrases — "Nomination"
— Word synonymous with naming, proposing or recommending. (Para 15)

Cases Referred:	Chronological	Paras
(1968) AIR 1968 Ker 244 (V 55) = 1968 Ker LT 268, K. M. Joseph v. State of Kerala		7, 18
(1967) AIR 1967 SC 1081 (V 54) = 1967-1 SCR 373 = (1967) 2 SCJ 830, Raja Anand v. State of U. P.		20
(1967) AIR 1967 SC 1427 (V 54) = 1967-1 ITJ 903=1967-2 SCJ 102, Jaisinghani v. Union of India		7, 18
(1965) AIR 1965 SC 491 (V 52) = (1964) 4 SCR 575, University of Mysore v. Govinda Rao		10
(1961) AIR 1961 SC 751 (V 48) = 1961 (1) Cri LJ 773 = 1961-2 SCR 679, State of Uttar Pradesh v. Baburam		12
(1961) AIR 1961 Mad 450 (V 48) = ILR (1961) Mad 553, Ramachandran v. Alagiriswami		10, 12, 22
(1957) AIR 1957 SC 389 (V 44) = 1957 SCJ 336 = 1957 SCR 279=		

1957-1 Mad LJ (Cri) 247, State of Bihar v. Ram Naresh	10
(1953) AIR 1953 Mad 392 (V 40) = 1953-1 Mad LJ 88, Pushpam v. State of Madras	17
(1953) AIR 1953 Nag 81 (V 40) = ILR (1952) Nag 267, Miss Cama v. Banwarilal	23
(1951) 342 US 98 = 96 L Ed 113, United States v. M. Wunderlich	18
(1948) 1948-1 KB 223 = 1947-2 All ER 680, Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation	18
(1938) AIR 1938 PC 266 (V 25) = (1938) 2 Mad LJ 780=65 Ind App 388, Faqir Singh v. Emperor	10
V. Thyagarajan, for Appellant; Govern- ment Pleader, T. Govindarajulu and P. M. Sundaram, for Respondent.	

ANANTANARAYANAN C. J. :— I have had the advantage of perusing the judgment of mv learned brother, which discusses all relevant aspects of these Writ Appeals, in considerable detail. I am in entire agreement with his conclusions, and, if I am appending a brief, separate judgment, it is only because of the importance of the vital aspect.

2. The facts on the record themselves are incontrovertibly established, and, indeed, there are no two views permissible on the facts. Briefly stated, in making the appointment of the first respondent to the office of the Public Prosecutor, North Arcot Sessions Division, the State was not appointing a person who had been nominated by the Collector, or was any nominee of the Collector, under Rule 45 of the Criminal Rules of Practice. The view to the contrary, taken by the learned Judge (Kailasam, J.) is clearly based on a misconception of the actual facts of the record, as my learned brother has so plainly shown.

3. On this aspect, which is the factual aspect, it is sufficient to be very brief. As the rule makes it mandatory for the Collector to consult the Sessions Judge, what actually happened was that the Collector referred the names of 17 Advocates, furnished by the Bar Association, to the District and Sessions Judge, to enable him to propose names, separately, for the office of the Public Prosecutor and the Office of Government Pleader, as the Collector had justification to assume that separate incumbents would have to be appointed for the two offices. The District and Sessions Judge furnished two distinct panels of names, and the appointee-respondent was included in the panel of names for the office of the Government Pleader, which does not now concern us at all. It is not in dispute that the name of the appellant was included by District and Sessions Judge in the panel of names for the office of Public Prosecutor. The Collector forwarded his nomination to

Government, in compliance with Rule 45, making the specific recommendation or nomination, whichever it might be termed, that the appellant, who was then Additional Public Prosecutor, be appointed Public Prosecutor, North Arcot Sessions Court. The appointee-respondent was not nominated by the Collector for this office, in any sense. If the nomination of the Collector had been accepted by Government, the appointment of the appellant to that office would necessarily have created a vacancy in the office of Additional Public Prosecutor, a distinct office, the filling up of which was not then imminent. The Collector expressed his opinion that that office could be given to the respondent-appointee, so that he could pick up work, and equip himself for greater responsibilities.

As my learned brother has shown, the actual appointing authority under Section 492 of the Code of Criminal Procedure is the State Government, and Rule 45 of the Criminal Rules of Practice is only the mode by which this power is to be exercised. The Collector is not the appointing authority, and, hence, the Government could well require the Collector not merely to nominate one person, but to submit a panel of nominees. Further, where the Government are unable, for any proper reason, to accept a single nomination of the Collector, if it happened to be a single nomination as in this case, the Government would further correspond with the Collector, with a view to obtaining a nomination, which might seem to be acceptable, in public interest. If the rule were to be taken as implying that the Collector need make only one nomination, even if Government were unable to accept that nomination this would imply that the virtual crux of the power would be with the Collector, and not the State Government, which is not the intendment of Section 492 of the Code of Criminal Procedure.

4. Hence, in the context of these facts, I propose to deal, very briefly, with the following questions:—

1. Is the Office of Public Prosecutor, a public office, within the ambit of quo warranto jurisdiction?
2. Is Rule 45 of the Criminal Rules of Practice not merely an administrative rule of directory significance, but a statutory or law-based mandatory rule, which the State Government must conform to, until and unless the content of the rule be changed?
3. Is the State Government bound to conform to the rule and prescribed procedure, in making such an appointment to a public office, as part of the incidents of the rule of law?

5. It appears to me, very clearly, that the answers to all these questions must be in the affirmative. Not merely is the office of Public Prosecutor a public office, but, in my view, it is a public office of considerable significance, for the integrity and efficiency of the administration of criminal justice. Any one appointed to this office must, in the interests of the public, have a high degree of efficiency, and knowledge of the law of Crimes and the Criminal Procedure; he must have character and integrity, that are irreproachable and above suspicion; he must have a sense of his duty to the public and to the Court, as overriding considerations. As can be immediately realised, if these requisites are lacking, the incumbent to such an office can gravely injure the administration of criminal justice.

The ideal Public Prosecutor is not surely concerned with securing convictions, or with satisfying the departments of the State Government, with which he has to be in contact. He must consider himself as an agent of Justice, and, as my learned brother has pointed out, his discretion to apply to the Court for its consent to withdraw from any prosecution, is a vital one. It is in the interests of the State and the Public, that any selection to such an office must be based on the most pertinent considerations, without prejudice or favour, and that only the best person or persons should be appointed.

6. I propose to deal very briefly with the second question, namely, the binding character of Rule 45 of the Criminal Rules of Practice. My learned brother has traced the lineage of this rule, and I need not recapitulate that aspect. But I do not see how it could be seriously disputed, that the preamble to the rules, published in 1958, is conclusive that Article 227 of the Constitution of India is the foundation for this rule, particularly Art. 227 (2) (b), which invests the High Court with power to make and issue rules "for regulating the practice and proceedings of such Courts". It must be noticed that the Government promulgated the Rule, after the High Court had framed it and after Government had accorded their prior sanction. As my learned brother has stressed, the relevant part of the proviso to Art. 309 of the Constitution could equally, be regarded as the foundation of the Rule. No doubt, the rule can be changed, if, in practice, there are difficulties experienced in the working of the rule. But, unless and until the rule is changed, in accordance with due procedure, it is a law-based rule, which Government must adhere to. It cannot be set at naught, or flouted, in an individual case, merely because of caprice, or in an arbitrary manner. If that happens, the Courts are bound to interfere, though it

may be open to Government to modify or alter the rule, for future contingencies.

7. This brings me to the last aspect of the matter, namely, whether it is open to the State Government to claim that, since it is the appointing authority with the power to appoint a person to the concerned office, and the Collector is a subordinate of Government, the Government may appoint whoever they like, irrespective of the procedure laid down by Rule 45, or the nomination of the Collector, because the power is unfettered. It is here that the observations of their Lordships of the Supreme Court in *Jaisinghani v. Union of India*, ((1967) 1 ITJ 903 = (1967) 2 SCJ 102 = AIR 1967 SC 1427 at p. 1434), which were also relied on by the Kerala High Court in *K. M. Joseph v. State of Kerala*, AIR 1968 Ker 244, appear to be not merely pertinent, but to bear upon a situation of that kind, with the weight and solemnity of basic legal principle. Not merely are the Executive Authorities, that is, the State in its executive aspect, bound to conform to the rule of law, but such a requirement is even more obligatory on the State, than on any private citizen. Any such decision should be predictable, and in conformity with principle; it should both appear to conform, and, also in the spirit as well as the letter, should subserve the rule of law. Arbitrariness in any such sphere, if countenanced or tolerated, will gravely jeopardise the rule of law, and may even bring it to an end.

8. For the reasons set forth by my learned brother, I entirely agree that the order appointing the first respondent as the Public Prosecutor of North Arcot District must be set aside, and that the State Government should now take up the question for consideration and due action, in the light of principles that we have stated. The appellant may claim that he has every right to be considered for the post, but he has certainly no right now to the appointment per se; the due appointment must be made afresh by Government, in conformity with the procedure established by law.

9. **NATESAN J.**— The appellant in these appeals is an Advocate of the Madras High Court practising at Vellore, North Arcot District, and an aspirant for the post of Public Prosecutor, North Arcot Sessions Division, which fell vacant on 31st August, 1967. By G. O. Ms. No. 231, dated 30th January, 1968 the Government appointed the first respondent herein as the Public Prosecutor and the appellant challenging the legality of the appointment moved this Court under Art. 226 of the Constitution by two petitions, one for a writ of quo warranto directed against the first respondent requiring him to show cause, by what authority he claims to hold the office of Public Pro-

secutor, North Arcot, and another for a writ of mandamus requiring the State of Madras, the 2nd respondent herein, to appoint the appellant as Public Prosecutor. The substantial ground of challenge to the appointment and the basis of the appellant's claim for the post is, that statutorily the appointment by Government can only be on the nomination of the District Collector in consultation with the Sessions Judge of the Division and that the Collector nominated the appellant only for the post. Our learned brother, Kailasam, J., before whom the petition came up for hearing, while holding that the appointment to the post of Public Prosecutor is governed by statutory requirements, proceeded in the view that the requirements of the rule have been complied with and dismissed the applications.

10. The function of a writ of quo warranto under the Constitution is summed up by Gajendragadkar, J., (as he then was) as follows in *University of Mysore v. Govinda Rao*, ((1964) 4 SCR 575 = AIR 1965 SC 491 at p. 494):

"Broadly stated, the quo warranto proceeding affords a judicial inquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right".

To sustain a quo warranto writ, the applicant has to satisfy the Court that the office in question is a substantive public office and that the incumbent whose position is questioned is holding the post without legal authority, that is, in appointing him the Government has contravened statutory provisions or binding rules.

That the office of Public Prosecutor is a public office, is not questioned before us for the respondents. Section 4 (t) of the Code of Criminal Procedure (V of 1898) defines "Public Prosecutor" thus:

"'Public Prosecutor' means any person appointed under Section 492, and includes any person acting under the directions of a Public Prosecutor and any person conducting a prosecution on behalf of Government in any High Court in the exercise of its original criminal jurisdiction".

Section 492 of the Criminal P. C. providing for the appointment of Public Prosecutor by the Government is found in Part IX, Supplementary Provisions,

Chapter XXVIII, under the heading "of the Public Prosecutor" and runs thus:

- "(1) The State Government may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors.
- (2) The District Magistrate, or, subject to the control of the District Magistrate, the Sub-Divisional Magistrate, may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of Police below such rank as the State Government may prescribe in this behalf to be Public Prosecutor for the purpose of any case".

The procedure as to appointment is Rule 45 of the Criminal Rules of Practice which reads:—

"A Public Prosecutor may be appointed for each Sessions Division. The appointment may be made for a period of three years on the nomination of the Collector who shall consult the Sessions Judge before submitting his nomination to Government but the Government is not precluded from reconsidering the appointment, if it thinks fit, before the close of that period."

Indubitably the office of Public Prosecutor involves duties of public nature and of vital interest to the public. Under Section 417, Criminal Procedure Code, the State Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order, of acquittal passed by any Court other than a High Court, under Section 493, Criminal Procedure Code, the Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution and the pleader so instructed shall act under his directions. The Public Prosecutor may appear to conduct a prosecution only under instructions from the Collector, and other officers who require his assistance in the conduct of criminal cases, should communicate with the Collector. He is the person to whom notice of appeal shall be given by Court of Session under Section 422 of the Code. The Public Prosecutor is not just an Advocate engaged by the State to conduct its prosecutions. The importance of the office from the point of view of the State and the community, is brought out in Section 494, Criminal P. C., which vests in the Public Prosecutor a discretion to apply to the Court for its consent to

withdraw from the prosecution of any person. The consent, if granted, has to be followed up by the discharge of the person or his acquittal, as the case may be.

It is relevant in this context to cite the following observations of the Supreme Court in *State of Bihar v. Ram Naresh*, ((1957) SCJ 336=(1957) SCR 279=(1957) Mad LJ (CrI) 247 = AIR 1957 SC 389 at p. 393) about the position of Public Prosecutor:—

"In this context it is right to remember that the Public Prosecutor (though an executive officer as stated by the Privy Council in *Faqir Singh v. Emperor* ((1938) 2 Mad LJ 780 = 65 Ind App 388 = AIR 1938 PC 266), is, in a larger sense, also an officer of the Court and that he is bound to assist the Court with his fairly considered view and the Court is entitled to have the benefit of the fair exercise of his function. It has also to be appreciated that in this country the scheme of the administration of criminal justice is that the primary responsibility of prosecuting serious offences (which are classified as cognizable offences) is on the Executive Authorities".

Manifestly the public would, in a large measure be interested in the manner in which he discharges his duties, and he could properly be considered, to be a person employed in connection with the affairs of the State. The Collector determines the fee payable to him under the relevant rules and he is remunerated by the State.

In *Ramachandran v. Alagiriswami*, ILR (1961) Mad 553 at p. 569 = (AIR 1961 Mad 450 at p. 460), this Court observed:—

"Nobody seriously doubts that the State Prosecutor in the City and Public Prosecutors in the mofussil are holders of public offices".

11. The next question for consideration is whether the appointment of Public Prosecutor is governed by any statutory provision or rule. Our learned brother, Kailasam, J., has traced the rules as to the appointment of Public Prosecutor from 1895. The Office is of ancient origin. Government Order dated 1st September, 1866, states that in every District Court there is a Government Pleader who is usually also the Public Prosecutor, and that he is nominated by the Collector and appointed by the Government. The rule, more or less in the form now we have providing for consultation of the Sessions Judge before the nomination is submitted to the Government, is found as Rule 142 in the Criminal Rules of Practice and Executive Orders published in 1910. The authority for the rule is G. O. No. 1232 Judicial dated 12th August, 1901. The rule became Rule 30 in the Criminal Rules of Practice and Circular Orders issued in

1931, after approval by the Government in G. O. Ms. No. 2420, dated 9th June, 1930. It is placed in Part I of the Rules consisting of rules under or in matter relating to the Code of Criminal Procedure.

The latest Criminal Rules of Practice and Circular Orders, 1958, received the approval of the Government in G. O. Ms. No. 978, dated 10th April, 1957 which runs as follows:—

"The passing of the Indian Constitution and the Adaptation of Laws Order, as amended by the Adaptation of Laws (Amendment) Order, 1950, the Cri. P. C. (Amendment) Act, 1955 (Central Act 26 of 1955), the Cri. P. C. (Madras Amendment) Act, 1955 (Madras Act 34 of 1955), Separation of the Judiciary from the Executive in this State, have necessitated the revision of the present edition of the Criminal Rules of Practice and Circular Orders, 1931. The High Court, Madras has forwarded to Government for approval a revised set of draft rules, Judicial, Presidency Magistrate Court and Administrative Forms, Rules and Orders under the Special enactments and also important circulars and orders issued by the High Court in matters relating to the Judiciary.

In exercise of the powers conferred by Art. 227 of the Constitution of India and of all other powers hereunto enabling, the Governor of Madras hereby approves the revised rules, forms, circulars, etc., forwarded by the High Court, Madras, with modifications as set out in the Appendix in these proceedings. The rules, forms, etc., in the Appendix will be published in the Fort St. George Gazette as rules made by High Court with the previous approval of the Government of Madras".

The Preamble to the Rules published in 1958 reads:—

"Whereas it is expedient to amend, consolidate and bring up to date the Criminal Rules of Practice and Orders, 1931, and incorporate therein the Orders, Notifications and Administrative instructions issued from time to time by the Government and the High Court, in exercise of the powers conferred by Art. 227 of the Constitution of India and of all other powers hereunto enabling, and with the previous approval of the Governor of Madras, the High Court hereby makes the following Rules and Orders for the guidance of all criminal Courts in the State".

The Governor of Madras who approves the rules forwarded by the High Court, purports to exercise the powers conferred by Art. 227 of the Constitution and all enabling powers. It is necessary to set out the material part of Cl. (2) and the related Proviso to Art. 227 which invests the High Court with power of superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction:

Article 227:

"(2) Without prejudice to the generality of the foregoing provision, the High Court may

(a) call for returns from such Courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts.

Provided that any rules made, forms prescribed or tables settled under Cl. (2) or Cl. (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor".

We are in entire agreement with the learned Judge. Kailasam, J., that the procedure relating to the appointment of Public Prosecutor can be said to relate to practice and proceedings of the Court. We have already referred to some of the important functions of the Public Prosecutor in the Districts with reference to criminal proceedings in Courts. The power to frame rules for regulating the practice and proceedings of criminal Courts can, in our view, properly include the qualifications of the person who has to function as Public Prosecutor in Criminal Courts. Rule 45 cannot be considered inconsistent with the provision of Sec. 492, Criminal P. C., vesting the power of appointment of Public Prosecutor in the State Government. The rule does not, in the least, detract from the power of Government to appoint Public Prosecutor. It only sets out the procedure which the Government will follow in making the appointment. Notwithstanding the rule, the power to appoint Public Prosecutor still vests in the State Government and so the requirement of Art. 227 for validity of the rule that it shall not be inconsistent with the provision of any law for the time being in force, is fully satisfied.

12. It appears to us that this rule could be sustained also under the Proviso to Art. 309 of the Constitution. Under that Article, the appropriate Legislature may regulate the recruitment and conditions of service of persons appointed to public services. The Proviso to Art. 309 enables the Executive also to make rules regulating the recruitment and the conditions of service, until provision in that behalf is made by an Act of the Legislature. The relevant part of the Proviso to Art. 309 runs thus:

"Provided that it shall be competent for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment and the conditions of service of persons appointed, to such services and posts until provision in

that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act".

No doubt the rule in question does not purport to have been made under power conferred by Art. 309. Usually when Government issues an order on the basis of a statutory provision, the provision of the Statute in pursuance of which the order is made is specified. But the omission of the authority for the order or rule is not decisive. While approving the rules forwarded to Government by the High Court, it is proclaimed that they have been approved by the Governor of Madras in exercise of the powers conferred by Art. 227 of the Constitution and all other powers hereunto enabling. The Criminal Rules of Practice contain provisions regarding various matters—rules relating to criminal procedure, judicial forms, etc. and within, we find this rule relating to the appointment of Public Prosecutor with an ancient lineage of Government Orders dating back to 1866. If the High Court under Art. 227 may not properly frame a rule with reference to the appointment of Public Prosecutor as a matter relating to practice and proceedings of Criminal Courts the rule should be deemed to have been made under the proviso to Art. 309 which enables the Governor or such person as he may direct to make rules regulating the recruitment and the conditions of service to posts in connection with the affairs of the State.

Sub-section (4) of S. 96-B of Government of India Act, 1919 provided that all rules in operation at the time of passing of that Act, whether made by the Secretary of State in Council or any other authority relating to the several services of the Crown in India were duly made in accordance with the powers in that behalf and confirmed the rules. The original rule regarding the appointment of Public Prosecutor had acquired statutory force by virtue of Section 96-B (4) of the Government of India Act, 1919. May be that the original rule is not continued. But in examining the character of the present rule, it is a factor to be taken into consideration. Why should we devalue after the Constitution when citizens are assured of the sovereignty of the Rule of Law, a rule that had statutory force, to an administrative direction to be followed at the discretion of the authority, when statutory basis could be found for the rule? When the Government approved the revised publication of the Criminal Rules of Practice and Orders, 1931 in G. O. No. 2420 dated 9th June, 1930, it is stated:—

"Under Section 107 of the Government of India Act, and Section 554 of the Code

of Criminal Procedure and all other powers enabling him on this behalf, the Governor-in-Council is pleased to sanction, subject to the alterations mentioned below, the rules in Part I of the Criminal Rules of Practice and Orders and the forms thereunto appended."

Section 107 of the Government of India Act, 1919 subject to certain modifications is similar to Section 224 of the Government of India Act, 1935. Article 227 of the Constitution is a reproduction of Section 224 with certain changes.

The submission that rule is only for guidance of the Executive and non-adherence to the rule is not justifiable, is untenable. In *State of Uttar Pradesh v. Baburam*, (1961) 2 SCR 679 = AIR 1961 SC 751 Subba Rao, J., (as he then was,) speaking for the majority, observed that statutory rules cannot be described, as or equated with administrative directions. Of course, the Court was considering the Police Acts and Rules made thereunder for the appointment of Police Officers and prescribing procedure for their removal. The clear and unambiguous expression in Article 309 of the Constitution that rules made by the Governor or such person as he may direct regulating the recruitment and the conditions of service of persons appointed, until provision in that behalf is made by or under an Act, shall have effect subject to the provisions of any such Act, must be given its full and unrestricted meaning. Having regard to the history of the rule regarding the appointment of Public Prosecutor, in our opinion, the rule has been made under constitutional powers and so has statutory force, whether it is Art. 227 or the Proviso to Art. 309 that is relied upon. The appointment of Public Prosecutor for the district does not rest solely on Standing Orders of the Government as was the case of the Government Pleader for Madras in ILR (1961) Mad 553 = (AIR 1961 Mad 450).

13. We have next to determine whether the appointment in this case is one that has been made without any regard to the statutory provisions. It is on this we have to differ with respect from our learned brother Kailasam, J. The relevant file has been produced for our perusal and we find the claim of the appellant justified that the appointee has not been nominated by the Collector for the post of Public Prosecutor and that it is the appellant that was recommended for the post. The counter-affidavit filed in this case, in fact, do not dispute the position. It is seen from the file that, in July, 1967, applications were called for the post of Government Pleader-cum-Public Prosecutor which was originally in vogue in the district. The District Bar Association furnished to the Collector names of 17

Advocates for consideration. There was then a proposal for bifurcation and appointment of separate individuals for the posts of Government Pleader and Public Prosecutor. The Collector referred the names of 17 Advocates given to him by the Bar Association to the District and Sessions Judge, North Arcot, to propose names for the posts of Government Pleader and Public Prosecutor separately on the assumption that there would be separate incumbents for the posts. The District and Sessions Judge furnished two distinct panels of names under the two heads, a panel of names for the appointment of Government Pleader and another for the appointment of Public Prosecutor each panel containing five names. The present appointee's name is found only in the panel of names for the appointment of Government Pleader and the appellant's name, in the panel of names for the appointment of Public Prosecutor. With reference to the present appointee who had a standing of six years and 4 months at the Bar, the learned District Judge recommended the relaxation of the provision in a Standing Order requiring seven years' standing at the Bar, there being a precedent for such relaxation. The appellant was appointed as Additional Public Prosecutor, Vellore, in 1962 relaxing the requirement. The District and Sessions Judge, in recommending the present appointee for the post of Government Pleader, pointed out that the appointee was Standing Counsel for the Vellore Municipality and competent in his work.

14. The Collector in forwarding his nomination to the Government while expressing his agreement with the panels given by the District and Sessions Judge, specifically recommended that the appellant who was then Additional Public Prosecutor be appointed Public Prosecutor. No alternative name was given by the Collector for the post. As regards the present appointee, the Collector added that he may be appointed as Additional Public Prosecutor. The post of Additional Public Prosecutor would fall vacant if the present appellant was appointed as Public Prosecutor. The Collector expressed his view that the post of Additional Public Prosecutor should go to a young Advocate, so that he might be groomed and trained to become Public Prosecutor in course of time. He remarked that the present appointee could conveniently pick up work under the guidance of the Public Prosecutor and equip himself for further responsibility in due course. It is clear from the note of the District Collector that for the post of Public Prosecutor he nominated only one individual, that is, the appellant. Far from sending up the name of present appointee for the post even alternatively, he indicated that the present appointee has to abide his time.

Our learned brother Kailasam, J., proceeded in the view that the letter of the District Judge to the Collector was not clear as to whether he recommended a person out of five names in the list to be appointed as Government Pleader and another person from the second list of five persons to be appointed as Public Prosecutor, and that the letter of the District Judge could be construed as recommending any one of the ten persons for appointment for either of the posts. If that were so, it is a matter for consideration. But as pointed out above, there is no ambiguity either in the panel of names sent by the Sessions Judge or, in the nomination made by the Collector. The Collector's recommendation and the letter of the Sessions Judge on the consultation, are precise as to what they state. That apart, under the rule it is the Collector that has to make the nomination. It must also be noticed that while the Collector has not recommended the present appointee for either of the posts then vacant, the District Judge who was consulted recommended the present appointee only for the post of Government Pleader. So neither the authority that has to be consulted under the rule, nor the authority that has to nominate, recommended the present appointee for the post of Public Prosecutor.

15. It was faintly argued on behalf of the respondents that the Collector only suggested the appointment of the appellant as Public Prosecutor and not nominated him. To nominate, as may be seen from any dictionary, means, to name or designate by name for office or place. Webster's New 20th Century Dictionary gives the word "nomination" among other meanings, "the naming or appointing a person to an office; the naming of a person as a candidate for election or appointment to an office". A meaning of the word "nominate" is 'to propose for office'. In the counter affidavit of the Secretary to the Government, Home Department, it is stated that the word "nomination" can only mean, naming, that is, recommending. Clearly, whether it is naming, proposing or recommending, the Collector does name, propose or recommend only the appellant for the office, and he does not name, propose or recommend the present appointee for the post.

16. If Rule 45 has statutory force unquestionably there is violation of the rule, in that the present appointee has not been appointed on the nomination of the Collector. The rule enjoins that the appointment be made on the nomination of the Collector. As precondition to nomination a duty is cast on the Collector to consult the Sessions Judge before submitting his nomination to the Government. The appointment by Government of a Public

Prosecutor for the District is thus conditioned by two requisites. Firstly the Collector should consult the Sessions Judge. Secondly, after such consultation, the Collector should submit his nomination to the Government. This does not mean that the Government is bound to accept the nomination sent up by the Collector. It is not the requirement of the rule that there can be only one nomination, and, once a nomination is sent up, it must be accepted by the Government. To interpret the rule in that manner would be to make the Collector the appointing authority, and that he is not, under Section 492, Criminal P. C. And such an interpretation would make the rule *ultra vires*, whether it is a rule under Art. 227 or Art. 309. The Government is the appointing authority and it is the Government that has to take the final decision. It may not approve of a nomination sent by the Collector. It may require the Collector to make a fresh nomination or call for a panel of names with his recommendation in consultation with the Sessions Judge. Only, for appointment not to contravene the rule, it must be a nominee of the Collector that should be appointed for the post.

17. The object of the requirements of the rule is self evident. The subject-matter is such that the requirements of the rule cannot be considered to be empty formalities. They are intended to secure to the Government, the appointing authority, real assistance. The Sessions Judge is expected to know the suitability or otherwise of the members of the Bar in his Sessions Division for the post. He has opportunities to appraise their fitness having regard to their standing in the Bar and the confidence they command. The Collector, the executive head in the district, may be properly expected to offer his advice in the matter. He is required under the rule to act in consultation with the Sessions Judge, the appropriate authority, to give advice for the selection. The consultation which has to precede nomination by the Collector is obviously intended to secure a conference of two minds eminently fitted for the task.

In *Pushpam v. State of Madras*, (1953) 1 Mad LJ 88 at p. 90 = (AIR 1953 Mad 392 at p. 393), Subba Rao, J., (as he then was) observed:

"Many instances may be found in statutes when an authority entrusted with a duty is directed to perform the same in consultation with another authority which is qualified to give advice in respect of that duty. It is true that the final order is made and the ultimate responsibility rests with the former authority. But it will not, and cannot be, performance of duty if no consultation is made, and even if made, is only in formal compliance with the provisions".

It is manifest on the facts that Rule 45 has been violated.

18. It is submitted that the appointment is an executive or administrative act of the Govt. and so is not justiciable. True the appointment is an administrative act. But if it contravenes the law, Courts can intervene even with an act of the Executive Authority. Here no absolute discretion is vested in the Govt. for making the appointment. The appointment has to be made in accordance with a rule, and a procedure prescribed has to precede the appointment. Having regard to the post to be filled up, the procedure prescribed cannot be considered to be purely directory. While the decision is that of the Government, and it may be an executive decision, the discretion given to the Government in the matter is circumscribed by the rule and it is within the four corners of the rule that the discretion must be exercised.

As pointed out by Lord Greene, M. R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, (1948) 1 KB 223 the exercise of such discretion must be a real exercise of the discretion. The Master of the Rolls said:

"If in a statute conferring the discretion there are to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters".

Rules made under statutory powers, unless they are constitutionally invalid, must be adhered to. Statutory rules which are functional in character are not made to be violated at the caprice of the Executive Authority concerned. There is no such thing as absolute or untrammelled discretion, the nursery of despotic power, in a democracy based on the rule of law. Douglas, J., in *United States v. M. Wunderlich*, (1951) 342 US 98 expressed in language which must ever be borne in mind by those that would govern and the governed:

"Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler. Where discretion is absolute man has always suffered".

In (1967) 1 ITJ 903 = (1967) 2 SCJ 102 = AIR 1967 SC 1427 at p. 1434, the Supreme Court spoke for our Constitution in these words:—

"In this context it is important to emphasise that the absence of arbitrary power is the first essential of the rule of law upon which our own Constitutional system is based. In a system governed by rule of law, discretion, when conferred upon Executive Authorities, must be confined within clearly defined limits. The rule of law from this point of view means

that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law".

Learned Counsel for the appellant drew our attention also to the decision of the Kerala High Court in AIR 1968 Ker 244, where, relying on the observations of the Supreme Court quoted above, it was held that the right of a State to make appointments to its service is not arbitrary.

19. A subsidiary point was raised for the appellant that the appointment was made on extraneous considerations and so can be quashed even if the rule has no statutory force. It is alleged in the affidavit in support of the application for quo warranto that the only consideration which weighed with the Government is that the present appointee is an active member of a particular political party. The argument based on this is, that considerations wholly not germane have weighed with the appointing authority, and, even if there is wide executive discretion in the matter of the appointment, the discretion is vitiated.

20. The Court's province in this regard is well settled. In *Raja Anand v. State of U. P.*, (1967) 1 SCR 373 = (1967) 2 SCJ 830 = AIR 1967 SC 1081 at p. 1085, the Supreme Court observed:

"It is true that the opinion of the State Government which is a condition for the exercise of the power under Section 17 (4) of the Act (Land Acquisition Act), is subjective and a Court cannot normally enquire whether there were sufficient grounds for justification of the opinion formed by the State Government under Section 17 (4) But even though the power of the State Government has been formulated under Section 17 (4) of the Act in subjective terms the expression of opinion of the State Government can be challenged as ultra vires in a Court of law if it could be shown that the State Government never applied its mind to the matter or that the action of the State Government is mala fide."

If people who have to exercise a public duty by exercising their discretion take into account matter which the Courts consider not to be proper for the guidance of their discretion, then in the eye of law they have not exercised that discretion. See Maxwell on the Interpretation of Statutes, 11th Edition, page 118. When considerations extraneous to the suitability of a person for appointment are taken into account in making an appointment, there is an abuse of discretionary power, and so the exercise of power ex-

ceeds the bounds of authority. The other aspirants for the office would have been left out of consideration on totally irrelevant grounds. It could then well be said that Art. 16 which provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State and Art. 14 are violated. While the fitness of a person to an office may be solely within the discretion of the appointing authority, the discretion, as has been repeatedly pointed out, must be exercised bona fide.

Wade, in his *Administrative Law*, at page 59 quotes Lord Halsbury's remark:—

"..... 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion.....according to law, and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular".

Arbitrary discarding of existing rules, be they administrative, and improvising ad hoc procedure for particular cases, is a dangerously unhealthy trend, as it may descend to "ad hominum" procedure cases, and give room for comments of favoured treatment violative of Art. 16. While Courts will not interfere with the choice of an individual with reference to an appointment made in the due exercise of its discretion by the Government without shutting out of consideration the claims of others for the post, Courts will certainly stand guard and are bound to do so, in a democracy, against flagrant abuse of powers on the simple and sound principle that the Constitution 'cannot have intended powers to be abused beyond what might be called the inevitable area where opinions may legitimately differ'.

21. While the principles which the appellant seeks to invoke are well settled, in our opinion, there is no room in this case for striking down the appointment in question on principle of arbitrary or capricious exercise of discretion and favoured treatment without any regard to established norms in the matter of the appointment. The appellant seeks to clutch at an averment made in the counter affidavit of the Secretary to the Government, Home Department, while denying the charge that active association of the appointee with the party in power is the basis of the appointment. Unfortunately, and as it strikes us, without appreciating the inference which the language employed could lead to the denial is thus expressed: "It is specifically denied that the only consideration that weighed with the Government in exempting the first respondent was his association with the D. M. K." But reading this averment in the light of the allegation in the affidavit which is travers-

ed thereby and the setting in which it is found in the counter affidavit, it is clear that the statement in the counter affidavit was not meant to be an acknowledgment that the affiliation with the party in power was one of the considerations for the appointment, though not the only one. The record and the file relating to the appointment which we have perused, do not warrant judicial inference of extraneous consideration like the one alleged by the appellant to have been the basis of the choice. The fact that an aspirant for office happens to be an active member of a political party in power by itself should not and cannot disqualify him if otherwise suitable for being appointed to a post. To make that a point against him when there is no legal bar, would be to exclude him from consideration for the post on wholly irrelevant grounds. The present appointment has to go on the sole ground that the appointee is not a nominee for the post sent up by the Collector. Neither the nomination of the Collector, nor the recommendations of the Sessions Judge which accompanied it has manifestly been relevant material in deciding on the appointment.

22. A point was taken for the appellant questioning the exemption granted to the appointee in respect of the requirement as to seven years standing at the Bar. This requirement is to be found in the Standing Orders relating to the appointment of Law Officers in the mofussil. It is not made out that this Standing Order has any statutory force, and it may be pointed out that the appellant himself got exemption when he was appointed as Additional Public Prosecutor. In ILR (1961) Mad 553 = (AIR 1961 Mad 450), the Division Bench points out that such Standing Orders of the Government regarding appointment to an office are devoid of statutory force and remain merely as declarations no doubt public and explicit declarations—but still only declarations by Government of their intention and line of conduct. Such Standing Orders have no legal sanction behind them and the Government may, in suitable cases in the exercise of discretion, relax the rules.

23. Learned Counsel for the first respondent submitted that the appellant invoking the special extraordinary jurisdiction of this Court has not come with clean hands and is therefore, disentitled to relief. It is urged that in his affidavit the appellant stated that the first respondent has not been enrolled in the Madras High Court and he is an Advocate of the Mysore High Court. This is clearly contrary to facts, and, in his reply affidavit, the appellant contented himself with the statement that in view of the assertion of the first respondent he withdrew this contention. The appellant, in his reply af-

fidavit, did not categorically admit the true position. The learned Judge, Kailasam, J., points out that, if the appellant had taken some care and looked into the list of the Bar Council, Madras, he would not have made the allegation, and that, in any event, after the specific statement by the first respondent, the appellant could have withdrawn his allegation without any qualification. However, before the learned Judge, Counsel for the appellant submitted that the defect in pleadings in this regard was unintentional. Unqualified regret on behalf of the appellant was expressed and the learned Judge who dealt with the writ petition, did not think it necessary to pursue the matter any further.

Learned Counsel for the first respondent submitted that, before granting a writ of quo warranto, it is necessary to see that the relator is a fit person to be entrusted with the writ and reference was made to the decision in *Miss Cama v. Banwarilal*, AIR 1953 Nag 81, for the proposition that a relator must not be disqualified by having acquiesced or concurred in the act which he comes to complain of. We fail to see the relevance of the decision in the context of this case. True, an averment, has been made in the affidavit in an irresponsible manner while challenging the validity of the first respondent's appointment. A little care and attention and a sense of responsibility in making the averment against a brother member of the Bar would have avoided this. One may say that the allegation has been made recklessly. But it has been atoned for by unqualified regret at the hearing and the learned Judge has accepted the same. Though the appellant himself is personally interested in the proceeding, being an aspirant for the office, still we cannot ignore the fact that the matter is one in which the public can be said to be equally interested and concerns the administration of justice.

24. It follows that the order of the Government G. O. Ms. No. 231, Home Department, dated 30th January, 1968 appointing the first respondent as Public Prosecutor for the North Arcot Sessions Division has to be quashed. The Government will have to proceed afresh in the matter to fill up in accordance with law the post which thus falls vacant. The appellant has applied for mandamus to act upon the only nomination sent up by the Collector and appoint him as Public Prosecutor for the term. This relief, he cannot have. As observed earlier, the Government is not bound to accept a nomination sent up by the Collector. It cannot be contended by the appellant that the Government is withholding from him a post to which he is entitled to, for the issue of a writ of mandamus. The appel-

lant can claim only that he should be considered for the post. We should here observe that in these proceedings we are not concerned, in the least, with the merits or qualification of either the appellant or the first respondent. The suitability of an applicant is for the authorities to decide.

25. We accordingly allow W. P. No. 436 of 1968, quashing the order appointing the first respondent as Public Prosecutor. The question of filling up the post of Public Prosecutor, North Arcot District will be taken up by the Government for consideration in the light of the observations made herein. W. A. No. 179 of 1968 is therefore, allowed and W. A. No. 180 of 1968 dismissed. The parties will bear their respective costs throughout.

Order accordingly.

AIR 1970 MADRAS 76 (V 57 C 20)

A. ALAGIRISWAMI J.

Kathoom Bivi Ammal and another, Appellants v. Arulappa Nadar and another, Respondents.

S. A. No. 1295 of 1964, and Memo of Cross-objections, D/-23-8-1968 against decree of Sub J., Tirunelveli, D/- 10-3-1964.

(A) Contract Act (1872), S. 208 — Cancellation of Power of Attorney — When effective as against agent and third parties — Object of provision stated.

The appellant appointed her step-daughter's husband as her Power-of-Attorney agent, who, in exercise of the power, executed two mortgages on the suit properties. The mortgages were challenged on the ground that the appellants had cancelled the Power-of-Attorney sufficiently prior to the date of execution of the mortgages. Neither the agent nor the mortgages knew about the cancellation of power-of-attorney: Held, that the mortgages executed by the agent were valid and binding on the appellant. The consideration that it was very unreasonable to expect that the appellant should inform the whole world that she had cancelled the power of attorney given to the person, was not relevant in the face of the clear words of the Section 208 of the Contract Act. The policy of the law, apparently in the interests of trade and commerce, is that the agent's action should bind the principal, even though the principal might have cancelled the agent's authority unless the third person with whom the agent enters into contracts knew of the termination of the agency.

(Para 2)

(B) Civil P. C. (1908), Ss. 11 and 100-101 — Cross suits by parties against each other — Disposal by common judgment —

Appeal preferred in one of the suits — Respondent not raising plea of res judicata — Held, he could not raise it in second appeal — If the plea had been raised earlier, appeal in the other suit also could have been filed. (Para 3)

(C) Civil P. C. (1908), Ss. 11, 96 and 100 — Cross suits by parties in respect of same subject-matter — Disposal by common judgment on evidence adduced in one suit — Parties consenting to such procedure — Party aggrieved appealing against judgment in his suit only — Failure to prefer appeal in the other suit, held, would not operate as res judicata — Object of appeal is to get rid of the decision pleaded in bar. AIR 1947 Nag 248 & (1906) ILR 29 Mad 333 (FB) & AIR 1953 SC 419 & ILR (1965) 1 Mad 57 & AIR 1935 Mad 214 & AIR 1942 Mad 226 & (1889) ILR 16 Cal 233 & AIR 1943 Mad 139 (FB) & AIR 1916 Mad 1133, Foll.; AIR 1942 Mad 421 & AIR 1962 SC 338 & AIR 1966 SC 1332, Dist.; (1901) ILR 24 Mad 350 held, overruled by (1906) ILR 29 Mad 333 (FB). (Para 8)

Cases Referred: Chronological Paras

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| (1966) AIR 1966 SC 1332 (V 53) = | |
| 1966-2 SCJ 768 = 1966-3 SCR 300, | |
| Sheodan Singh v. Daryao Kunwar | 8 |
| (1965) ILR (1965) 1 Mad 57 = 77 | |
| Mad LW 644, Subbiah Udayar v. | |
| Kamppiah Udayar | 7 |
| (1962) AIR 1962 SC 338 (V 49) = | |
| 1962-1 SCJ 63 = 1962-1 Mad LJ | |
| (SC) 39 = 1962-1 Andh WR (SC) | |
| 39 = (1962) 3 SCR 759, Badri | |
| Narayan Singh v. Kamdev Prasad | |
| Singh | 7, 8 |
| (1953) AIR 1953 SC 419 (V 40) = | |
| 1950 SCR 754, Narahari v. Shankar | 7 |
| (1947) AIR 1947 Nag 248 (V 34) = | |
| ILR (1947) Nag 691, Manohar | |
| Vinayak v. Laxman Anand Rao | 8 |
| (1943) AIR 1943 Mad 139 (V 30) = | |
| ILR (1943) Mad 235 = (1943) IL | |
| Mad LJ 1 (FB), Papammal v. | |
| Meenamammal | 5 |
| (1942) AIR 1942 Mad 226 (V 29) = | |
| 1941-2 Mad LJ 932, Narayana- | |
| swami Iyer v. Sevadappa Gounder | 6 |
| (1942) AIR 1942 Mad 421 (V 29) = | |
| ILR (1942) Mad 677 = 1942-1 | |
| Mad LJ 281, Chockalinga Thevar | |
| Firm v. Sankarappa Naicker | 6 |
| (1935) AIR 1935 Mad 214 (V 22) = | |
| 67 Mad LJ 364, Lakshmi Ammal | |
| v. Official Receiver Tinnevely | 6 |
| (1916) AIR 1916 Mad 1133 (V 3) = | |
| 29 Mad LJ 551, Ramaswami Chetty | |
| v. Karuppan Chetti | 5 |
| (1906) 16 Mad LJ 63 = ILR 29 | |
| Mad 333 (FB), Panchanada Velan | |
| v. Vaithinatha Sastrial | 5, 8 |
| (1901) ILR 24 Mad 350, Guru- | |
| rajammah v. Vankatakrishnamma | |
| Chetti | 5 |
| (1889) ILR 16 Cal 233, Abdul Majid | |
| v. Jew Narain Mahto | 5 |

(1840) 11 Ad & El 589 = 113 ER
539, Trueman v. Loder 2

R. Gopalaswami Iyengar, for Appellants; S. Thyagaraja Iyer, for Respondents.

JUDGMENT:— This appeal arises out of O. S. No. 42 of 1962. Defendants 2 and 1, who are husband and wife are the appellants. The first defendant filed O. S. No. 17 of 1962 against her step-daughter, Fareeda Beevi, her husband and the plaintiff in O. S. No. 42 of 1962 for a declaration that the two mortgage deeds executed by her step-daughter's husband, the third defendant in that suit, one in favour of her step-daughter, the first defendant in that suit, and the other in favour of the second defendant in that suit, who as already mentioned is the plaintiff in O. S. No. 42 of 1962, were void and not binding on her. The third defendant in that suit was her power-of-attorney agent and in that capacity, he executed the mortgages in favour of the first and second defendants in that suit. On the ground that they had been executed by him after she had cancelled the power-of-attorney in favour of the third defendant that suit was decreed and there was no appeal, against it either by the first or by the second defendant. O. S. 42 of 1962 was filed by the second defendant in O. S. No. 17 of 1962 against the plaintiff in O. S. No. 17 of 1962 as the first defendant, her husband as the second defendant, a tenant under the first defendant as the third defendant and the son-in-law of defendants 1 and 2 as the fourth defendant, this son-in-law being the third defendant in O. S. No. 17 of 1962. O. S. No. 42 of the 1962 was dismissed. As against that dismissal, the plaintiff in O. S. No. 42 of 1962 filed an appeal and that appeal was allowed and the suit decreed. Defendants 1 and 2 have, therefore, come upon appeal to this Court.

The trial Court held that the first defendant had cancelled the power-of-attorney executed by her in favour of the fourth defendant on 2nd September, 1958, and that, therefore, the mortgage executed by the fourth defendant in favour of the plaintiff was not valid. But it gave a decree against the fourth defendant for the sum due on the mortgage. The lower appellate Court also held that the power-of-attorney was validly cancelled though there seems to be some confusion in its mind with regard to this point as seen from its discussion in paragraphs 9 and 10 of its judgment. However, on the ground that under Section 208 of the Indian Contract Act, the termination of the authority of an agent does not take effect, so far as regards third persons, before it becomes known to them. The cancellation would not bind them and consequently the mortgage deed executed by the fourth defendant in favour of the

plaintiff was valid. But it gave only a charge decree for the mortgage amount. The plaintiff has, therefore, filed a memorandum of cross-objections and wants a decree for possession of the mortgaged property to be granted in his favour.

2. As both the Courts below have held that the power-of-attorney executed by the first defendant in favour of the fourth defendant has been validly cancelled by her even before the fourth defendant executed the mortgage in favour of the plaintiff, the only question that arises is whether under Section 208 of the Indian Contract Act, such cancellation will have the effect of making the mortgage executed by the fourth defendant void as against the first defendant. Section 208 of the Indian Contract Act is as follows:

"208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or so far as regards third persons, before it becomes known to them".

Illustration (b) to this section is as follows:—

"(b) A, at Madras, by letter directs B to sell for him some cotton lying in a warehouse in Bombay and afterwards by letter, revokes his authority to sell and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B, the money, with which B absconds, C's payment is good as against A."

This illustration is apposite to the facts of this case. In Mulla on Indian Contract Act, Students' Edition, Eighth Edition, page 226, the case of Trueman v. Loder, (1840) 11 Ad & El 589, is referred to. That was a case where A traded as B's agent with B's authority. All parties with whom A made contracts in that business were held to have a right to hold B liable to them until B gives notice to the world that A's authority is revoked; and it makes no difference if in a particular case the agent intended to keep the contract on his own account. It is argued on behalf of the appellant that it is very unreasonable to expect that the first defendant should inform the whole world that she had cancelled the power-of-attorney given to the fourth defendant, and that that she cannot be expected to approach every body with whom the fourth defendant was likely to enter into contract and inform them of the cancellation. I do not think that such considerations have any relevance in the face of the clear words of the section. The policy of the law, apparently in the interests of trade and commerce, is that the agent's action should bind the principal, even though the principal might have cancelled the agent's authority unless the third persons with whom the

agent enters into contracts knew of the termination of the agency. On this point, therefore, the conclusion of the lower appellate Court is correct, and it should be held that the mortgage executed by the fourth defendant in favour of the plaintiff is valid and binding on the first defendant.

3. One point, which was strenuously urged by the appellants in this Court was that this appeal is barred by *res judicata*. The argument is put thus: The first defendant in O. S. No. 42 of 1962 obtained a decree in O. S. No. 17 of 1962 holding that the mortgage executed by the fourth defendant in favour of the plaintiff and Fareeda Beevi, who were the first and second defendants respectively in that suit (O. S. No. 17 of 1962) was void and not binding on the first defendant, who was the plaintiff in that suit. There was no appeal against that decree. It has, therefore, become final and operates as *res judicata* because the same question arises in this suit. On the other hand, it is urged on behalf of the contesting respondent that this question was not raised by the first defendant in his appeal before the lower appellate Court and that if she had raised that question he could at least have filed an appeal with a petition to excuse delay and that the appellants should, therefore, not be allowed to raise this question of *res judicata* in this Court. There is considerable force in this contention. But all the same I will discuss the question of *res judicata* that has been raised.

4. There is no doubt that the question that arises for determination in this suit is the same as in O. S. No. 17 of 1962. The present first defendant wanted a declaration that the mortgage executed by the present fourth defendant in favour of the present plaintiff was not binding on her. This suit, O. S. No. 42 of 1962, was for a declaration of the plaintiff's right in respect of that very othi. The following were the issues framed in O. S. No. 17 of 1962:—

- (1) Whether the cancellation of the power given to the 3rd defendant by the plaintiff is true and valid?
- (2) Whether the suit documents executed by the 3rd defendant as agent of the plaintiff are null and void?
- (3) Whether they were executed by the third defendant bona fide for purposes binding on plaintiff?
- (4) To what relief, if any, is the plaintiff entitled?

The following were the issues framed in O. S. No. 42 of 1962:—

- (1) Whether the 4th defendant was a power-of-attorney agent of the first defendant on the date of the suit mortgage bond? If not whether the said bond executed by him

in favour of the plaintiff is void and unenforceable?

- (2) Whether the said bond is sham and nominal and not supported by consideration?
- (3) Whether the plaintiff is not entitled to delivery of possession of the suit properties?
- (4) Whether the plaintiff is entitled to claim damages?
- (5) Whether the amount of profits claimed by the plaintiff is excessive?

It would be noticed that issues 1 and 2 in O. S. No. 17 of 1962 and 1 and 2 in O. S. No. 42 of 1962 are in respect of the same question, though the wording of the issues is different in O. S. No. 42 of 1962 and the onus is thrown on the plaintiff. Both the suits were tried together by consent and all the evidence was recorded in common. Both these sets of issues were discussed together by the trial Court and its finding is found at the end of paragraph 21 of its judgment in the following terms:

"I hold on issue 1 in O. S. No. 17 of 1962 that the cancellation of the power given to the 3rd defendant by the plaintiff is true and valid. On issue No. 2 in O. S. No. 17 of 1962, I hold that the suit documents executed by the 3rd defendant as agent of the plaintiff are null and void against the plaintiff. On issue 1 in O. S. No. 42 of 1962, I hold that the 4th defendant was not a power of attorney agent of the first defendant on the date of the suit othi bond and that the bond is void and unenforceable against the plaintiff. On issue No. 2 in O. S. No. 42 of 1962 I hold that the suit bond is supported by consideration and that the 4th defendant is liable to pay the othi amount to the plaintiff".

5. These two sets of issues are the crucial issues in the two suits, and the question that arises is the same in both the suits, that question being whether the power-of-attorney executed by the first defendant in favour of the fourth defendant, had been validly cancelled. Both the Courts have held that the suit mortgage bond is supported by consideration in the sense that the plaintiff has paid consideration towards it. I cannot, therefore, accept the contention on behalf of the appellants that issues in the two suits are different and the question that arises for decision is different in the two cases. Therefore, the decision of this Court in *Panchanadavelan v. Vaithinatha Sastrial*, (1906) 16 Mad LJ 63=ILR 29 Mad 333 (FB) would govern the facts of this case. There it was held that where cross-suits between the same parties on the same facts were tried together and judgment was given on the same day, but separate decrees were passed and an appeal was preferred against one of the decrees alone

that the decree unappealed did not operate as a bar under Section 13 (present S. 11) of the Code of Civil Procedure so as to preclude the appellate Court from dealing with the decree appealed against, and that the doctrine of *res judicata* has no application when the very object of the appeal, in substance if not in form is to get rid of the decision which is pleaded in bar. The Full Bench that decided the case followed the decision in *Abdul Majid v. Jew Narain Mahto*, (1889) ILR 16 Cal 233, and by implication refused to follow the decision in *Gururajammah v. Venkatakrishnamma Chetti*, (1901) ILR 24 Mad 350. The following discussion of this question is very apt to the facts of this case:

"Technically, no doubt, the tenant's appeal ought to have been in both suits and the proper course for the District Judge to have taken would have been to require the appellant to amend his memorandum of appeal so as to make it an appeal in both suits; but the fact that the tenant only appealed in his own suit and did not prefer an appeal in the landlord's suit did not preclude the District Judge from deciding upon the merits the questions raised in the appeal which was before him. The subject-matter of litigation in the two suits was the same, the evidence was the same, and the two suits were tried together. The reasons for which the tenant's suit was dismissed were the reasons for which judgment was given in favour of the landlord in his suit.

We do not think that, either under Section 13 of the Civil P. C., or on general principles, the doctrine of *res judicata* has any application to the facts of this case. The doctrine does not apply when, as here, the very object of the appeal, in substance if not in form, is to get rid of the adjudication which is said to render the question which the Appellate Court is asked to decide *res judicata*. The tenant's appeal in his suit if successful would have the effect of superseding the adjudication in the landlord's suit".

In *Pappammal v. Meenammal*, ILR (1943) Mad 235 = (1943) 1 Mad LJ 1 = AIR 1943 Mad 139 (FB) the Bench which made reference to the Full Bench, had to consider this question. They referred to the decision in (1906) 16 Mad LJ 63 = ILR 29 Mad 333, and pointed out that Full Bench had clearly indicated the principle to apply in the circumstances of the case that where the object of the appeal being in substance, if not in form, is to get rid of the very adjudication which is put forward as constituting *res judicata* that the adjudication should not be held to bar the appeal. The Bench also added the qualification that the decision must have been rendered at the same time and the suits must have been tried together but it was not material that they must be

cross-suits. The Bench then referred to the decision in *Ramaswami Chetti v. Karuppan Chetti*, 29 Mad LJ 551 = (AIR 1916 Mad 1133) which followed the Full Bench decision in (1906) 16 Mad LJ 63 = ILR 29 Mad 333, and held that that decision is not to be confined to cross suits only but that it is equally applicable to suits between the same parties in which a common question is raised and decided and an appeal is preferred in only one of the suits. Paragraph 1 of the head note in 29 Mad LJ 551 = (AIR 1916 Mad 1133) is to the following effect.

"Where the matter in issue in two suits was the same and suits were tried together on the same evidence and disposed of by the same Judge, and the judgment in the one case was based on and followed the judgment in the other, though separate decrees were drawn up, an appeal against one of these decrees is not barred by *res judicata* by reason of the fact that no appeal was filed against the other decree".

6. In the decision in *Lakshi Ammal v. Official Receiver, Tinnevely*, 67 Mad LJ 364 = (AIR 1935 Mad 214), Beasley, C. J., referred to the sentence in the Full Bench judgment to the following effect.

"It would lead to startling results if we were to hold that an appellate tribunal is precluded from dealing with a question which comes before it on appeal because an inferior Court, upon the same facts but in a case other than the case under appeal, had given a decision which had not been appealed against, at the same time as the decision in the case under appeal". And held that the doctrine of *res judicata* had no application when the very object of the appeal was to get rid of the decision pleaded in bar. In *Narayanaswami Iyer v. Sevadappa Gounder*, (1941) 2 Mad LJ 932 = (AIR 1942 Mad 226), the decision in 67 Mad LJ 364 = (AIR 1935 Mad 214) was followed:

In *Chockalinga Thevar, Firm v. Sankarappa Naicker*, ILR (1942) Mad 677 = (1942) 1 Mad LJ 281 = (AIR 1942 Mad 421), it was held thus:

"Where during the pendency of an appeal against the finding in a suit, the same issue had been raised and decided differently in another suit in the same Court later by a different judge and such later decision had been allowed to become final it will operate as *res judicata* in the appeal against the earlier decision".

But this decision cannot help the appellants because there were different decisions in different suits tried on different occasions by different Judges. In Mulla's Commentaries on the Code of Civil Procedure at page 38 of Edition 11, the learned author says:

"The preponderance of judicial decisions in different High Courts is in favour of the view that the judgment not appealed against does not become *res judicata*. This

is on the ground that a decision given simultaneously cannot be said to be a decision in a former suit".

7. In *Subbiah Udayar v. Karupiah Udayar*, ILR (1965) 1 Mad 57, a Bench of this Court referred to the decision in *Badri Narayana Singh v. Kamdev Prasad Singh*, (1962) 1 SCJ 63 = (1962) 1 Mad LJ (SC) 39 = (1962) 1 An WR (SC) 39 = (1962) 3 SCR 759 = (AIR 1962 SC 338), relied upon by the appellants in this case and pointed out that that case related to two appeals arising out of one proceeding before an Election Tribunal the subject-matter of the appeals being different and separate decrees were drawn, and that there was one further appeal against the order in one appeal only, and remarked (*Subbiah Udayar's case*, ILR (1965) 1 Mad 57):

"It was held that the finding in the unappealed decree would operate as *res judicata*. The Supreme Court in that very decision has recognised that when there is a single suit, the question of *res judicata* does not arise merely because there are two decrees based on the same judgment".

The Bench referred to an earlier decision of the Supreme Court in *Narahari v. Shankar*, (1950) SCR 754 = (AIR 1953 SC 419), where it was pointed out that the question of *res judicata* arises only when there are two suits and that even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit, that when there is only one suit, the question of *res judicata* does not arise at all and as that in case, both the decrees were in the same case and based on the same judgment and the matter decided concerned the entire suit there was no question of the application of the principle of *res judicata*. The Bench held as follows:—

"Where there is only one *lis* the question of *res judicata* does not arise at all. Both the decrees in the instant case are based on the same judgment and matter decided concerns the entire claim. The subject-matter in dispute between the parties in substance can be regarded as forming one *lis* only. By virtue of the peculiar procedure obtaining in regard to applications filed under Section 42 of the Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948) it has been the practice for such claimants to compensation money to file his own application.

In such a case, the applications are consolidated for the purpose of hearing and a common judgment given. Both the applications in the instant case must be regarded therefore, as comprising a single controversy and that they should be regarded as constituting a single proceeding as the subject-matter is the same. There

is no question of the application of the principle of *res judicata* to such a case."

8. The above decision and the discussion therein would show that the decision relied upon by the appellants in (1962) 1 SCJ 63 = (1962) 1 Mad LJ (SC) 39 = (1962) 1 An WR (SC) 39 = (1962) 3 SCR 759 = (AIR 1962 SC 338), has no application to the facts of this case.

Another case relied upon by the appellants is *Sheodan Singh v. Daryao Kunwar*, (1966) 2 SCJ 768 = (1966) 3 SCR 300 = AIR 1966 SC 1332. It was there held as follows:

"Where the trial Court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground like limitation or default in printing, with the result that the trial Court's decision stands confirmed, the decision of the appeal Court will be *res judicata* and the appeal Court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal Court is to confirm the decision of the trial Court given on merits and if that is so, the decision of the appeal Court will be *res judicata*". That really does not apply to the facts of this case, as would be seen from paragraph 19 of that decision at page 1338. Their Lordships referred to the case in *Manohar Vinayak v. Laxman Anandarao*, AIR 1947 Nag 248. In that case two suits were consolidated by consent of the parties and there were certain common issues. Appeal was taken from the decision in one suit and not from the decision in the other, and it was urged in the High Court that the decision in the other suit had become final. The High Court applied the principle that *res judicata* could not apply in the same proceeding in which the decision was given and added that by a parity of reasoning it could not apply to suits which were consolidated. They pointed out that the view taken in (1906) ILR 29 Mad 333 = 16 Mad LJ 63 (FB) is similar to the one in AIR 1957 Nag 248 and that they need not express an opinion as to its correctness. The authority of the decision in (1906) 16 Mad LJ 63 = ILR 29 Mad 333 (FB) which has been consistently followed in this Court has not been shaken by either of the two decisions relied upon by appellants. It follows, therefore, that in this case, the appeal is not barred by *res judicata*. The two suits were tried together by consent, the issues raised a common question, the evidence was the same, the decision in one suit followed the decision in the other suit, the effect of the appeal in one suit was in substance to get rid of the common decision and therefore, the fact that an appeal was filed only against the decree in one suit, but not against the decree in the other suit does not mean that the decree in the

suit not appealed against became res judicata.

9. The second appeal fails and is, therefore, dismissed. The decree passed by the lower appellate Court is a charge decree and may be executed.

10. I do not think there is any justification in this case for allowing the cross-objections. The lower appellate Court has apparently taken the equities of the case into consideration. After all the suit was decreed against the first defendant on purely technical considerations. It is rather hard on her that notwithstanding the cancellation by her of the power-of-attorney given in favour of her son-in-law the fourth defendant she should be made to pay the plaintiff because of the fraud played by the fourth defendant. The memorandum of cross-objections is also dismissed.

11. There will be no order as to costs.

12. No leave.

Appeal and cross objections dismissed.

AIR 1970 MADRAS 81 (V 57 C 21)

VEERASWAMI J.

Chinnaswami Naicker, Petitioner v. Kandasami Gounder and others, Respondents.

Civil Revn. Petns. Nos. 1802 & 1803 of 1967, D/- 25-10-1968 from order of Dist. Munsif Court, Periakulam in I. A. No. 878 of 1967.

Civil P. C. (1908), O. 6, R. 17; O. 1, R. 8 — Application for amendment of plaint so as to make suit a representative one must be made within time allowed for institution of suit, AIR 1940 Mad 789, Foll.; 1958-2 Mad LJ 540, Not Foll.

(Paras 2 and 4)

Cases Referred: Chronological Paras (1958) 1958-2 Mad LJ 540, Ayyaperumal Chettiar v. Palaniandi Chettiar 3 (1940) AIR 1940 Mad 789 (V 27) = ILR (1940) Mad 808, Madina Bibi v. Ismail Durga Association 1, 2, 3, 4

K. S. Desikan, for Petitioner; T. P. Gopalakrishnan, for Respondents.

ORDER:— In my view the decision of the Court below is correct. The summary order was made on 16th June 1966. There is no dispute that the suit should be instituted within a year of that date, and that, it should be in a representative capacity. Vide Madina Bibi v. Ismail Durga Association, ILR (1940) Mad 808 = AIR 1940 Mad 789. The suit was filed on 5th September 1966 and the written statement on 21st November 1966. The defendants pointed out, in the written statement, the defect, to wit, the suit was not in a representative capacity. The

issues were framed on 28th November 1966 and the suit came up for trial twice, but was adjourned every time. The petition for amending the plaint, to make the suit a representative one, was filed only on 21st July 1967. The Court below took the view that the application should be dismissed on the ground of limitation.

2. The view taken by the Court below is unsustainable. No doubt amendment of pleading should be freely allowed, at whatever stage it is asked for. But, this can only be subject to the pleas as to limitation or other prejudice to the other party. If the suit had been instituted on 21st July 1967, it would undoubtedly be barred by limitation. Mr. Desikan for the petitioner urges that ILR (1940) Mad 808 = AIR 1940 Mad 789 is distinguishable on the ground that there application for amendment of the plaint was taken out after issues had been framed and the trial held thereon. But I see no difference in principle, whether the amendment is sought for after the expiry of the period of limitation and at the stage of trial, before or after. The principle is that an application for amendment of the pleading should be within the time allowed for the institution of the suit.

3. Reference for the petitioner is also made to Ayyamperumal Chettiar v. Palaniandi Chettiar, 1958-2 Mad LJ 540. Ramaswami, J. held, in similar circumstances, that an amendment should be freely allowed. That was a suit by an attaching creditor under O. 21, R. 63, Civil P. C. to establish his right to attach and bring to sale certain property by avoiding a transfer of the property on the ground that it had been made with the intent to defeat his claim. The learned Judge, in view of ILR (1940) Mad 808 = AIR 1940 Mad 789, was aware that such a suit should be brought in a representative capacity in compliance with Order 1, Rule 8 of the Code. On the question of limitation the learned Judge observed that it was by then well settled that in a suit of this nature, where on account of ignorance or misapprehension there was no prayer that the decree that may be passed should be for the benefit of all the creditors, amendment should be freely allowed even at a late stage.

4. With respect, I am not able to share that view. The question is one of limitation and not one of sympathy or expediency. If excusing the delay is permissible, that is another matter. In the absence of an enabling provision, I do not see how, if on the date the application for amendment was made the suit would have been barred by limitation, there is any escape but that the application has got to be dismissed on the ground of limitation, and that is the principle laid down in ILR (1940) Mad 808 = AIR 1940 Mad 789. As

I said, on principle that case is not distinguishable from the instant one.

5. The petitions are dismissed, but with no costs.

Petitions dismissed.

AIR 1970 MADRAS 82 (V 57 C 22)
KAILASAM J.

T. V. Sundaram Iyengar and Sons (P) Ltd. by Managing Director, T. S. Krishna, Madurai, Petitioners v. State of Madras represented by Secy. to Govt., Dept. of Industries, Labour and Housing, Madras and others, Respondents.

Writ Petns. Nos. 3463 and 3464 of 1967, D/- 19-9-1968.

(A) Industrial Disputes Act (1947), Section 2-A (as inserted by Amendment Act 35 of 1965) — Constitution of India, Articles 245, 246; Schedule 7, List 3, Entry 22 and List 1 Entry 97 — Validity of Section 2-A — By amendment a dispute between single workman and management is deemed to be an industrial dispute — Competence of Parliament to legislate on individual dispute — Interpretation of Entry 22.

The Court must interpret the relevant words in the entry in a natural way and give the said words the widest interpretation. What the entries purport to do is to describe the area of legislative competence of the different legislative bodies, and so, it would be unreasonable to approach the task of interpretation in a narrow or restrictive manner. (Para 5)

Giving the term 'industrial dispute' in Entry 22 of List 3 of Schedule 7 a wide and natural meaning, there is no reason for restricting it to disputes between a body of workmen and the management. A dispute between a single workman and the management would also come within the natural meaning of the term 'Industrial Dispute'. The entry also includes labour disputes. There is no reason for excluding disputes between individual workman and the employer from the purview of the term 'Labour disputes.' In the Industrial Disputes Act, provision is also made for determination of a dispute between an individual workman and the management, such as Section 33-C (2) of the Act. The plea therefore, that Parliament will have no power to legislate regarding disputes between an individual workman and the employer has to be rejected. Case law discussed.

(Paras 5, 6)

Even if the amended Section 2-A of the Industrial Disputes Act is held to be not falling under Entry 22, List III, it would certainly fall under the residuary Entry, Entry 97, List I. (Para 7)

GM/HM/C881/: /LGC/B

(B) Industrial Disputes Act (1947), Section 10 (1) (c) — Reference — Government can make a reference even if it had declined to make a reference earlier. W. P. No. 3436 of 1967 (Mad), Rel. on. (Para 8)

(C) Constitution of India, Art. 226 — Industrial Disputes Act (1947), Ss. 10 (1) (c) and 2-A — Order of reference — Notification mentioning that industrial dispute has arisen between "workmen and the Management" — But it was clear that what the Government was considering and what it was referring was whether non-employment of worker S is justified and if not to what relief he is entitled — Held it could not be said that order was vitiated due to misconception by Government that dispute was collectively between workmen and Management — As reference was competent after introduction of S. 2-A, legality of such a reference could not be questioned. (Para 9)

(D) Constitution of India, Art. 226 — Industrial Disputes Act (1947), S. 10 (1) (c) — Reference — In notification, report of Labour Officer referred to as conciliation report — Such an error would not vitiate order of reference. (Para 9)

Cases Referred: Chronological Paras
(1967) W. P. No. 3436 of 1967 (Mad) 8
(1965) AIR 1965 SC 1387 (V 52) =

(1965) 2 SCR 355, Banarasi Das v.
Wealth Tax Officer, Spl. Circle,
Meerut 5

(1957) AIR 1957 SC 104 (V 44) =
1956 SCR 956, C. P. T. Service v.
Raghunath 6

(1957) 1957-2 All ER 776 = 1957-2
QB 483, R. v. Industrial Disputes
Tribunal 3

(1951) AIR 1951 Mad 616 (V 38) =
1949-2 Mad LJ 789, Kandan Textile
Ltd. v. Industrial Tribunal (1),
Madras 3

V. K. Thiruvengkatachari for A. R. Ramanathan, P. Vedavalli, for Petitioner; Government Pleader, K. V. Sankaran, N. T. Vanamamalai, R. Ganesan, S. Ramaswami, S. T. Ramalingam and S. Shakir, for Respondents.

ORDER:— These two writ petitions are filed by Messrs T. V. Sundaram Iyengar and Sons (P) Ltd., by its Managing Director, Sri T. S. Krishna. The third respondent was employed as an apprentice in the company from 1-5-1964 under order dated 29-4-1964 for a specific period of twelve months. After the period of apprenticeship, the third respondent was taken as a probationer under a fresh contract of service as a Probationary Technical Assistant with effect from 1-5-1965. There was an enquiry regarding the misconduct of the third respondent, and his probation was terminated by an order dated 3-2-1966. The Labour Officer, Tirunelveli, sent a conciliation report on 31-12-1966 to the

Government and on consideration thereof, the Government passed its order dated 24-2-1967 declining to make a reference. Subsequently, on 6-7-1967 the Government referred the matter for adjudication.

2. In these petitions the main contention that is raised is that Section 2-A of the Industrial Disputes Act, 1947, is ultra vires and void and violative of Arts. 14 and 19 of the Constitution of India. As the validity of a Central enactment was questioned, notice was given to the Attorney General and the matter comes up for final disposal.

3. Mr. V. K. Thiruvengkatachari, learned counsel for the petitioners, submitted that Section 2-A of the Industrial Disputes Act is beyond the legislative competence of the Parliament. Section 2-A of the Industrial Disputes Act runs thus:—

"Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination, shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute".

By the amendment, a dispute between a workman and his employer is deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute. Before the introduction of this amendment, 'industrial dispute' was defined under Section 2 (k) as meaning any dispute or difference between 'employers and workmen'. Industrial dispute between employers and workmen had been understood as something more than an individual dispute between a worker or a few workers and the employer. It must be a collective dispute, a dispute between the employer on the one hand and the entire establishment or a part of the establishment on the other hand in which case it is reasonable to presume that at least a substantial number of the employees in the establishment as a whole or in the concerned part of the establishment should be at dispute—vide *Kandan Textile Ltd. v. Industrial Tribunal* (1) Madras, AIR 1951 Mad 616. The same view is taken in *R. v. Industrial Disputes Tribunal*, 1957-2 All ER 776 that the dispute should be between a body of workmen and the management and not merely a dispute between a single workman and his employer. By this amendment, a dispute between a single workman and the management is deemed to be an industrial dispute.

4. The contention of Mr. V. K. Thiruvengkatachari, the learned counsel for the petitioners, is that Parliament has no power to convert an individual dispute

into an industrial dispute. Entry 22 in List III, Seventh Schedule of the Constitution of India is "Trade Unions; industrial and labour disputes". It is submitted that the term "Industrial Dispute" has acquired a specific meaning in law as a dispute between a body of workmen and the management and Entry 22 in List III cannot be construed as empowering the Parliament to legislate on dispute between a single workman and the management. Referring to Entry 7, List III, it was submitted that Parliament may legislate regarding 'contracts'; but Entry 22 in List III may not be wide enough to empower Parliament to legislate on individual disputes also. The meaning of the word "deemed" which is used in the amended Section 2-A of the Industrial Disputes Act was relied on for the submission that it was an admission on the part of the Parliament that what was not an industrial dispute was deemed to be an industrial dispute notwithstanding that it is not an industrial dispute—vide "Words and Phrases Judicially defined," Volume II, page 48 Roland Brown.

5. It has been held that the entries in the various lists should be given a wide meaning. In *Banarasi Dass v. Wealth Tax Officer, Spl. Circle, Meerut*, AIR 1965 SC 1387 it has been held that the Court must interpret the relevant words in the entry in a natural way and give the said words the widest interpretation. What the entries purport to do is to describe the area of legislative competence of the different legislative bodies, and so, it would be unreasonable to approach the task of interpretation in a narrow or restrictive manner. The Supreme Court held that the word 'individuals' used in Entry 86, List I would include a Hindu undivided family. Giving the term 'industrial dispute' a wide and natural meaning, there is no reason for restricting it to disputes between a body of workmen and the management. A dispute between a single workman and the management would also come within the natural meaning of the term 'Industrial dispute'. The entry also includes labour disputes. There is no reason for excluding disputes between individual workman and the employer from the purview of the term 'labour disputes'.

6. Dealing with the C. P. and Berar Industrial Disputes Settlement Act (23 of 1947), the Supreme Court observed in *C. P. T. Service v. Raghunath*, AIR 1957 SC 104 at p. 109 thus:—

"While Act No. 14 of 1947 may be said to be primarily concerned with disputes of labour as a class, Act No. 20 of 1946 is directed to getting the rights of an employee under a contract defined. Now, as the C. P. and Berar Industrial Disputes Settlement Act No. 23 of 1947 covers the ground occupied by both Act No. 20 of

1946 and Act No. 14 of 1947, it would be proper to interpret the expression 'industrial dispute' therein in a sense wider than what it bears in Act No. 14 of 1947, so as to cover not only disputes of workmen as a class but also their individual disputes". Thus, the Supreme Court as accepted the position that the expression 'industrial dispute' would also include individual disputes. It is also seen that in the Industrial Disputes Act, provision is also made for determination of a dispute between an individual workman and the management, such as Section 33-C (2) of the Act. The plea therefore, that Parliament will have no power to legislate regarding disputes between an individual workman and the employer has to be rejected.

7. The learned Government Pleader submitted that even if it is conceded for purposes of argument that the amendment would not fall within the scope of Entry 22, List III, it would in any event fall under the residuary Entry, Entry 97, List I which empowers the Parliament to legislate on any matter not enumerated in List II or List III, including any matter not mentioned in either of those lists. The submission of the learned counsel for the petitioners is that if the Entry contemplated only a dispute collectively between the workmen and the management, the residuary entry cannot be relied on to enable the Parliament to legislate on individual disputes. This contention cannot be accepted, for, the learned Counsel is unable to state how what does not fall within the entries will not come under the residuary entry. Even if the amended Section 2-A of the Industrial Disputes Act is held to be not falling under Entry 22, List III, it would certainly fall under the residuary Entry, Entry 97, List I. The main contention of the learned counsel for the petitioners regarding the legislative competence of the Parliament to legislate Section 2-A of the Industrial Disputes Act therefore, fails.

8. The plea of the learned counsel for the petitioner that the State Government has no right to make a reference when once it has refused to make a reference has not been accepted by this Court. In W. P. No. 3436 of 1967 (Mad) the right of the Government to make a reference even after it had declined to make a reference earlier has been upheld by this Court.

9. The last contention of the learned Counsel for the petitioners is on the merits. The learned Counsel submitted that the order of reference is vitiated by errors apparent on the face of the records. The order of reference states that on a reconsideration of the orders passed in G. T. Rt. No. 396, Industries, Labour and Housing, dated 24-2-1967, the Government have referred for adjudication the dispute about non-employment of Thiru

S. Krishnan. The notification making the reference in G. O. Rt. No. 1231, dated 6th July 1967 is in the following terms:—

"Whereas the Government are of opinion that an industrial dispute has arisen between the workmen and the management of T. V. Sundaram Iyengar and Sons (P) Ltd., Tirunelveli, in respect of matters mentioned in the annexure to this order:—

And whereas, in the opinion of the Government of Madras, it is necessary to refer the said dispute for adjudication; Now, therefore, in exercise of the powers conferred by Section 10 (1) (c) of the Industrial Disputes Act, 1947 (Central Act 14 of 1947), the Governor of Madras hereby directs the said dispute be referred for adjudication to the Labour Court, Madurai".

The dispute that is referred is—

1. Whether the non-employment of Thiru S. Krishnan is justified and if not to what relief he is entitled.
2. To compute the relief if any awarded in terms of money if it can be computed".

The submission on behalf of the petitioner is that there is nothing to indicate that the Government was aware of the fact that the dispute was between an individual workman and the management and as the Government was under the impression that it was a collective dispute between the workmen and the management of T. V. Sundaram Iyengar and Sons (P) Ltd., the order is vitiated due to the misconception by the Government. This plea is mainly based on the wording of the notification that an industrial dispute has arisen between the "workmen and the management" of T. V. Sundaram Iyengar and Sons (P) Ltd. I am unable to accept this contention, for, it is clear that what the Government was considering and what it was referring was whether the non-employment of Thiru S. Krishnan is justified and if not to what relief he is entitled. The plea that the Government was under the misapprehension that the dispute was collectively between the workmen and the management is not borne out from the documents. It is clear that the Government was dealing with the dispute which related to the dismissal of Thiru S. Krishnan and they referred that dispute.

As the reference is competent after the introduction of Section 2-A of the Industrial Disputes Act, the legality of such a reference cannot be questioned. It was also pointed out that another error committed in the notification is that the report of the Labour Officer is referred to as the conciliation report. The report of 6-4-1967 is not a conciliation report. It is only the remarks of the Labour Officer on the petition dated 6-3-1967 of Thiru S. Krishnan. It is conceded by the Gov-

ernment that this is an error. But I do not think that this error would in any way vitiate the order of reference. All the contentions raised by the learned counsel for the petitioner fail and these writ petitions are dismissed with costs. Advocate's fee Rs. 200 one set for both the cases.

Petition dismissed.

AIR 1970 MADRAS 85 (V 57 C 23)

KRISHNASWAMY REDDY, J.

T. Subbiah, (Accused) Petitioner v. S. K. D. Ramaswamy Nadar, (Complainant) Respondent.

Criminal Revn. Case No. 1306 of 1968; Criminal Revn. Petn. No. 1289 of 1968, D/-17-2-1969.

(A) Criminal P. C. (1898), S. 94 — Word "thing" refers to physical or material object — Summons for purpose of taking specimen signature or handwriting is not for production of any document or thing.

Section 94, Criminal P. C., applies only to cases where the Court requires the production of any document or other thing necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under the Criminal P. C. The word "thing" referred to therein is a physical object or material and does not refer to an abstract thing. Therefore, it cannot be said that issuing of summons to a person for the purpose of taking his specimen signature or handwriting is for the production of any document or a thing contemplated under S. 94.

(Para 6)

(B) Constitution of India, Art. 20 (3) — Court directing a person to give his specimen signature and handwriting — Does not amount to testimonial compulsion offending Art. 20 (3)—(Point conceded in view of AIR 1961 SC 1808).

(Para 7)

(C) Evidence Act (1872), Ss. 73, 45, 47 — Court cannot direct person to give specimen signature and handwriting pending investigation by Police — Nature and extent of Court's power in such matter, explained — Sine qua non of applying S. 73 is enquiry before Court — AIR 1962 Pat 255 (FB), Dissented from—(Identification of Prisoners Act (1920), S. 5) — (Criminal P. C. (1898), Ss. 164, 173).

The petitioner was arrested by Police in connection with certain offences of cheating, forgery etc. and subsequently released on bail. Pending the investigation the Police filed a Memo to Sub-Divisional Magistrate requesting him to direct the petitioner to give specimen signature and handwriting for purposes of further investigation. On issue of notice by the Magistrate:

Held, that the Magistrate had no power to direct the accused to give his specimen handwriting or signature in the course of investigation by the police at their instance.

(Para 19)

Court can form opinion in respect of handwriting either (a) on the opinion of an expert or (b) on the opinion of a person acquainted with the handwriting or (c) by comparison by the Court itself. Under Section 73, the Court by its own comparison of writing has to form its opinion. This power under Section 73 can be exercised by the Court without being asked for by any party. While exercising such power, the Court for the purpose of comparison, can take the extraneous aid by using magnifying glass, by obtaining enlargement of photographs or by even calling an expert.

(Para 8)

Under Section 73 an additional power is conferred on the Court to direct any person present in Court to write any words or figures. But to direct a person to write words or figures for the purpose of comparison, there must be (i) a cause before the Court, (ii) the person so directed must be a party to the cause, (iii) he should be present in Court in respect of the said cause and (iv) such comparison must be necessary to determine the issue raised in the said cause. The sine qua non of applying the provisions of the Evidence Act is the enquiry by a Court.

(Para 10)

The Magistrates cannot take part in the investigation by the police or aid the police in any manner except in cases where such assistance is specifically provided in the Criminal P. C. or under any other statute.

(Paras 11, 12)

Also the contrast between S. 5 of the Identification of Prisoners Act and Section 73, Evidence Act shows that the Court under S. 73, Evidence Act does not have even power to issue summons to the person to be present in Court unless he is already present in Court as a party concerned in the proceeding before it. The Magistrate can direct a person to give his finger prints in the course of investigation by the police by virtue of Section 5 of the Identification of Prisoners Act but not under Section 73 of the Evidence Act though the finger prints are included therein for the purpose of comparison. AIR 1962 Pat 255 (FB), Dissented from; AIR 1961 SC 1808, Disting: 1966 Mad LJ (Cri) 298 (Ker) & AIR 1958 Bom 207 & AIR 1958 Cal 123, Rel. on.

(Para 13)

(D) Evidence Act (1872), S. 73 — "Any person" — Interpretation of — Those words refer to persons who are parties to "cause" pending before Court.

Though the words "any person" are so wide as to include all persons, the words "person present in Court" limit only those persons who are before the Court to whom the Court may give a direction, to write any words or figures. Again, those

words may not include an onlooker or a spectator but refer to persons who are parties to a 'cause' pending before the Court. It may include even the witnesses of the contesting parties in the said cause.

(Para 10)

(E) Evidence Act (1872), S. 73 — Exercise of powers under — Stage for — Warrant for arrest of accused issued under Ss. 60 to 63, Criminal P. C. — Power is not one exercised in course of enquiry or trial— Power under S. 73, Evidence Act could not be exercised. AIR 1962 Pat 255 (FB), Dissented from. (Para 15)

Cases Referred: Chronological Paras

(1966) 1966 Mad LJ Cri 298 = 1965

Ker LT 950, Aloysious John v. State of Kerala 16

(1962) AIR 1962 Pat 255 (V 49) =

1962 (2) Cri LJ 84 (FB), Gulzar Khan v. State 15, 16

(1961) AIR 1961 SC 1808 (V 48) =

1961 (2) Cri LJ 856, State of Bombay v. Kathi Kalu Oghad 4, 7, 14

(1960) AIR 1960 Cal 32 (V 47) =

1960 Cri LJ 56, Farid Ahmed v. The State 14

(1958) AIR 1958 Bom 207 (V 45) =

1958 Cri LJ 619, State v. Poonamchand 17

(1958) AIR 1958 Cal 123 (V 45) =

1958 Cri LJ 367, Hiralal v. State 18

(1928) AIR 1928 PC 277 (V 15) =

28 Mad LW 737, Kessarbai v. Jethabhai Jivan 9

K. Ramaswami, for Petitioner; Assistant Public Prosecutor, for the State; A. Shanmughavel, for the Complainant.

ORDER:— This revision petition has been filed by the accused in Crime No. 4 of 1968, District Crime Branch, Ramana-thapuram at Madurai, against the order of the Sub-Divisional Magistrate, Srivilliputur, directing him to appear on 27-11-1968 for taking his specimen signature and handwriting for the purpose of investigation.

2. The relevant facts necessary for the appreciation of the contentions raised by the petitioner are briefly as follows;

3. The petitioner was arrested by the Rajapalayam Police in connection with certain offences of cheating, forgery etc., alleged to have been committed by him. He was subsequently released on bail. While the investigation was pending, the Inspector of Police, District Crime Branch, Ramanathapuram, filed a memo on 21-9-1968 before the Sub-Divisional Magistrate, Srivilliputur, requesting him to direct the petitioner to give his specimen handwriting and affix his specimen signature both in ink and pencil for the purpose of further investigation in the matter. On that memo, the learned Sub-Divisional Magistrate issued notice to the petitioner asking him to appear on 5-10-1968 and

give his specimen handwriting and signature for the purpose of further investigation. On 5-10-1968 the petitioner appeared through his counsel and filed an objection petition alleging that he was not bound in law to furnish specimen handwriting or signature as that would amount to testimonial compulsion to offer evidence against himself, offending Art. 20 (3) of the Constitution of India.

4. After hearing both sides, the learned Sub-Divisional Magistrate following the decision of the Supreme Court in State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808 overruled the objections raised by the petitioner and directed him to appear on 27-11-1968 for the purpose of giving his specimen signature and handwriting.

5. Against the above order, this revision has been filed. In this revision petition, the petitioner raised the following points; (1) that the Sub-Divisional Magistrate has no jurisdiction to issue any summons to the petitioner under Sec. 94, Criminal P. C. for the purpose of producing any documents and consequently for complying with the directions issued by the Court; (2) that the direction given by the Court insisting upon the petitioner to give his specimen signature and handwriting would amount to testimonial compulsion offending Art. 20 (3) of the Constitution of India. This point has been raised in the lower Court and negatived; (3) that the Sub-Divisional Magistrate had no jurisdiction under Section 73 of the Evidence Act to direct the petitioner to give his specimen handwriting or signature when the charge-sheet had not been filed, in other words, the Sub-Divisional Magistrate had no jurisdiction to exercise this power under Section 73 of the Evidence Act during the pendency of the investigation while he has not taken cognizance of the case.

6. In respect of the first point that the Sub-Divisional Magistrate has no jurisdiction under Section 94, Criminal P. C. to issue summons to the petitioner for the purpose of taking his specimen signature or handwriting from him. I am of the view that there is nothing to indicate, that the learned Sub-Divisional Magistrate has issued summons to the petitioner under Section 94, Criminal P. C. Section 94, Criminal P. C., will apply only to cases where the Court requires the production of any document or other thing necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under the Criminal P. C. In this case, the summons was not issued to the petitioner for the production of any document or any other thing. The word "thing" referred to in Section 94, Criminal P. C. is a physical object or material and does not refer to an abstract thing. It cannot be said that issuing of summons to a person for

the purpose of taking his specimen signature or handwriting is for the production of any document or a thing contemplated under Section 94, Criminal P. C. It is not the case of the prosecution that the learned Magistrate exercised his power under Section 94, Criminal P. C., in issuing summons to the petitioner. The learned Counsel for the petitioner is unable to substantiate this point and ultimately did not press it.

7. In respect of point No. 2 that directing the petitioner to give his specimen signature and handwriting will amount to testimonial compulsion under Art. 20 (3) of the Constitution of India, the learned counsel was unable to press this point in view of the decision of the Supreme Court in AIR 1961 SC 1808.

8. In respect of point No. 3 the main question that arises is, as already pointed out, whether the Court has got power to direct the accused to give his specimen handwriting, signature or to write words or figures in the course of the investigation by the police, under Section 73 of the Indian Evidence Act. It, therefore, becomes necessary to consider the scope of Section 73 of the Evidence Act which runs thus;

"In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also, with any necessary modifications, to finger impressions."

This section, therefore, makes it clear that, when the Court considers necessary to ascertain whether the signature, writing or seal is that of the person, alleged to have been written or made, the Court can compare such signature, writing or seal with the admitted or proved signature, writing or seal of that person and that while doing so, the Court is empowered to direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare such words or figures with those alleged to have been written by that person. This is an enabling provision for the Court making an enquiry in determin-

ing an issue to form its opinion by comparison of the words or figures as the case may be in a given case. In respect of the proof of handwriting or signature, we have two other modes provided under the Evidence Act. Under Section 45, the opinions of experts specially skilled in such signs will be relevant for forming an opinion by the Court on such points. Under Section 47, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed, will be relevant for the purpose of the Court forming an opinion, whether a particular document was written or signed by him. Section 73 of the Evidence Act provides the third method. Thus the Court can form opinion in respect of handwriting either (a) on the opinion of an expert or (b) on the opinion of a person acquainted with the handwriting or (c) by comparison by the Court itself. Under Sections 45 and 47 of the Evidence Act, the Court has to form an opinion on the opinion of others, whereas under Section 73 of the Evidence Act, the Court by its own comparison of writings has to form its opinion. In spite of the opinions of expert or a person acquainted with the handwriting, the Court could still, if it desires to use its skill in comparing the handwriting or signatures, do so under Section 73, to which no party to the cause will have a right to question or object to. This power under Section 73 can be exercised by the Court without being asked for by any party. While exercising such power, the Court for the purpose of comparison, can take the extraneous aid by using magnifying glass, by obtaining enlargement of photographs or by even calling an expert—all these to enable the Court to determine by comparison. There is no basis for the view that the Court cannot seek extraneous aid for its comparison; but on the other hand, there is indication in Section 73 of the Evidence Act itself that such extraneous aid might be necessary. Section 73 enables the Court to compare the finger impressions also. The finger impressions cannot be normally compared by naked eye without a special skill required for the purpose. In comparing finger impressions, the Court may have to take necessarily the help of a skilled person.

9. In *Kessarbai v. Jethabhai Jivan*, AIR 1928 PC 277, the Privy Council while dealing with the scope of Section 73 of the Evidence Act, observed that mere comparison of signatures without the aid in evidence of microscopic enlargements or any expert advice is dangerous.

10. For the purpose of comparison under Section 73 by the Court, an additional power is conferred on it to direct any person present in Court to write any words or figures enabling the Court to

compare them with any words or figures alleged to have been written by such person. Though the words "any person" are so wide as to include all persons, the words "person present in Court" would limit only those persons who are before the Court to whom the Court may give a direction, to write any words or figures. Again here, in my view, the words "any person present in Court" may not include an onlooker or a spectator who has come to Court for the purpose of sight seeing or for even witnessing the proceedings in Court. The words "any person present in Court" will refer to persons who are parties to a 'cause' pending before the Court. It may include even the witnesses of the contesting parties in the said cause. It is clear to my mind that, to direct a person to write words or figures for the purpose of comparison, there must be a cause before the Court, that the person so directed must be a party to the cause, that he should be present in Court in respect of the said cause and that such comparison is necessary to determine the issue raised in the said cause. If there is no cause pending before the Court for its determination, the question to ascertain the signature or handwriting of a person will not arise at all and, therefore, the provisions of Section 73 of the Evidence Act will apply only when a matter is pending before the Court and not otherwise. The provisions of the Evidence Act will apply only in relation to matters of fact under enquiry before a Court. If there is no enquiry by a Court, there is no scope of applying any of the provisions of the Evidence Act. The sine qua non of applying the provisions of the Evidence Act is the enquiry by a Court.

11. The enquiry or trial in criminal cases commences only after the court takes cognizance of the matter provided under Section 190, Criminal P. C. The cognizance for the Court is taken either on a private complaint or on a report by the police or on any other information received from any person or upon his own knowledge or suspicion that an offence has been committed.

12. The final report under Section 173, Criminal P. C., is submitted by the police as a result of investigation under Chapter XIV of the Criminal P. C. The Magistrates cannot take part in the investigation by the police or aid the police in any manner except in cases where such assistance is specifically provided in the Criminal P. C. or under any other statute, such as recording of statements from witnesses and recording of confession from the accused under S. 164, Criminal P. C., in the course of the investigation by the police.

13. Under Section 5 of the Identification of Prisoners Act, 1920 it is specifically

provided that if a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Code of Criminal Procedure, it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect. It also provides that in that case, the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken as the case may be, by a police officer. The word "measurements" mentioned in the said provision will include finger prints and foot prints but not the handwriting or the signature. It is very significant to note that taking of handwriting or signature from a person by a Magistrate in the course of investigation by the police is specifically excluded. When the Parliament made this enactment, it must have had in its mind not only that Section 73 of the Evidence Act does not give power to the Court to take finger prints, signature and handwriting from a person in the course of investigation by the police but also it must have thought that it might not be necessary to include the taking of handwriting or signature of a person in the course of investigation by the police. Otherwise, there is no tangible reason for the Parliament to exclude, under the Identification of Prisoners Act, the taking of handwriting or signature. The Parliament must have probably thought that though the taking of the handwriting or the signature of a person is one of the modes of identification, it was not an infallible one and that the better mode of proving the handwriting or signature is what is provided under S. 47 of the Evidence Act, namely, the evidence of that person who is acquainted with the signature of the person concerned. In this context, it is also worthwhile to note in contrast to Sec. 73 of the Evidence Act that this section empowers the Magistrate to direct any person irrespective of the fact whether that person is a party to the cause or not, and the section also empowers the Magistrate to direct a person to be produced before him at the time and place specified by him, and does not confine only to those persons present in Court. By this contrast between these two provisions, though under different statutes, it appears to my mind that the Court under S. 73 of the Evidence Act does not have even power to issue summons to the person to be present in Court unless he is already present in Court as a party concerned in the proceeding before it. The Magistrate can direct a person to give his finger prints in the course of investigation by the police by virtue of Section 5 of the Identification of Prisoners Act but not under Section 73 of the Evidence Act though the finger prints

are included therein for the purpose of comparison.

14. It is contended by Sri Shanmughavel, the learned counsel appearing for the complainant that in the interests of justice it is the duty of the Magistrate to assist the police in the course of investigation and that Section 73 must be read so as to give a liberal meaning to it and he stresses this point further, stating that there is no other provision under any other statute enabling a Magistrate to direct a person to give his handwriting or signature in the course of investigation. There is a fallacy in this contention. If, in the interests of justice, even, before the Court takes cognizance of the case, it would assist the Police Officer in investigation equally, in the interests of Justice, it can be contended that a party accused of an offence by the police, even before the Magistrate takes cognizance of the case against him, could approach the Magistrate and seek his assistance to take his specimen signature or handwriting for the purpose of comparison in the course of investigation by the police to establish his innocence. Can it be said that the Magistrate could comply with the request of the party before taking cognizance of the case against him? This will lead to an anomaly. The learned counsel is unable to press this point further. But, however, he relied upon a decision of the Supreme Court in AIR 1961 SC 1808.

On a careful reading of the decision of the Supreme Court, I do not find any basis for the contention of the learned counsel that even during the investigation, the Magistrate can direct a person to give the specimen handwriting or signature under Section 73 of the Evidence Act. That decision arose from three appeals from three States, namely, Bombay, Punjab and West Bengal. In the Bombay case, the Police, in the course of the investigation, had obtained specimen handwritings of the accused for the purpose of comparison of the handwriting in the disputed document. In the Punjab case, the impressions of the palms and fingers of the accused were taken by the police in the course of investigation in the presence of a Magistrate, obviously under the provisions of Sections 5 and 6 of the Identification of Prisoners Act. In the West Bengal case, the facts of which are similar to the facts of the present case, the accused, after he was released on bail, was directed by the Magistrate under Section 73 of the Evidence Act to give his specimen writing and signature for the purpose of comparison; during the investigation by the police and at their instance. The learned counsel depends upon the following passage in the said decision.

"To be a witness" may be equivalent to "furnishing evidence" in the sense of

making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for the "purpose of identification". "Furnishing evidence" in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that — though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English law on the subject — they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminal to justice. The taking of impressions of parts of the body of an accused person very often becomes necessary to help the investigation of crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law Courts with legitimate powers to bring offenders to justice. Furthermore it must be assumed that the Constitution-makers were aware of the existing law, for example, Section 73 of the Evidence Act or Sections 5 and 6 of the Identification of Prisoners Act (33 of 1920). Sec. 5 authorises a Magistrate to direct any person to allow his measurements or photographs to be taken if he is satisfied that it is expedient for the purposes of any investigation or proceeding under the Code of Criminal Procedure to do so; 'Measurements' include finger impressions and foot-print impressions. If any such person who is directed by a Magistrate under S. 5 of the Act, to allow his measurements or photographs to be taken resists or refuses to allow the taking of the measurements or photographs, it has been declared lawful by Section 6 to use all necessary means to secure the taking of the required measurements or photographs. Similarly Section 73 of the Evidence Act authorises the Court to permit the taking of finger impression or a specimen handwriting or signature of a person present in Court, if necessary for the purpose of comparison".

Nowhere in this passage we find that Section 73 of the Evidence Act authorises the Court to take the finger impression or specimen handwriting of the person present in Court in the course of investigation by the police. It is true that in the West Bengal case, (the point of) the specimen handwriting or signature to be taken in the course of investigation by the police does not appear to have been raised at all. It is also significant to note that in the decision of the High Court of West Bengal against which the appeal was filed reported in Farid Ahmed v. The State, AIR 1960 Cal 32, it was held that the order could

not have been made under Section 73 of the Evidence Act as it was made in the course of an investigation. This appears to be the finding given by the West Bengal High Court in that case on that point. In the appeal, against the decision of the High Court to the Supreme Court, this point was not at all raised. The Supreme Court was wholly concerned in all the three cases, irrespective of the details of the facts of those cases, with the question whether the taking of finger prints, handwriting etc., etc., from an accused either under the Identification of Prisoners Act or under S. 73 of the Evidence Act, would offend Art. 20 (3) of the Constitution. This is made very clear in the first sentence of para 2 of the majority judgment which is as follows:

"It is not necessary to state in any detail the facts of each of the cases now before us. We shall, therefore, state only so much of the facts as have occasioned calling in aid of the provisions of Cl. (3) of Art. 20 of the Constitution".

This passage makes it abundantly clear that the Supreme Court was not concerned with any other question in relation to the facts of each of these cases. I am, therefore, of the view that there is no basis for the contention of the learned counsel that the Supreme Court has at least indirectly approved the point that the Magistrate can take handwriting or signature of the accused in the course of investigation.

15. The learned counsel relied upon a Full Bench case of the Patna Court in *Gulzar Khan v. State*, AIR 1962 Pat 255 (FB) which is similar to the facts of this case. The facts of that case are these; They were concerned with three cases. In one case, the accused were directed by the Magistrate to appear before the police for giving their finger-prints and foot prints for the purpose of comparison in the course of investigation, when the accused were on bail. In the second case, the accused was directed by the Magistrate to appear before the Sub Inspector of Police and to give specimen of his signature for the purpose of comparison while he was on bail and the investigation was pending. In the third case, the Magistrate directed the accused to appear before him and to give specimen handwritings and thumb-impressions. To an argument by the counsel that Section 73 of the Evidence Act cannot be invoked by the Magistrate before taking cognizance of the case and that the Magistrate was not empowered under S. 73 to direct a person to give specimen handwriting and thumb impressions for the purpose of investigation by the police, the Court answered it by one sentence that the argument could not be acceded to. The Court has observed (sic) its view in the following

terms indicating that even before the Magistrate takes cognizance of the case, he can direct the accused to give specimen handwriting and signature under Sec. 73 of the Evidence Act:

"But even in regard to Section 73 of the Evidence Act, the word "Court" therein must be equated with the Court of the Magistrate in a case triable by him or before it is committed to sessions in a case triable by the Court of Session. As "a matter of fact, in every case where the accused is arrested and he is required to give his specimen handwriting of signature or thumb impression etc., he is arrested under a warrant which must be issued by a Magistrate or when the police arrest without a warrant in a cognizable offence under Section 60 of the Code of Criminal Procedure, he must be produced before a Magistrate without unreasonable delay and follow the procedure under Sections 60 to 63 of the Code as also under Art. 22 of the Constitution of India and that attracts the provisions of Section 73 of the Evidence Act. In none of the numerous cases, has this point been specifically raised on this account and this contention also fails accordingly."

With great respect, I am unable to agree with these observations for the reasons given by me in the earlier portion of my judgment. The Magistrate issuing a warrant for the arrest of an accused or exercising his powers under Sections 60 to 63 of the Criminal P. C. are not the powers exercised by him in the course of an enquiry or trial by him which, as already pointed out by me, is the only stage when he could exercise his powers under Section 73 of the Evidence Act.

16. In a decision of a Division Bench of Kerala High Court in *Aloysious John v. State of Kerala*, 1966 Mad LJ CrI 298 (Ker). Govinda Menon, J., on behalf of the Division Bench, dissented from his own earlier judgment, decided by him as single Judge, and held that under S. 73 of the Evidence Act, the Magistrate has no powers at the investigation stage by the police to issue a direction to the accused to appear in Court for the purpose of giving specimen handwriting and signature at the request of the police. The Division Bench expressed inability to subscribe to the view mentioned in AIR 1962 Pat 255. I respectfully agree with this decision.

17. In *State v. Poonamchand Gupta*, AIR 1958 Bom 207 it was held that Cl. (2) of Section 73 of the Evidence Act limits the power of the Court to directing a person present in Court to write any words or figure only where the Court itself is of the view that it is necessary for its own purposes to take such writing in order to compare the words or figures so written with any words or figures alleged to have

been written by such person, and that the power does not extend permitting one or the other party before the Court to ask the Court to take such writing for the purpose of its evidence or its own case.

18. In *Hiralal v. State*, AIR 1958 Cal 123, it was held that Section 73 cannot be construed as an instrument or a device to be used for the advancement of any party, either the prosecution or the accused that it is one of those sections where large powers are given to the Court to find out the truth and to do complete justice between party and party and that any other use of it would be wholly unjustified. I respectfully agree with these two decisions.

19. In the result, I find that the Magistrate had no power to direct the accused to give his specimen handwriting or signature in the course of investigation by the police at their instance.

20. The petition is allowed.

Petition allowed.

AIR 1970 MADRAS 91 (V 57 C 24)

SPECIAL BENCH

M. ANANTANARAYANAN C. J.,
RAMAKRISHNAN AND NATESAN, JJ.

Antoniswamy, Applicant v. Anna Manickam and another, Respondents.

M. C. No. 7 of 1964, D/-28-1-1969, referred by Dist. J., West Tanjore, D/-4-12-1964.

Divorce Act (1869), Sections 10 and 17 — Husband's petition for dissolution of marriage — Grounds of wife's adultery and desertion — Both respondents remaining ex parte — Petitioner examining himself alone — No corroboration — His evidence held sufficient for relief sought for — (Evidence Act (1872), Ss. 3, 120 and 134).

Where in the proceedings on husband's petition for dissolution of marriage on the grounds of wife's adultery and desertion, the husband examined himself alone and there was no corroboration to his testimony and both the respondents remained ex parte, merely because the respondents did not care to contest the proceeding may not justify Court in coming to the conclusion that the evidence of the petitioner was true and worthy of credit.

(Para 3)

Under Section 7 of the Divorce Act, Courts have to be circumspect, and the uncorroborated evidence of a husband has to be received with caution, and assessed with vigilance.

(Para 4)

But in the ordinary circumstances of society in this country, a man would not like to make statements against a wife, such as of prolonged desertion and con-

tinued illicit intimacy with another man, if such averments have no basis or foundation in truth. Again, under the Act, the matrimonial offence of adultery per se gives the husband a cause of action for divorce. In the instant case there was continuous illicit intimacy, with a third party, deserting the home and the husband altogether.

Taking these circumstances into consideration together with the provisions of Sections 3 and 134 of the Evidence Act, the husband's evidence could be accepted as sufficient for the relief sought by him. (Para 4)

Cases Referred: Chronological Paras
(1923) AIR 1923 Mad 9 (V 10) =

68 Ind Cas 931, P. Joseph v. P.

Ramamma

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M. A. Srinivasan (amicus curiae), for Applicant; C. Chinnaswami (amicus curiae), for Respondent.

M. ANANTANARAYANAN C. J.: This is a reference by the learned District Judge, West Thanjavur, under Section 10 read with Section 17 of the Indian Divorce Act, for dissolution of the marriage as between the petitioner and the first respondent, on the facts of the record.

2. The evidence in this case is very simple, and within a brief compass. The parties are Indian Christians, and the evidence of the petitioner is that he married the first respondent 18 years ago at Ammapettai. They lived for about six years at Saliangalam, immediately after the marriage. In the year 1951 the petitioner was appointed as watchman of the Raja Mirasdar Hospital, Thanjavur, and he, thereupon, proceeded to Thanjavur along with the first respondent and the two lived together there. The first respondent lived with the petitioner only till 1963, and she then deserted the petitioner, ran away from him, and began living in illicit intimacy with the second respondent. From 1955 onwards she had been living separately, and, with the second respondent, her paramour. The petitioner swears that there is no collusion between the parties and he prays for dissolution of the marriage, under Section 10 of the Indian Divorce Act, on the ground of adultery by the wife.

3. This case has occasioned us some anxiety, because it is the petitioner (P. W. 1) alone who has given testimony on oath, and there is no other evidence on the record, in corroboration of his testimony. The two respondents have remained ex-parte throughout, and even in this Court. But that is a circumstance which may not justify any Court in coming to the conclusion that the evidence of the petitioner is true and worthy of credit, merely because the respondents have not cared to contest the proceeding. Actually, in the light of Section 7 of this Act, which lays down that the High Courts and

District Courts should give relief, in such cases, on principles and rules as nearly as possible conformable to the principles and rules of the Divorce and Matrimonial Courts in England, there have been prior instances when this Court declined to act and give relief on the uncorroborated testimony of the husband. One such instance is *P. Joseph v. P. Ramamma*, 68 Ind Cas 931 = (AIR 1923 Mad 9).

4. But, we are definitely of the view that, in this case, not merely is the husband (P. W. 1) a competent witness, but that his evidence is true, worthy of credit and that it deserves to be acted upon. We may point out that, under the Indian Evidence Act, "a fact is said to be proved" within the meaning of the relevant definition in Section 3, when the Court considers its existence so probable, on the available evidence, that a prudent man ought to act upon the supposition that the fact exists. Under Section 134 of the same Act, no particular number of witnesses, nor particular quantum of evidence is required by the law for the proof of any fact. Certainly, in divorce cases, because of the principles of Section 7 of the Indian Divorce Act, Courts have to be circumspect in this regard, and the uncorroborated evidence of a husband will have to be received with caution, and assessed with vigilance.

But, keeping these principles in mind, nevertheless, we are convinced that this is a case in which the evidence ought to be accepted, and the relief ought to be afforded. The evidence of the husband (P. W. 1) appears to be true, worthy of credit, and free from any possible suspicion of collusion. As the learned District Judge points out, there are two sons by this marriage, aged 17 years and 14 years, whom the husband (P. W. 1) is bringing up, in his custody and nurture. It is most improbable that the husband would have come forward with a proceeding of this character, if the wife (first respondent) had not really deserted him, and had not been living in adultery with the second respondent.

It has to be borne in mind that, in the ordinary circumstances of society in this country, a man would not like to make statements of that character, against a wife, including averments of prolonged desertion and continued illicit intimacy with another man, had these averments no basis or foundation in truth. Again, though under the statute the matrimonial offence of adultery per se gives the husband a cause of action for divorce, this is actually a case of continuous illicit intimacy, with a third party, deserting the home and the husband altogether. We are, hence, satisfied that this is a case in which the evidence on record ought to be accepted, as affording a sufficient basis for the relief sought for by the husband.

5. Hence, we confirm the decree of the learned District Judge under Section 17 of the Indian Divorce Act and accept the reference.

Reference accepted.

AIR 1970 MADRAS 92 (V 57 C 25)

ISMAIL J.

Pamela Williams, Petitioner v. Patrick Cyril Martin, Respondent.

O. P. No. 158 of 1968, D/- 29-10-1968.

(A) Guardians and Wards Act (1890), Ss. 25 and 4 (2) — Guardian — Meaning of — It means all kinds of guardians whether testamentary, certificated, natural or even de facto. (Para 5)

(B) Guardians and Wards Act (1890), Ss. 25 and 4 (2) — Illegitimate child — There is no authority to hold that under English law mother of illegitimate child is natural guardian of the child: AIR 1934 Lah 1003, Rel. on; Case Law Ref.

(Para 11)

(C) Guardians and Wards Act (1890), S. 7 — Scope — Declaration is merely recognition of pre-existing right — Declaration as to guardianship — When can be made.

The declaration as to guardianship that may be made by the Court is merely a recognition of a pre-existing right and this is made clear when Section 7 of the Guardians and Wards Act, 1890, provides separately for appointment of a guardian and declaration of a person as a guardian. When the person who wants to be declared a guardian does not in fact occupy the position of a guardian pursuant to any power recognised by law, the question of the Court declaring such a person as a guardian does not arise. As a matter of fact, where a person happens to be natural guardian of a minor under the law applicable to the parties, the question of such a person getting himself or herself appointed or declared as a guardian under the provisions of the Guardians and Wards Act, does not arise, since such an appointment or declaration is wholly unnecessary for such a guardian to exercise his powers and discharge his duties as the law itself designates him or her as the guardian of the minor concerned and pursuant to such designation, the guardian acquires the rights and incurs the obligations relevant to such a status. Only where a guardian has been appointed by a will or other instrument, the question of such a guardian getting himself or herself declared by the Court may possibly arise. (Para 12)

(D) Guardians and Wards Act (1890), Ss. 7 and 25 — Appointment of guardian — Petitioner a permanent resident of

CM/IM/B79/69/VGW/P.

England — Held, she could not be appointed as guardian of minor so as to enable her to obtain custody of minor under S. 25: (1911) 22 Mad LJ 68 & AIR 1931 Mad 478, Rel. on; AIR 1937 Lah 797 & AIR 1942 Lah 162 & AIR 1933 All 780 & AIR 1937 Bom 158, Not Foll. — Held further on facts that the case did not constitute an exception to aforesaid rule. Case Law Ref. (Paras 15, 18)

(1758) 1 Bott PLC (Const) 478, R.

v. Felton & Wenman

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Seelia Seetharaman, for Petitioner; K. S. Varadachari and Jagannath, for Respondent.

Cases Referred: Chronological Paras

- (1965) 78 Mad LW 151, Neelamega v. Mrs. Angelina Neelamega 8
 (1956) 1956-2 All ER 876 = 1956-1 WLR 911, Re G. Infant 6
 (1947) AIR 1947 Mad 172 (V 34) = ILR (1947) Mad 519, Dorairaj v. Lakshmi 8
 (1944) AIR 1944 Cal 433 (V 31) = ILR (1943) 2 Cal 554, In the matter of Lovejoy Patel 16
 (1942) AIR 1942 Lah 162 (V 29) = 44 Pun LR 186 = 20 Ind Cas 137, Ghulam Qadar v. Alladin 15
 (1937) AIR 1937 Bom 158 (V 24) = ILR (1937) Bom 348, Chimanlal Ganpat v. Rajaram Maganchand Oswal 15
 (1937) AIR 1937 Lah 797 (V 24) = ILR (1937) Lah 426, Nazir Begam v. Ghulam Quadair Khan 15
 (1937) AIR 1937 Mad 51 (V 24) = ILR (1937) Mad 383, Raja of Vizianagaram v. Secy. of State for India 16
 (1934) AIR 1934 Lah 1003 (V 21) = ILR 15 Lah 630, Pareem Kaur v. Banarsidas 11
 (1933) AIR 1933 All 780 (V 20) = ILR 56 All 20, Beniprasad v. Mt. Parwati 15
 (1931) AIR 1931 Mad 478 (V 18) = 60 Mad LJ 615, Subbaratnammal v. Seshachalam Naidu 14
 (1931) 1931-1 KB 317 = 144 LT 383, In re, J. M. Carroll, an infant 11
 (1912) 1912-171 C 926, Ma Mya v. Felix Slym 11
 (1912) 28 TLR 342, Rex v. Walker 11
 (1911) 22 Mad LJ 68 = 10 Mad LT 477, Batcha Chetti v. Ponnuswami Chetti 14
 (1901) 1901-2 KB 385 = 70 LJKB 752, Mumphyrs v. Polak 11
 (1891) 1891 AC 388 = 65 LT 423, Barardo v. Mc. Hugh 11
 (1885) 30 Ch D 324 = 54 LJ Ch 1122, In re, Willoughby, an infant 7, 14
 (1883) 10 QBD 454 = 52 LJ QB 442, Reg v. Nash 11
 (1837) 2 My & Cr 31 = 40 ER 552, Cambell v. Mackay 16
 (1804) 1 B & P (N R) 148 = 127 ER 416, Ex parte Knee 11
 (1801) 6 Ves Jun 363 = 31 ER 1095, Mountstuart v. Mountstuart 16

ORDER:—This is a petition under Sections 7 to 10 and 25 of the Guardians and Wards Act 1890, for declaring the petitioner herein to be the guardian of the person of the petitioner's minor illegitimate daughter born on 8-9-1955 and for directing the respondent herein, the putative father of the said illegitimate child, to give custody of the said minor child to the petitioner herein. The respondent is the husband of the petitioner's mother's younger sister. The petitioner, two other daughters and her brother were the children of her parents. After the death of the petitioner's father, the petitioner's mother married one G. Ballard. The petitioner claims to be very much attached to her aunt, namely, the wife of the respondent. According to the petitioner, she used to frequently visit the respondent and his wife. From 1950 to 1963, the petitioner lived with the respondent in the respondent's house as his mistress and it is as a result of this illicit connection between the petitioner and the respondent, the daughter was born on 8-9-1955. In 1963, the petitioner left India for England, where she secured a job as a short-hand writer Secretary. During the period of her stay in England, she used to send small amounts and presents to the illegitimate daughter. In December 1967, she came over to India and the evidence makes it clear that she was friendly with the respondent. She requested the respondent to send the minor to England along with her at least for a holiday and the respondent also agreed to send the minor to England during the summer vacation, when the school would remain closed. I may mention here at this stage that the minor is studying in VII Standard in St. Kevins Presentation Convent, Royapuram, During her stay in India, in December 1967-January 1968, for the purpose of taking the minor to England, the petitioner contacted the High Commissioner of the United Kingdom, at Madras and she was advised that she must obtain a declaration of sponsorship for the child. After the petitioner returned to England in January 1968, on 31st January 1968, she made a sponsorship declaration before Notary Public in London, undertaking to bear the cost of passage of the minor from India to United Kingdom to maintain her during her stay in the United Kingdom and repatriate her to India at her cost, if and when necessary. She sent the sponsorship declaration to the respondent herein to enable him to take necessary steps by way of obtaining a

completing the other formalities, with a view to send the minor to England. A photostat copy of the said declaration of sponsorship has been filed as Ex. P-1 in this case. The petitioner's case is, that after she sent the declaration of sponsorship to the respondent, the respondent did not take steps pursuant to the same, as agreed to by him for sending the minor to England, when the petitioner was here in India and her letters to the respondent in this behalf were not replied to and she wrote to the minor also and she also did not write back. On the other hand, the case of the respondent is that the minor was not willing to go to England and he replied to the letters of the petitioner. It is under these circumstances, the petitioner has now come over to India and instituted the present proceedings before this Court.

2. In the petition and in the affidavit filed in support of the petition, the case of the petitioner with regard to her prayer for being declared a guardian of the minor is that she is the mother of the child and has great love and concern for the minor's welfare and she is the natural guardian and that she is in a good position and hence she is able to maintain the minor in comfort in a decent atmosphere. In support of her case that the respondent should be directed to hand over the custody of the minor child to the petitioner, the petitioner states that the law recognises the right of the mother to the guardianship of her illegitimate child and the putative father has no rights; that the putative father is profligate and callous and is in an impecunious condition; that the respondent is legally married and has to maintain his wife and a son on a meagre salary. And the petitioner has also given the following reasons, which led to the present petition, the utter disregard and silence of the respondent after agreeing to send the minor to England at the request made by the petitioner, when she was in India in December 1967—January 1968, the respondent's refusal to deliver custody of the minor even after the petitioner obtained a declaration of sponsorship from the Notary Public in London and forwarded the same to the respondent in February 1968; the respondent's failure to reply to the solicitor's notice sent to him in April 1968, on behalf of the petitioner; and the impressionable age of the minor and the unhealthy surroundings in which she is growing up at a time when the petitioner could give her a good, healthy and normal life in London. The petitioner further avers in the petition that the minor is reaching an age when she should be looked after with great care and affection and in the minor's present set up her future happiness is in jeopardy; that she is in the midst of people who lead abnormal lives; that the wife of the respondent,

who happens to be the maternal aunt of the petitioner is a woman of weak will, feeble in mind and body, who is a complete slave of the respondent and lives in virtual fear of being thrown out by him; that the respondent's only son Charles is a lad of 21 years who is leading a wayward life; that the respondent does not wish his daughter, the minor, to get away from his clutches, for she feels that he will lose all hold on the petitioner, the mother of the child, whom he wants back at any cost; that the respondent is in short a sadist and thoroughly selfish man whose mind is completely warped and who does not care for the happiness of these close to him; and that the petitioner fears that her only child will develop into an emotionally troubled person, for she has found out when she was with the child last, that is, barely six months before the filing of the petition, that the father had succeeded to some extent in alienating the love of the minor for its mother, the petitioner. These allegations are further elaborated in the affidavit filed in support of the petition. In the affidavit, the petitioner states that during the four and odd years she had been away, she had been making herself secure financially well so that she might provide a comfortable home for her daughter, that she had been sending her money and other articles so that the minor might not be in want, as her father, the respondent, is unable to maintain her properly, as his income is only about Rs. 500 p. m. now and as he has in addition to maintain his lawful wife and son Charles who is 21 years and who are dependent on him; that the respondent is about 54 years and is a frustrated man who has not been able to adjust himself gracefully to the vicissitudes of life; and that continuing with him will result in an emotional upheaval in the minor who needs a steady hand to guide her at this juncture. The petitioner further states that she wants to give the minor proper and adequate training in good surroundings so that she may become a useful member of society; that the respondent is poisoning the minor's mind against the petitioner; that when she was in Madras in last December, 1967—January 1968, she found the minor treating her with scant respect and showing no signs of affection for her, the mother, though she had been doing her best for the minor's welfare; and that the respondent is sowing seeds of hatred in the minor's mind to destroy her and she is very much concerned about preserving the minor's mental stability. She has also stated in her affidavit that in England she got married to Mr. Hugh Williams in February 1965, and that she has no children through him and he wishes to give the minor, the illegitimate daughter of the petitioner, a home and happiness.

3. In his counter statement, the respondent has denied the allegations of the petitioner and states that he has been maintaining the minor ever since her death (?) at his own expense and educating the child at his own cost; that the said minor child is loved and treated by the wife of the respondent and looked after, as her own child and the minor girl is attached to the respondent, his wife and son; that the respondent is earning about Rs. 800 p. m. and has been providing the child with every comfort and convenience. With regard to what happened in December 1967, January 1968, the respondent does not deny that he agreed to send the minor to England for a holiday, when the school in which she is studying closed for summer vacation, but states that the petitioner did not send any money to pay for the passage and also the minor refused to leave for England and the respondent could not force the child. With reference to the circumstances under which the petitioner came to live with the respondent, the respondent states that the petitioner and her sisters were sent out of the house by their step-father and they sought the asylum of this respondent and the respondent was feeding and clothing them and he got the sisters married and met all the expenses of the petitioner for qualifying herself as a stenotypist. With reference to the allegation of the petitioner that she was sending money and other articles to the minor, the respondent denies the same and states that the petitioner used to send postal orders for paltry sums of 10 shillings or so very occasionally and that too only very recently. The respondent has denied the allegations made by the petitioner against his character and conduct. He also relies on a letter written by the petitioner to the respondent from England on 3-2-1968 marked as Ex. R-1 in this case, as completely falsifying the allegations of the petitioner with reference to the character and conduct and behaviour of the respondent.

4. In support of her case, the petitioner has examined herself as P. W. 1, the landlady under whom her mother and step-father are living, as P. W. 2, her mother as P. W. 3 and her step father as P. W. 4 and has marked Exs. P-1 to P. 13. On the other hand, the respondent has examined himself as R. W. 1 and his wife as R. W. 2 and has marked Ex. R. 1.

5. The first question for my consideration is whether the petitioner herein is entitled to invoke Section 25 of the Guardians and Wards Act 1890, for an order directing the respondent to hand over custody of the minor to the petitioner. Under Section 25, the Court can pass an order for the return of the custody of a minor to its guardian. Consequently, if the petitioner wants to invoke Section 25 of the Guardians and Wards Act, in her

aid, she must establish that she is the guardian of the minor concerned. For the purpose of this section, it is not necessary that she should be a guardian appointed by the Court or declared by the Court and it is enough if the person invoking that section happens to be a guardian, as defined in the Act, under Section 4 (2) of the Act which states—

“‘guardian’ means a person having the care of the person of a minor or of his property, or of both his person and property”.

Hence, the term ‘guardian’ as used in this section means all kinds of guardians whether testamentary, certificated, natural or even de facto. Therefore, the petitioner must establish that she is the guardian of the minor before she could have recourse to Section 25 of the Act. As already stated, from the date of the birth of the minor, the minor has been living with the respondent and of course the petitioner also lived with the respondent till 1963, when she left for England. When she left for England, she did not take the child with her and the child continued to stay with the respondent. The evidence makes it clear that during the period when the petitioner lived with the respondent, the petitioner had no means of supporting herself and it was the respondent who was maintaining both the petitioner and the minor child. Hence there is nothing surprising when the petitioner allowed the child to remain in the custody of the respondent and herself alone went to England with the help of her aunts. Consequently, it cannot be said that the petitioner is a de facto guardian. The only contention that was advanced by the learned counsel for the petitioner was that the petitioner is the natural guardian of the minor. Her argument is that the minor being an illegitimate child, the father is not the natural guardian and only the mother is the natural guardian. Whether the putative father or the mother or who else is the natural guardian of the illegitimate child has to be decided according to the law to which the parties are subject. The parties in this case belong to the Anglo-Indian community and consequently counsel on both sides wanted me to proceed on the basis that the law that is applicable to them is the English law. On the face of it, the two systems of personal law prevalent in the country, namely, Hindu law and Mahomedan law, cannot apply to the parties and therefore, necessarily both because of the fact that they happen to belong to the Anglo-Indian community and because of the fact they have invoked the jurisdiction of this Court, the question of guardianship will have to be determined with reference to the English law.

6. Learned counsel for the petitioner referred to several decisions as holding or

deciding that under the English law, mother is the natural guardian of an illegitimate child, but was not able to bring to my notice any particular passage in any of the said decisions as holding or deciding that point. She referred to the decision in *Re G*, an infant, 1956-2 All ER 876. There, Lord Evershed M. R. observed in the course of his judgment thus:—

“As the child was illegitimate, according to the common law of the land, the mother was, and is, the person responsible for the upbringing of the child”. The learned Master of the Rolls, referring to the judgment of Wynn Parry, J. against which the appeal in question was preferred had further stated—

“The last few lines that I have read make it, to my mind, quite plain that the judge’s view was broadly this: First, that particularly since this was an illegitimate child, *prima facie* the child should be with her mother”.

In my opinion, neither of these two observations of the learned Master of the Rolls decides or holds that the mother of an illegitimate child is the natural guardian of the illegitimate child.

7. The other decision referred to by the learned counsel for the petitioner is in *re Willoughby*, an infant, (1885) 30 Ch D 324. In my opinion, that case also has nothing whatever to do with the point now under consideration. That case dealt with the appointment of a guardian for a minor who was a British subject, according to the law of England, but whose mother was a French citizen and the minor herself was residing in France. The question for consideration was whether the English Court could make an order appointing a guardian for such minor, when the minor who was a British subject had no property in England and was residing outside England and whose guardian according to the law of France was her mother, who was a French citizen. As Lindley, L. J. pointed out:

“This is a curious case. The infant is English by nationality and French by domicile. Her father is dead, and her mother is by the French law under the Code Civil the guardian of the infant. The infant is not resident here, and has no property here; therefore it is a little strange that this Court should interfere by appointing a guardian; inasmuch as the guardian so appointed will have no authority in France and can do nothing here. The case is singular for these reasons, but it does not follow that the order ought not to be made”.

Consequently, the decision in that case has nothing to do with the question of the guardianship of an illegitimate child. No doubt, the learned counsel for the petitioner referred to this decision in connection with another objection raised by the

learned counsel for the respondent and I shall refer to it later in the course of this judgment.

8. The learned counsel for the petitioner then relied on the decision of Venkatadri, J. in *Neelamega v. Mrs. Angelina Neelamega*, (1965) 78 Mad LW 151. In that case, a putative father applied for appointment of himself as the guardian under the Guardians and Wards Act of his four minor illegitimate children and for directing the mother to deliver custody of the children to the father. That petition was dismissed by the learned Judge and this Court confirmed that conclusion. The learned Judge stated—

“The question for consideration is who should be the legal guardian for the children born of such union. In similar circumstances while dealing with the question as to who is entitled to the custody of the minor child, it was held in *Dorairaj v. Lakshmi*, ILR (1947) Mad 519= (AIR 1947 Mad 172) that the mother was entitled to the custody of the child, as there is no authority either in the texts of Hindu law, or in the decided cases for recognising that the putative father of an illegitimate son by a permanently kept concubine has any right to the custody of the person of that son during his minority. It was also pointed out that the right does not necessarily flow from his duty to maintain the son or from the fact that the son has a limited right of inheritance to the putative father”.

In my opinion, this decision also does not help the case of the petitioner. Just now I am not considering the question whether the petitioner is entitled to the custody of the minor child under the law and if so, how she can enforce that right. All that I am concerned is that in so far as the petitioner has invoked the aid of Sec. 25 of the Guardians and Wards Act, 1890, whether she is the guardian of the minor child so as to enable the Court to pass an order directing the return to the custody of the minor child to her. For the purpose of deciding whether the petitioner is the guardian as contemplated by Sec. 25 of the Guardians and Wards Act, the decision of Venkatadri, J. is not of any assistance to the petitioner.

9. The learned counsel for the petitioner then referred to the following passage contained in Eversley on ‘Domestic Relations’ 6th Edn. at page 440:—

“According to the older law, neither the putative father nor the mother of an illegitimate child had the legal right of guardianship; but the tendency of the modern law is to recognise the mother not only as the natural but the legal guardian of her bastard child, and entitled to its custody unless there are very strong reasons for displacing her right, so that she may sue out a writ of habeas corpus for

vices to be performed by the contractor under this agreement'. If the Post Master General shall give notice in writing to the contractor that he has reason to be dissatisfied with the conduct of any driver the contractor will forthwith on receiving the complaint supply and substitute in the place of the driver complained of another approved driver for the purpose of this contract".

(Underlining (here into ' ') is ours).

The following facts are established from the evidence on record: The drivers of the motor vehicles used for the conveyance of the postal articles were paid by Defendant No. 3; the appellants had no right to take any disciplinary proceedings against the drivers or to discharge them and if the postal authorities were not satisfied with the conduct of any driver the Post Master General had the right to tell Defendant No. 3 to substitute another driver for the purpose of the contract. The question is whether the plaintiffs have discharged their burden against the presumption existing that the general employer continues to be the master of the driver notwithstanding the hiring of the vehicle with the driver.

51. From the oral evidence of Defendant No. 4, it does not appear that the postal authorities had any right to direct the manner of driving the vehicle. It was argued by the learned counsel for the Respondents that under Cl. 7, the postal authorities had the power or right to direct and control the manner of driving. The learned Central Government Pleader submitted that the entire agreement has to be read and Cl. 7 therein has to be construed not in an isolated manner and that the obedience of orders contemplated under Cl. 7 was for the purpose of carrying out the services to be performed by the contractor under the agreement. He further submitted that since the agreement was for a term of three years and the contractor would not be available to receive directions as to the performance of the contract, as is usual in contracts of this character, the drivers on behalf of the contractors were required to obey orders and in complying with the said directions, the drivers do not receive them as servants of the appellants but receive them as servants of the contractors. The right conferred on the appellants under the agreement, in our opinion, does not empower the postal authorities to control the manner of driving the vehicles by the drivers. The intention of the parties was that the drivers should receive the directions or the orders of the postal authorities and comply with the same for the purpose of carrying out the services. The Postal Authorities had the right to direct the drivers as to what postal articles they should convey, from what place to what

place they should drive and at what time they should start. That is what is contemplated under Cl. 7 of the agreement and not the right to control the manner of driving which was vested in the drivers to be exercised in their discretion. The plaintiffs, in our judgment, have failed to establish that the relationship of master and servant had been constituted pro hac vice between the appellants and the driver Defendant No. 4. Accordingly Point No. VI is answered in favour of the appellants.

52. Point No. VII: The Respondent's learned counsel submitted an alternative argument that assuming that Defendant No. 3 was an independent contractor and the appellants were not constituted temporary masters of Defendant No. 4, even then, the appellants are liable for the negligence of their contractor or the servants of the contractor since the appellants are performing a statutory duty in conveying the mails and they cannot evade or escape the responsibility by entrusting the work enjoined on them by the statute to an independent contractor.

53. In Winfield on Tort 7th Edition at pages 756-757 it is stated thus:

"Where a special duty is laid by statute on an individual or class of individuals either to take care or even to ensure safety (an absolute duty in the true sense) they cannot in any way escape from or evade the full implication of and responsibility for that duty: whether the duty is absolute in this sense depends upon the true construction of the statute. Many of the duties imposed by the Factories Act, 1948 e.g. to guard dangerous machinery, are absolute. Where a statute authorises something to be done which would otherwise be illegal, the duty is generally such that there is liability if the work is done by an independent contractor. There is a recognised exception that an employer is not liable for the collateral or casual negligence of an independent contractor, that is, negligence in some collateral respect, as distinct from negligence with regard to the very matter delegated to be done."

54. The liability of an employer for the tort of his independent contractor where a special duty is laid by the statute on the employer is not a truly vicarious liability; he is liable for a duty which he has broken himself.

55. The Indian Post Office Act, 1898, has granted the exclusive privilege of conveying letters to the Central Government. That exclusive privilege includes all the incidental services of receiving, collecting, sending, despatching and delivering of letters except in the cases mentioned in clauses (a), (b) and (c) of sub-section (1) of Section 4 of the Act. Where the Union Government is sued for

damages for loss of a letter owing to the negligence of a servant employed in the Post Office, it is not defence to plead that the work of conveying letters was entrusted to an independent contractor and the loss of the letter was caused owing to the negligence of the contractor or the contractor's servant. But where a contractor is employed for transporting postal articles from one post office to another or from the railway station to the post office and the contractor's driver by his negligence commits a tort, say, running over a man, the Union Government is not liable because that is a collateral negligence.

56. In the instant case, it was not in consequence of any order of the postal authorities that Defendant No. 4 ran against the gate pillar of the compound wall; it was in consequence of his negligence in driving the vehicle, that is to say, in performing the work for which he was employed by Defendant No. 3 to do. In performance of the work of Defendant No. 4, viz., the manner of driving the vehicle, the postal authorities had not intervened. Therefore, in our opinion, the appellants are not liable for the negligence of Defendant No. 4.

57. Our findings on Point Nos. VI and VII are sufficient to dispose of the appeals; the appellants succeed on the said findings. Since the appeals were argued on all the points and the matter may be taken in appeal to the Supreme Court, we have given our findings on all the points.

58. For the above reasons, these appeals are allowed, the decrees of the Court below against the appellants i.e. Deft. Nos. 1 and 2 are set aside and suits O. S. Nos. 37 and 38 of 1959 are dismissed against Defendants Nos. 1 and 2.

59. In the circumstances, we direct the parties to bear their own costs.
Appeals allowed.

AIR 1970 MYSORE 34 (V 57 C 7)

B. M. KALAGATE, J.

Deepchand, Accused Petitioner v. Sampathraj, Complainant, Respondent.

Criminal Revn. Petn. No. 306 of 1968 D/- 24-3-1969, against order of Second Additional S. J., Bangalore, D/- 2-4-1968.

(A) Evidence Act (1872), Ss. 126, 146 and 149 — Scope — Privilege under S. 126 is not absolute — Defamatory questions put by lawyer to a witness in cross-examination on client's instructions — No reasonable basis available for putting them — Such communication is not professional — Its disclosure is not protected under S. 126 — Witness, on instructions of client, asked in cross-examination whether he was doing opium smuggling

business, whether he was involved in opium smuggling case in a particular year, whether he was doing cloth smuggling trade and whether he came away from Rajasthan to Bangalore because of a warrant against him — Imputation conveyed by those questions is per se defamatory — Hence client is liable under S. 500 Penal Code, 1935 MWN 460, Dissented from—(Penal Code (1860), S. 499 Exception 9 — Judicial proceedings — Privilege of witnesses).

The privilege under S. 126 Evidence Act is not absolute. When defamatory questions are put by a lawyer to a witness in cross-examination on client's instructions without any reasonable basis for putting them, such a communication is not professional and its disclosure is not protected under S. 126. Where a witness, on the instructions of the client, is asked in cross-examination whether he was doing opium smuggling business, whether he was involved in an opium smuggling case in a particular year, whether he was doing cloth smuggling trade and whether he came away from Rajasthan to Bangalore because of a warrant against him, the imputation conveyed by those questions is per se defamatory. Hence that client is liable under S. 500 Penal Code.

(Paras 6, 9 and 14)

It is true that the law gives power to the Court to protect witnesses. But it can be seen from S. 146 that it is perfectly open to a lawyer to put questions to a witness in cross-examination to shake his credit by injuring his character and the mere fact that the answer to such questions may directly or indirectly tend to criminate the witness is no justification to refuse to answer them. The effect of Ss. 146 to 149 is that though it is permissible for a lawyer to put such questions, nonetheless the lawyer must be satisfied that there are reasonable grounds for thinking that the imputation which those questions convey is well founded, since if such questions are put the damage is done.

(Paras 8 and 10)

The privilege under Section 126 is not absolute but is only a qualified one. This is seen from the illustrations to the Section also which make it clear that all professional communications are not privileged and protected from disclosure. If it is an absolute privilege then no witness, whether male or female, will be safe in a Court of law when he or she is under cross-examination.

(Paras 9 and 11)

Further, under S. 126 the communication which is made to a lawyer must be in course of and for the purpose of employment as such. It cannot be said that when a lawyer puts a question on the instructions of his client to a witness in cross-examination which is defamatory without there being any reasonable ground for putting it, it is a communication made for the purpose of the employment as lawyer. Though S. 146(3) permits a question injuring the character of the witness, such a communication of the client

to his lawyer cannot be said to be a professional one and that it is absolutely privileged and its disclosure is protected under S. 126 without the express consent of the client. Thus when a witness, on the instructions of the client, is asked in cross-examination whether he was doing opium smuggling business, whether he was involved in an opium smuggling case in a particular year, whether he was doing cloth smuggling trade and whether he came away from Rajasthan to Bangalore because of a warrant against him, the imputation conveyed by them is per se defamatory. Therefore that client is liable under S. 500 Penal Code. 1935 Mad WN 460, Expl. and Diss. from; AIR 1954 Mad 741 Dissenting from 1935 Mad WN 460, Ref. (Paras 6, 7, 13 and 14)

(B) Penal Code (1860), S. 499 Exception 9 — Burden of proof — Accused relying upon exception 9 — Therefore it is for him to prove that his case falls under that exception. AIR 1966 SC 97, Foll.—(Evidence Act (1872), S. 105). (Para 16)

(C) Penal Code (1860), Ss. 499 and 500— Conviction and sentence — Questions per se defamatory put by lawyer to witness in cross-examination on instructions of his client — No reasonable basis available for putting them — It cannot be said that the client can be convicted only as abettor and not as principal offender. AIR 1954 Mad 741, Foll. (Para 18)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 97 (V 53) = 1966
Cri LJ 82, H. Singh v. State of Punjab 16
(1954) AIR 1954 Mad 741 (V 41) =
1954 Cri LJ 1239, Ayesha Bi v. Peer Khan Sahib 12, 18
(1935) 1935 Mad WN 460, Palaniappa Chettiar v. Emperor 11, 12

M. V. Devaraju and A. Shamanna, for Petitioner; P. S. Devadas, for Respondent.

ORDER: The petitioner was the accused in C. C. 3227 of 1966 in the Court of the Additional First Class Magistrate, Bangalore. The respondent herein filed a complaint against the petitioner accused for an offence under S. 500 of the Indian Penal Code.

2. The facts leading to the complaint may be briefly stated as follows:—The complainant and the accused are both businessmen. The accused was involved in what is known as Gold Control Order case wherein the complainant was examined as a witness in support of the prosecution. During the course of cross-examination of the complainant, learned Counsel Sri Chandra Kumar who appeared for the accused in that case put the five questions mentioned in the complaint. According to the complainant, those questions were put at the instance of the accused with a view to harm the complainant's reputation and standing in the business community of Bangalore and also with intent to lower his character. He further alleged that the imputations made by

the accused against him are all absolutely false and were made deliberately to damage and harm the complainant's moral, social and business reputation and the imputations conveyed by those questions are per se defamatory. Therefore the accused is liable for punishment under Section 500 of the Indian Penal Code.

3. The learned Magistrate, on the evidence adduced before him, found the accused guilty of the offence and convicted him of the offence punishable under S. 500 of the Indian Penal Code and sentenced him to undergo simple imprisonment till the rising of the court and to pay a fine of Rs. 500 or in default of payment of fine, to undergo simple imprisonment for a further period of two months.

4. Against the said order, the accused preferred an appeal in the Court of the II Additional District and Sessions Judge, Bangalore, challenging his conviction and sentence. The learned Sessions Judge agreeing with the conclusion reached by the learned Magistrate, confirmed the conviction and sentence imposed on the accused and dismissed the appeal. It is the correctness and legality of this order that is challenged in this petition under Ss. 435 and 439 of the Code of Criminal Procedure.

5. Mr. Devaraju, the learned counsel for the petitioner submitted that the imputation made fell within the Ninth Exception to Section 499 of the Indian Penal Code and if so, there is no defamation. He also contended that the information conveyed to the Advocate by the accused were professional communications and their disclosure is not permissible under S. 126 of the Indian Evidence Act. The five questions that were put to the complainant were as follows:

"1. In 1949-50 have you done the business of opium smuggling ?

Ans: No.

2. Is it a fact that you were involved in a opium smuggling case in 1949-50 and you were under remand for 15 days?

Ans: It is absolutely incorrect.

3. In 1949-50 you were not doing the business of smuggling the cloth from the running train at Marwad?

Ans: No.

4. Was there not a case at that time regarding the smuggling in which you were involved?

Ans: I was a mere witness.

5. I put it to you that because there was a warrant against you, you came away to Bangalore from Rajasthan?

Ans: It is not correct."

From the above questions it is clear that the imputation made against the complainant was that he was doing the business of opium smuggling and that he was involved in a opium smuggling case in 1949-50: it is also clear that the imputation conveyed by the third question was that the complainant was doing the business of smuggling of cloth from running train and from the fifth ques-

tion, that he has come to Bangalore from Rajasthan because there was a warrant against him.

6. Not much discussion is necessary to find that the imputation conveyed by these questions is per se defamatory.

7. These questions were put in open Court and made public. The Courts below were in my opinion, right in coming to the conclusion that the imputation conveyed by the questions was per se defamatory. Therefore, the two questions that arise for consideration are, whether the imputation conveyed by the above questions fall within the Ninth Exception to Section 499 of the Indian Penal Code and whether they are privileged communications which cannot be disclosed without the express permission of the client under Section 126 of the Indian Evidence Act.

8. Now, the Ninth Exception to Section 499, Indian Penal Code, reads as follows:

"Ninth Exception:—It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or any other person, or for the public good."

At this stage it would be appropriate to refer to S. 146 of the Indian Evidence Act which permits lawful questions to be put in cross-examination. It is provided that when a witness is cross-examined, he may, in addition to the questions referred to in that Section, be asked any question which tends to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture. Thus, it would be seen that it is perfectly open to a lawyer to put questions to a witness in cross-examination in order to shake his credit by injuring his character and the mere fact that the answer to such questions may directly or indirectly tend to criminate the witness is no justification to refuse to answer such questions.

It is also pertinent to note the provisions of Section 149 of the Indian Evidence Act which provides that no question referred to in Section 148 ought to be asked, unless the lawyer asking it has reasonable grounds for thinking that the imputation which it conveys is well founded. Thus, the effect of the provisions of Sections 146 and 149 is that though it is permissible for a lawyer to put a question in cross-examination of a witness to shake his credit by injuring his character, nonetheless, the lawyer must be satisfied that there are reasonable grounds for thinking that the imputation which it conveys is well founded.

9. But what is contended before this Court by the learned counsel for the petitioner Mr. Devaraju is that the communications made by a client to his lawyer are professional communications and are protected

from disclosure unless their disclosure is permitted either by the client expressly or under the provisions of Section 128 of the Evidence Act.

To me, it appears that the privilege stated in Section 126 of the Evidence Act is not an absolute privilege as claimed but is only a qualified one. This proposition receives support from the illustrations to Section 126 itself. If it was an absolute privilege as claimed, then no witness whether male or female would be safe in a Court of law when he or she is under cross-examination.

10. It is true that law gives power to the court to protect witnesses, but then, if the question is put the damage is done. It is therefore, reasonable to state that though under Section 146 (3) of the Evidence Act the lawyer is entitled to put questions to shake the credit of a witness by injuring his or her character, there must be some reasonable ground for thinking that the imputation conveyed by the question is well founded.

11. Mr. Devaraju, in support of his contention that the privilege under Section 126 is an absolute one, relied upon the decision in Palaniappa Chettiar v. Emperor, 1935 Mad WN 460. The Order of the Court is so brief that it is difficult to find out the reasons for stating that the privilege under Section 126 is an absolute one and a lawyer is not at liberty to disclose the communications made to him during the course of his employment. According to the learned Judge, all communications are privileged and are protected from disclosure. With respect, this statement is clearly unsupportable in view of the illustrations to Section 126 which make it clear that it is not all professional communications that are privileged and are protected from disclosure.

12. In a subsequent decision of the same High Court in Ayesha Bi v. Peer Khan Sahib, 1954 Cri LJ 1239 = (AIR 1954 Mad 741) the decision in Palaniappa Chettiar, 1935 Mad WN 460 came to be considered where the learned Judge was not inclined to accept the proposition stated therein as correct.

13. Section 126 of the Indian Evidence Act provides that no lawyer shall be permitted to disclose any communication made to him in the course, and for the purpose, of the employment as such lawyer by or on behalf of his client unless with the express consent of his client. The communication which is made to a lawyer must be in course, and for the purpose, of employment as such.

In my view, it cannot be said that when a lawyer puts a question on the instructions of his client to a witness in cross-examination which is defamatory in character without there being any reasonable ground it is a communication made for the purpose of the employment as lawyer. A question put to a witness in cross-examination which might injure his character though permissible under Section 146 (3) of the Indian Evidence Act with a view to shake his credibility, nonethe-

less, there must be a reasonable ground for putting a question which is defamatory in character and if there is no basis for putting such questions, then it is difficult to state that such a communication which is defamatory in character is a professional communication and its disclosure is protected under Sec. 126 of the Indian Evidence Act without the express consent of his client.

14. The trial Court has observed that the lawyer did not claim any privilege under Section 126 of the Indian Evidence Act. Mr. Devadass appearing for the respondent has pointed out that the evidence of P. W. 1, the Advocate, clearly shows that he had not satisfied himself that there were reasonable grounds for thinking that the imputation conveyed by the questions is well founded. This he states is obvious from his admission that he did not show that the imputation conveyed by those five questions was well founded. He states that if the lawyer was in possession of any such document, he would have confronted the witness with such document.

He, therefore, contends that the questions put by the learned Advocate were without any reasonable grounds. In my opinion, the communication by the client to his lawyer to put questions which are defamatory in character to the witness in cross-examination without there being any basis cannot be said to be absolutely privileged and are protected from disclosure without the express consent of the client under S. 126 of the Indian Evidence Act. Since the imputation conveyed by the questions is per se defamatory the accused is liable for conviction.

15. But the accused has, as already stated also relied on the Ninth Exception to Section 499 of the Indian Penal Code. The Court below has held that the accused cannot justifiably claim protection under the Ninth Exception to Section 499 of the Indian Penal Code.

16. Mr. Devaraju for the petitioner has drawn my attention to a decision of the Supreme Court in H. Singh v. State of Punjab, AIR 1966 SC 97 wherein the scope of the Ninth Exception to Section 499 of the Indian Penal Code came to be considered. Since the accused has relied upon the exception it is for him to prove that his case falls under that exception. The Supreme Court has, in that decision, stated that the burden of proof by the accused who relies on an exception is not the same which ordinarily lies on the prosecution to prove its case, but it has clearly stated that the accused must show that he has acted in good faith and by the test of probabilities his evidence establishes his case.

17. From the evidence on record, I am of the opinion that both the Courts below were right in coming to the conclusion for the reasons stated, that the accused was not entitled to the benefit of the Ninth Exception to Section 499 of the Indian Penal Code.

18. It was next contended by Mr. Devaraju that the accused can be convicted only

as abettor and not as a principal offender. That is a proposition which cannot be accepted. Such a submission was made in Ayesha Bi's case, 1954 Cri LJ 1239 = (AIR 1954 Mad 741) referred to above where his Lordship rejected that contention by observing that there is no meaning in stating that defamation cannot be committed by a proxy through the mouth of his Vakil.

19. In the result, for the reasons stated above, I confirm the conviction and sentence passed by the Court below and dismiss this revision petition.

Petition dismissed.

AIR 1970 MYSORE 37 (V 57 C 8)

A. R. SOMNATH IYER AND AHMED
ALI KHAN, JJ.

City Municipal Council Bellary, Plaintiff
v. Union of India Owning S. Rly., Defendant.

Original Suit No. 1 of 1969, D/-16-1 1969.

(A) Limitation Act (1908), Art. 120 — Suit by Municipality to recover property and other taxes — Provision under Article 120 attracted.

The Municipality sued the Union of India owning Southern Railway to recover property and other taxes due in respect of properties owned by the said Railway within the municipal limits. The period to which the claim related commenced on 1-4-1957 and ended on 31-3-63. The suit was filed on 7-10-1963.

Held, that the tax payable in respect of the earliest period commenced on 1-4-1957 became payable only on 1-4-1958 and hence the suit filed on 7-10-63 i.e., within 6 years from 1-4-1958 when the right to sue for it accrued, under Art. 120 of the Limitation Act, was within time. (Para 15)

(B) Constitution of India, Art. 285 (2) — Conditions necessary — Nature of the pre-Constitution tax and not the amount is the criterion — (Municipalities — Madras District Municipalities Act (5 of 1920), S. 81 — Property tax under — Tax same as under S. 64 of the Mysore City Municipalities Act) — (Municipalities — Mysore City Municipalities Act (7 of 1933), S. 64 — Property tax under — Tax same as one under S. 81 of the Madras District Municipalities Act) — (Railways Act (1890), S. 135 and Railways (Local Authorities Taxation) Act (1941), S. 3(1) — Pre-Constitution tax paid by Union at commencement of Constitution — Nature of the tax, no change in — Fresh notification, not a condition precedent for demand).

Three conditions which should exist before the Union property could be made to fall within the exception which clause (2) of Art. 285 incorporates are, firstly, that there

GM/IM/C803/69/TVN/D

should be an impost by the State or by an authority within the State, secondly, that the Union property was liable to pay that tax immediately before the commencement of the Constitution and thirdly, that the tax continues to be levied in the State even after the commencement of the Constitution. (Para 33)

The 'tax' under Art. 285 (2) of the Constitution for payment of which there was a pre-constitutional liability on the part of the Union to pay, refers not to the amount of tax payable by it but to its character. What in effect it provides is that if a tax was exigible in respect of Union property during the period preceding the Constitution, such tax whatever may be its measure, continues to be payable so long as its levy continues in the State even after the commencement of the Constitution. That liability is enforceable even if the measure of the tax gets altered by the adoption of a new method or mode for its computation or quantification. (Paras 36 and 37)

Therefore, where the tax demanded by the Municipal Council was no other than the same tax which was imposed in pre-Constitution period under the Madras District Municipalities Act, and paid by the Union Government by virtue of a notification of Government of India under S. 3 (1) of the Railways (Local Authorities Taxation) Act, 1941, the mere fact that the amount of tax payable varied with the adoption of a different method of computation prescribed by the relevant provisions of the Mysore City Municipalities Act (which had come into force in place of the Madras Act which stood repealed under Mysore Laws Extension to Bellary and Amendment Act, 1955) did not absolve the Union Government from its liability to pay the tax under Art. 285 (2) of the Constitution. The postulate that such diminution or enhancement of the one tax or the other, introduced a new tax in the relevant area is not correct. (Paras 40, 51 and 55)

The tax demanded by the Municipal Council under Sec. 64 of the Mysore Act not being a new impost, did not require a new notification under S. 135 of the Railways Act or under S. 3 of the Railways (Local Authorities Taxation) Act and such a notification was no condition precedent to the impugned demand. AIR 1948 Cal 116 (2) and AIR 1957 All 452, Foll. AIR 1929 Mad 746 and AIR 1943 Mad 733 and AIR 1954 All 56 and AIR 1964 SC 1166, Dist. (Paras 29, 52 and 56)

Cases Referred: Chronological Paras

- (1964) AIR 1964 SC 1166 (V 51) =
 (1964) 6 SCR 947, Amravati Municipality v. Ramachandra 41, 45
 (1957) AIR 1957 All 452 (V 44) =
 1957 All LJ 531, Union of India v. Municipal Board Lucknow 39
 (1954) AIR 1954 All 56 (V 41) =
 1953 All LJ 497, Kanpur Municipality v. Dominion of India 41, 44

- (1948) AIR 1948 Cal 116 (2) (V 35) =
 52 Cal WN 173, Governor-General of India in Council v. Corporation of Calcutta 38, 39
 (1943) AIR 1943 Mad 733 (V 30) =
 1943-2 Mad LJ 307, South Indian Rly. v. Panchayat Board Mandapam 41, 43
 (1929) AIR 1929 Mad 746 (V 16) =
 ILR 52 Mad 779, Municipal Council Cuddapah v. M. and S. M. Rly. Co., Ltd. 41, 42, 43

Venugopalacharya and A. V. Albal, for Plaintiff; K. Nanjundiah, for Defendant.

SOMNATH IYER, J.: In this suit, which has been withdrawn to this Court under Article 228 of the Constitution, from the Court of the Civil Judge, Bellary, in which it was originally instituted, the plaintiff is the City Municipal Council of Bellary, and the defendant is the Union of India, owning the Southern Railway. The plaintiff, which will be referred to in the course of this judgment as the municipal council, asks for a declaration that it has the right to levy and collect the taxes enumerated in paragraph 5 of the plaint in respect of properties owned by the Union of India and situate within the municipal limits of Bellary. It also asks to make a decree against the Union of India for a sum of Rupees 38,988.

2. It is undisputed that the Union of India which owns the Southern Railway, is the owner of sixty-five buildings and twenty vacant lands which are situate within the municipal limits of the Bellary City Municipality. It is also not controverted that in respect of these eighty-five properties, the then Madras and Southern Mahratta Railway became liable to pay general property tax and water and drainage tax under a notification of November 26, 1941, promulgated by the Government of India under Section 3 (1) of the Railways (Local Authorities Taxation) Act, 1941 (Central Act XXV of 1941). In consequence, during some of the years prior to the commencement of the Constitution the Madras and Southern Mahratta Railway which owned those properties used to pay a sum of Rs. 4,792-13-0 as tax for the sixty-five buildings owned by it and a sum of Rs. 863-11-6 as tax payable in respect of the twenty vacant lands which it owned.

3. After the Madras and Southern Mahratta Railway ceased to be the owner of these properties, the Government of India which became its owners continued to pay the tax after it acquired such ownership and even after the commencement of the Constitution until April 1, 1956.

4. The Bellary City Municipal Council was functioning until October 24, 1955, under the provisions of the Madras District Municipalities Act (Madras Act V of 1920), when the district of Bellary became part of the former State of Mysore on October 1, 1953 under the provisions of the Andhra

State Act, 1953 (Central Act XXX of 1953). The provisions of the Madras District Municipalities Act continued to operate in the district of Bellary under the provisions of Section 53 of the Andhra Act, and stood repealed only with effect from October 24, 1955, under the Mysore Laws Extension to Bellary and Amendment Act, 1955 (Mysore Act XIV of 1955), when the Mysore City Municipalities Act 1933 (Act VII of 1933) was extended to the district of Bellary.

5. So, on and from October 24, 1955, the relevant statute under which the municipal council was exercising its municipal administration was the Mysore City Municipalities Act, 1933.

6. In the course of this judgment, the Madras District Municipalities Act will be referred to as the 'Madras Act' and the Mysore City Municipalities Act, 1933, will be called the 'Mysore Act'.

7. We should observe here that the Mysore City Municipalities Act, 1933, is no longer in force in the State of Mysore since it was repealed with effect from April 1, 1965 by the Mysore Municipalities Act, 1964, (Mysore Act XXII of 1964). But with this repeal we are not concerned in this suit which relates to the period antecedent to the date of such repeal.

8. The case for the municipal council which is the plaintiff before us is that there was an unreasonable repudiation by the Union of India of the demand made by it for the payment of property tax in respect of the period commencing on April, 1, 1957 and ending with March 31, 1963. The tax so demanded comprised of the following items:

- (a) tax on buildings and lands,
- (b) water tax and
- (c) education tax.

In respect of the years 1960-61, 1961-62 and 1962-63 the demand also includes the impost described as health cess.

9. The case for the Municipal Council as set out in the plaint was that the tax so demanded which the Union Government was liable to pay immediately before the commencement of the Constitution, and which continued to be levied in the new State of Mysore after its formation on November 1, 1956, continued to be exigible under the provisions of Article 285 (2) of the Constitution.

10. Many contentions were raised on behalf of the Union of India in the written statement produced by them. The main ground on which there was a repudiation of the liability to pay the tax demanded was that the tax which was payable immediately before the commencement of the Constitution was not the tax demanded by the municipal council and so was not exigible. There was another contention that the demand also related to buildings which

were constructed only after the commencement of the Constitution and that the tax demanded in respect of those buildings was not payable. But Mr. Nanjundiah appearing for the Union of India intimated us that the Union of India does not dispute that the suit claim relates only to buildings which were in existence before the commencement of the Constitution.

11. On the pleadings produced by the parties, the following issues were settled by the Civil Judge, Bellary:

1. Whether on merger of the City of Bellary to Mysore State, right to levy tax on property of the Union Territory is barred under Article 285 of the Constitution of India?

2. Whether the enforcement of the Mysore City Municipalities Act, 1933 to Bellary had changed the incidence of property tax levied on the Union within the meaning of Article 285 clause (2) of the Constitution of India?

3. Whether the plaintiff is estopped from taxing railway properties at Bellary in view of the letter of the Mysore Government dated 29-1-1962 in L.T.H-53-CTX-59 to the Central Government?

4. Whether the failure to issue a fresh notification under Section 3 of the Local Authorities Act (Act 25 of 1941) puts an end to the plaintiff municipality's right to tax the properties of the Union of India?

5. Whether the right to tax property of the Indian Union consequent on the enforcement of the Mysore City Municipalities Act arises only on issuing of a notification under the Indian Railways Act under Section 135 and read with Section 3, Local Authorities Taxation Act, 1941?

6. Whether there is any change in the incidence, mode of assessment and levy of tax under the Mysore City Municipalities Act as contended in paragraph 13 of Written Statement of the defendant? If so, whether the plaintiff is entitled to levy tax on the property of the Indian Union?

7. Whether the suit is barred by limitation?

8. Whether this is a fit case to refer to the High Court under Section 113 of Civil P. C.?

9. Whether the defendant has not agreed to pay the education tax and whether the refusal of the plaintiff to receive the same is proper?

10. What is the amount due and payable to the plaintiff by way of arrears of tax?

11. To what relief is the plaintiff entitled to?

12. What order?

12. It will be seen that quite a few issues among these which the Civil Judge framed overlap one another and they are Issues 1, 2 and 6. Similarly Issues 1, 4 and 5. The eighth issue no longer survives since

the suit is now before us under Art. 228 of the Constitution.

13. It is not necessary to record any finding on Issues 3 and 9 since Mr. Nanjundiah did not press the defendant's case with reference to those two issues.

14. So, the three main questions on which we have to pronounce are:

(i) Whether on the extension of the provisions of the Mysore City Municipalities Act, 1933, to the district of Bellary, the liability of the Union of India to pay the taxes which were originally being paid in respect of the properties owned by the Union disappeared, and whether that liability would arise only on the issue of a fresh notification under Section 135 of the Indian Railways Act read with Section 3 of the Railways (Local Authorities Taxation) Act, 1941?

(ii) Whether the liability to pay the taxes which the Union of India had been previously paying was not preserved by Article 285 (2) of the Constitution?

(iii) Whether the suit is barred by limitation?

15. On the question of limitation, a feeble argument was presented by Mr. Nanjundiah on behalf of the Government of India and it is obvious that there is no substance in the plea relating to it. It will be recalled that the period to which the claim relates commenced on April 1, 1957 and ended on March 31, 1963. The tax payable in respect of the earliest period commenced on April 1, 1957 which became payable only on April 1, 1958, and the demand for this payment was made by the municipal council through a bill presented under Section 95 of the Mysore City Municipalities Act on February 14, 1958. The suit was instituted on October 7, 1963, and it was not seriously disputed by Mr. Nanjundiah that the suit was governed by the residuary Article 120 of the Indian Limitation Act, 1908, which prescribes a period of six years for the institution of a suit like the one before us. The right to enforce the claim in respect of the earliest period accrued only on April 1, 1958 and so, the suit brought on October 7, 1963, is well within time, and that is our finding on the seventh issue.

16. We should mention here that Mr. Venugopalachari appearing on behalf of the Municipal Council and Mr. Nanjundiah appearing for the Union of India submitted to us that it was not necessary for the parties to produce any evidence in the suit since it presented only pure questions of law.

17. Mr. Nanjundiah made the further submission that the repudiation of the claim of the Municipal Council would be restricted only to the claim which related to the tax demanded in respect of the buildings and vacant lands owned by the Union. We were informed by Mr. Nanjundiah that the Union of India would not dispute its liabi-

lity to pay water tax and education tax or its liability to pay health tax for the years 1960-61, 1961-62 and 1962-63.

18. So, the only question to be decided is whether Article 285 (2) of the Constitution maintains its liability to pay property tax on its buildings and lands.

19. It is common ground as we were informed during the course of the proceedings before us that the impost in the form of property tax on buildings and lands situate within the municipal limits of the Bellary Municipality, was made under the provisions of Section 81 of the Madras Act, and that, no new impost was as such made by the Municipal Council under Section 64 of the Mysore Act which in displacement of the Madras Act commenced to operate on October 24, 1955. It is thus undisputed that the tax on buildings and vacant lands which was imposed under Section 81 of the Madras Act is the tax which continues to be levied within the limits of the Municipal Council after the Mysore Act came into force.

20. But Mr. Nanjundiah on behalf of the Union of India contended that such continuance of old impost does not attract the application of Art. 285 (2) of the Constitution which reads:

"285 (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

Exemption of property of the Union from State taxation.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State."

21. The stress of Mr. Nanjundiah's argument was that although the Union did pay and continued to pay the tax imposed on lands and buildings during the period when the Madras Act was in force, that liability perished when the Mysore Act came into force, for the reason that the tax imposed under the Madras Act is not the tax which the Municipal Council now claims under the Mysore Act. It was also said that since the measure of the tax has also become altered by resort to the mode of quantification of the tax prescribed by the Mysore Act, the tax payable after such quantification was a new tax distinct from the old tax payable under the Madras Act, and so, was not the old tax.

22. That was also the postulate on which was constructed the further argument that the Union of India could not be made liable to pay that new tax except under a new notification under Section 135 of the Indian Railways Act read with Sec-

tion 3 of the Railways (Local Authorities' Taxation) Act, 1941.

23. Section 135 (1) of the Indian Railways Act as it read in the year 1946 when a notification was promulgated by the Government of India under Section 3 (1) of the Railways (Local Authorities' Taxation) Act, 1941 reads:

"135. Taxation of railways by local authorities. Notwithstanding anything to the contrary in any enactment, or in any agreement or award based on any enactment, the following rules shall regulate the levy of taxes in respect of railways and from railway administrations in aid of the funds of local authorities, namely:

(i) A railway administration shall not be liable to pay any tax in aid of the funds of any local authority unless the general controlling authority has, by notification in the Official Gazette, declared the railway administration to be liable to pay the tax.

24. It is not controverted that there was a notification by the general controlling authority in the year 1946 which is reflected in a notification under Section 3 (1) of the Railways (Local Authorities' Taxation) Act, 1941, which was made on June 18, 1946 by the Government of India which reads:

"Notification"

In pursuance of sub-section (1) of Section 3 of the Railways (Local Authorities' Taxation) Act, 1941 (XXV of 1941) the Central Government is pleased to declare that the Administration of the Madras and Southern Mahratta Railway shall be liable to pay, in aid of the funds of the local authorities, specified in column I of the schedule annexed hereto the taxes specified in column II thereof.

SCHEDULE

Local authority	Taxes
I	II
4. Bellary Municipality	General property tax, and water and drainage tax

Explanation: In this schedule,

(i) General property tax means so much of the property tax levied under clause (a) of sub-section (1) of Section 81 of the Madras District Municipalities Act, 1920 (Madras Act V of 1920) as comprising a tax for general purposes;

(ii) Water and drainage tax means so much of the property tax as is levied in accordance with clause (b) of the said sub-section; and

(iii) Education tax is the tax levied as a surcharge on property tax in accordance with Section 34 of the Madras Elementary Education Act, 1920 (Madras Act VIII of 1920)."

25. Under Section 3 (1) of the Railways (Local Authorities' Taxation) Act, 1941, under which the above notification was promulgated reads:

"3. Liability of railways to taxation by local authorities—

(1) In respect of property vested in the Central Government, being property of a railway, a railway administration shall be liable to pay any tax in aid of the funds of any local authority, if the Central Government, by notification in the official Gazette, declares it to be so liable.

26. It was maintained that since the tax which by the notification under the above sub-section made the Madras and Southern Mahratta Railway which was the predecessor in title of the Union Government liable to pay only the general property tax which was levied under the Madras Act, that liability disappeared when the Mysore Act repealed the Madras Act and commenced to operate in the district of Bellary on October 24, 1955. It was, according to the argument advanced by Mr. Nanjundiah by that process that the notification of the Central Government lapsed and for that reason that Article 285 (2) can have no relevance.

27. Before proceeding to discuss this submission, we should mention that there was an admitted variation of the amount of the taxes payable by the Union of India with respect to the buildings and those payable in respect of the vacant lands when the Mysore Act came into force. This variation consisted of the diminution of the buildings tax and an enhancement of the tax on vacant lands. The tax payable in respect of the buildings became reduced to a sum of Rs. 4,326-80p. from Rs. 4,792-13-0 which was the tax payable under the repealed Act. Similarly, the old tax with respect to the vacant lands amounting to Rs. 863-11-6 became enhanced to Rupees 2,538-50 p.

28. But, it is undisputed that these variations were not attributable to the coming into being of any new impost under the repealing Act, but, because of the mode by which the quantification of the taxes payable under the repealed Act was made. So, the tax on buildings of which there was a quantification on the basis of a new formula prescribed by the repealing Act became smaller, and, the tax payable for the vacant lands which was determined by the application of the method prescribed by the repealing Act in displacement of the process prescribed by the repealed Act became higher.

29. But, what cannot be overlooked is that whatever was the mode by which there was a quantification of the tax payable by the Union of India, the tax of which there was such quantification was not a new tax

which was not in existence when the Constitution commenced to operate but was the same old impost the attributes of which were not different from the attributes of the tax which the municipal council demanded. The tax continued to be property tax which was imposed under the old Act and the demand related only to the property tax which had been so imposed.

30. Section 81 (1) of the Madras Act empowered the municipal council by resolution to levy a tax on buildings and lands. Similarly, Section 64 of the Mysore Act bestowed power on the municipal council to impose a tax in the form of a rate on buildings or lands or both situated within the municipality. Even if the municipal council had made a new impost under Section 64 of the Mysore Act in the form of a rate on buildings and lands, that impost would have had the same attributes, as the impost which had been made under the Madras Act under the 81st section of that Act. But, what might have been the legal position with respect to Article 285 (2) of the Constitution had a new impost been made in that way does not arise for consideration in this case for the reason that no such new impost was made by the municipal council of Bellary which preserved the old impost made under the Madras Act although the quantification of the tax imposed under its provisions was suitably altered so as to bring it into conformity with the formulas which the Mysore Act incorporated.

31. The question, therefore, is whether that alteration in the mode of quantification excludes the operation of Article 285 (2) of the Constitution.

32. The provision which that clause incorporates is that subject to any law which Parliament may make, the liability of the Union to pay tax on its property which was immediately before the commencement of the Constitution liable or treated as liable to pay that tax, shall continue to be so liable so long as that tax continues to be levied in the State. This provision is an exception to that contained in clause (1) which says that the property of the Union shall stand exempted from payment of all taxes payable to a State or any authority within that State.

33. The three conditions which should exist before the Union property could be made to fall within the exception which clause (2) incorporates are, firstly, that there should be an impost by the State or by an authority within the State, secondly, that the Union property was liable to pay that tax immediately before the commencement of the Constitution and thirdly, that that tax continues to be levied in the State even after the commencement of the Constitution.

34. It was asserted on behalf of the Union that although it may be that the first two conditions exist, the third did not.

This assertion was founded on the postulate to which we have already referred that the old tax which the Union of India was paying before the commencement of the Constitution and even thereafter, is not the tax now demanded, since, there was a reduction of the tax in respect of buildings and an enhancement of the tax in respect of lands after the extension of the provisions of the Mysore Act to the district of Bellary.

35. The acceptance of this postulate would involve the assumption that Art. 285 (2) when it speaks of the 'tax' for the payment of which there was a pre-constitutional liability on the part of the Union to pay, refers to the amount of the tax payable by it and not to its character. We do not think it right to place any such narrow construction on the provision of this clause.

36. We lean to the view that Art. 285 (2) of the Constitution does not speak of the amount of the tax but only speaks of its nature or character. What in effect it provides is that if a tax was exigible in respect of Union property during the period preceding the Constitution, such tax whatever may be its measure, continues to be payable so long as its levy continues in the State even after the commencement of the Constitution. That liability, in our opinion, is enforceable even if the measure of the tax gets altered by the adoption of a new method or mode for its computation or quantification.

37. So, if in respect of its properties the Union Government was liable to pay property tax before the commencement of the Constitution, that property tax so long as property tax is not abolished in the area in which the Union properties are situate, continues to be exigible even after the commencement of the Constitution even if its measure gets diminished or enhanced.

38. That that is the true interpretation to be placed upon Article 285 (2) of the Constitution is clear from the enunciation made by Mukherjea, J., as he then was, in Governor-General of India in Council v. Corporation of Calcutta, AIR 1948 Cal 116 (2). The question which arose in that case was whether a tax in respect of a property which was not in existence before the Government of India Act, 1935 was enacted, could be demanded under Section 154 of that Act, the provisions of which correspond to Article 285 of the Constitution. In the context of the enunciation made in that case that no such tax could be demanded, Mukherjea J., said this :

"So far as the Calcutta Municipal Act is concerned, the only two kinds of property that required consideration for the purposes of determining the scope of exemption under S. 154, Government of India Act, are land and building, for it is upon lands and buildings that consolidated rates are imposed by the Calcutta Municipal Act. We do not think however that the mode of assessment employed by the Calcutta Cor-

poration is at all a relevant factor in determining the meaning of the word 'property' for purposes of S. 154, Government of India Act.

• • • • The liability for rates that exists in respect of a particular property prior to April 1937, and which is to continue according to the proviso, may certainly include any future variation resulting from alteration in the valuation of the property or the rate of assessment, but it does not include any future liability on account of any new property being added to it, no matter whether according to the method of assessment followed by the taxing authority the additional property could be separately taxed or not." (pages 119 and 120).

39. Again, in *Union of India v. Municipal Board Lucknow*, AIR 1957 All 452, a similar interpretation was placed on Article 285 (2) of the Constitution and the enunciation made in that case reads:

"Moreover, it is the nature of the tax for which sanction has to be obtained. Any variation of the quantum of tax based on an increase in the value of the property or additions made to that property would also be covered by the proviso to Article 285 of the Constitution. This point also arose, it appears, in a Calcutta case in AIR 1948 Cal 116 (2) (A), and it was observed by Mukherjea J., that the liability for rates that exists in respect of a particular property prior to April 1937, and which is to continue according to the proviso, may certainly include any future variation resulting from alteration in the valuation of the property or the rate of assessment...." (pages 454 and 455).

40. That being so, and, since the tax demanded by the Municipal Council was no other than the same tax which was imposed under the Madras Act, the mere fact that there was a diminution of the tax in respect of buildings and an enhancement of the tax in respect of lands by the adoption of a different method of computation which was prescribed by the relevant provisions of the Mysore Act did not absolve the Union Government from its liability to pay the tax under Article 285 (2) of the Constitution since the postulate that such diminution or enhancement of the one tax or the other, introduced a new tax in the relevant area cannot be sound and is therefore unacceptable.

41. We do not think that Mr. Nanjundiah appearing on behalf of the Union Government can derive any support for his contention to the contrary from the decisions upon which he relied, namely, *Municipal Council Cuddapah v. M. and S. M. Rly. Co. Ltd.*, AIR 1929 Mad 746, *South Indian Railway v. Panchayat Board Mandapam*, AIR 1943 Mad 733, *Kannur Municipality v. Dominion of India*, AIR 1954 All

56 and *Amraoti Municipality v. Ramachandra*, AIR 1964 SC 1166.

42. In AIR 1929 Mad 746, the contention of the Railway Administration that it was not liable to pay the tax imposed under the provisions of the Madras Act V of 1920 succeeded on the ground that the tax imposed under that Act was not the tax which had been imposed under the Madras District Municipalities Act 4 of 1884 the liability to pay to which had been declared by a notification under Section 135 of the Railways Act. The ratio of the decision was that the tax imposed was "substantially different", but, whether the view taken in that case that the taxes imposed were substantially different in that way is supportable or not is not a matter into which we need make any investigation in this suit. But, it is clear that if the view had been taken in that case that they were not substantially different, the contention raised on behalf of the Railway Administration would not have succeeded. It is this feature of that case which distinguishes it from the case before us.

43. The view taken in AIR 1943 Mad 733, rested wholly on the view taken in AIR 1929 Mad 746, which, as we have already explained, has no relevance to the case before us in which the impost made under the Madras Act is the very impost which the Union Government is called upon to pay.

44. The decision in AIR 1954 All 56, can have no application to the present case since that case was one in which there was a decision by an arbitrator under Sec. 3 (2) of the Railways (Local Authorities' Taxation) Act and the elucidation made in that situation was that the local authority could not demand tax in excess of the amount determined by the arbitrator.

45. The decision in AIR 1964 SC 1166, was the foundation of the argument that the words "so long as that tax continues to be levied in that State" occurring in Art. 285 (2) of the Constitution, should be interpreted in the same way in which the words "may continue to be levied" occurring in Article 277. The argument maintained was that since it was explained by the Supreme Court that no old tax may continue to be levied under Article 277, if the rate of the old tax is enhanced, an enhanced or reduced old tax ceases to be exigible even for purposes of Article 285 (2).

46. But, it is clear that the expression "may continue to be levied" occurring in Article 277 cannot receive the same meaning which the expression "so long as that tax continues to be levied in that State" occurring in Art. 285 (2) should be given. Article 277 authorises the continuance of the levy of an old tax which was lawfully imposed before the commencement of the Constitution by the Government of any State or a local or other authority or body even if under the Constitution that impost

is an impost which could be made only by Parliament.

47. The terminal tax, the levy of which was called in question before the Supreme Court, was a tax concerning three new items which was not exigible in respect of those items before the commencement of the Constitution but was imposed after the Constitution came into force by the concerned municipal council in the State.

48. The argument advanced on behalf of the Council was that under Article 277 of the Constitution, it had the power to impose a terminal tax on new items so long as there was an impost in the form of a terminal tax on some item or the other, before the commencement of the Constitution. It was this contention which was repelled by the Supreme Court on the ground that for purposes of Article 277 of the Constitution, the impost which could continue to be levied even if the topic relating to the impost is in the Union list, is an old impost which after the commencement of the Constitution has not suffered any transformation or variation of any kind including its measure. The ratiocination which impelled that conclusion emphasised the importance of legislative competence concerning which the suit before us presents no controversy.

49. Moreover, between the collocation of the words in Art. 277 and their arrangement in Article 285 (2), there is no similarity, Article 277 which says that a tax lawfully levied before the Constitution "may...continue to be levied", continues an old impost with respect to which the Constitution transmits to Parliament Legislative competence, which, no longer resides in the legislative organ which created it. And so, the power to recover it is limited to its old magnitude which could after the Constitution be varied only by Parliament.

50. But the words "so long as that tax continues to be levied" in Article 285 (2) which only mean that there should have been no subsequent disappearance of the impost, do not introduce any such limitation. While the purpose of the relevant phrase in Article 277 is the authorisation of the recovery of the amount of the tax previously payable, the emphasis of the concluding words of Article 285 (2) is on the exclusion of liability when there is a subsequent cessation of the impost, and, not on its measure, if it continues to maintain its character. The suggestion that we should understand the words occurring in the two articles in the same way is to mistake the purpose of the one for the intentment of the other.

51. The discussion made so far yields the result that the property tax which the Union of India was called upon by the Municipal Council to pay was the same old property tax which was imposed under the Madras Act. The attenuation of the measure of the tax in the one case and the increase

in the case of the other are not factors which could change the attributes or the character of the tax. The tax demanded was the same old tax although its quantification which was made by a different process entitled the municipal council to make a higher demand in the case of lands.

52. That that is the true position is what negatives the contention that Article 285 (2) is inapplicable and makes unavailable the argument that a new notification under Section 135 of the Railways Act or under Section 3 of the Railways (Local Authorities' Taxation) Act, 1941, was a condition precedent to the impugned demand.

53. Indeed, in the letter addressed by the Southern Railways Administration on January 30, 1957 to the Municipal Council, it did not dispute its liability to pay the tax imposed under the Madras Act, but only repudiated its liability to the extent of the enhancement which, as we have already stated, was made only in the case of taxes with respect to the vacant lands while on the contrary the tax with respect to the buildings had become smaller. There was also a contention raised in that letter that scavenger tax was not payable. But with that question, we are not concerned in this suit since we have been intimated by both sides that the Municipal Council has made no demand for the payment of scavenger tax. The genuineness of this letter was not disputed by Mr. Nanjundiah appearing on behalf of the Union Government although he explained to us that what was stated in that letter was attributable to a mistaken impression in them and of the General Manager of the Southern Railways Administration. But, as already explained by us, nothing turns upon the concession made by the General Manager since our decision in this suit depends upon the conclusion reached by us on the merits of the case and not upon the concession made by him.

54. So, our findings on issues 1, 2, 4, 5 and 6 are in favour of the plaintiff and against the defendant. Our finding on the first issue is that the liability of the Union of India under Article 285 (2) of the Constitution did not perish when the District of Bellary became part of the old State of Mysore.

55. Our finding on the second issue is that the extension of the provisions of the Mysore City Municipalities Act, 1933, to the District of Bellary did not affect that liability created by Article 285(2) of the Constitution.

56. Our finding on the 4th and 5th issues is that the promulgation of a fresh notification under Section 3 of the Railways (Local Authorities' Taxation) Act, 1941, and Section 135 of the Indian Railways Act was not necessary to create a right in the plaintiff to demand the taxes which it called upon the Union of India to pay.

57. Our finding on the second issue is also our finding on the sixth issue.

58. In the result, we make a decree in favour of the plaintiff as prayed for in the plaint. By that decree, we make a declaration that the plaintiff has a right to levy and collect the taxes mentioned in paragraph 5 of the plaint on the properties of the defendant situate within the municipal limits as specified in Schedule A to the plaint, and we make a further decree against the defendant and in favour of the plaintiff for the payment of a sum of Rs. 38,988. The defendant shall also pay the plaintiff the costs of this suit and future interest on the amount for which we have made a decree in favour of the plaintiff at six per cent per annum from the date of the institution of the suit till date of payment.

Suit decreed.

AIR 1970 MYSORE 45 (V 57 C 9)

A. NARAYANA PAI, J.

M. Shivarama Bhat and another, Petitioners v. Mahabala Bhatt Muliya and others, Respondents.

Civil Revn. Petns. Nos. 536 to 538 of 1967, D/- 8-4-1969.

Civil P. C. (1908), O. 26, Rr. 10(2), 18 — Notice by Commissioner issued only to two defendants out of three — Legal consequence would be not total invalidation of report but non-availability of same as evidence under R. 10(2) as against defendant not served with notice — Defendants served with notice could have no objection or statable case for getting report set aside on alleged contravention of R. 18 — Report can also be made use of either for corroboration or for contradiction of oral evidence of Commissioner if he is examined as witness: Second Appeal (M) 60 of 1956 D/- 11-10-1960 (Orissa), Disting.

(Paras 14, 15, 16)

Cases Referred: Chronological Paras

(1960) Second Appeal No. (M) 60 of 1956 D/- 11-10-1960 (Orissa) 8

(1934) AIR 1934 Mad 548 (V 21) = 1934 Mad WN 155, Latchan Naidu v. Ramkrishna Ranga Rao 8

Ganpathi Bhat, for Petitioners; B. P. Holla, for Respondent No. 1.

ORDER: These three revision petitions are directed against the common order disposing of three interlocutory applications in a partition suit, Original Suit No. 75 of 1964 on the file of the Civil Judge, Mangalore.

2. The suit was filed by the first respondent Mahabala Bhatt as plaintiff against his father Ramachandra Bhat (Petitioner), his brothers Shama Bhat and Shivarama Bhat (Respondents 2 and 3) and the said Shama Bhat's two sons Ramachandra Bhat and Ramakrishna Bhat, — arrayed as defendants 1 to 5 respectively (Vide C. R. P. 537/67).

3. Immediately on filing the suit, the first respondent (plaintiff) made an application for appointment of a Commissioner to prepare an inventory of moveables and jewellery in the family house together with valuation thereof and also to make an estimate of the yield of an areca garden belonging to the family situated within a particular survey number specified in the application. To that application, he made only defendants 1 and 2 parties as respondents. A lawyer practising in Mangalore was appointed Commissioner for the purpose. He went to the family house and the areca garden and made a report in compliance with the direction in Court's warrant appointing him as Commissioner. He gave notice of his proposed execution of the warrant only to defendants 1 and 2 and not to the third defendant. The third defendant is said to be residing in Mangalore as an apprentice under a Chartered Accountant. No notice was given to him. The first two defendants admitted their presence at the time the Commissioner executed his warrant. Third defendant was not present.

4. After the report was submitted to the Court, the first defendant filed one application R. I. A. No. 246/1965 to set aside the report and the third defendant filed two applications, — R.I.A. No./296/1965 to set aside the order of Court for the appointment of Commissioner and R. I. A. No. 458/1965 to set aside the Commissioner's report. All the three applications have been dismissed by the Civil Judge.

5. Hence, these revision petitions, C. R. Ps. 536/67 and 538/67 by the third defendant and C. R. P. 537/67 by the first defendant.

6. All the factual allegations made in support of the prayer for setting aside the report have been dealt with by the Civil Judge in an elaborate order and the findings of fact recorded by him are not open to question in a revision petition.

7. The only point worthy of consideration is whether the report is available or can be made use of in the suit against the third defendant, for the reason that no notice had been given to him either by Court or by the Commissioner of the execution of the commission.

8. It has been argued on his behalf that the entire report must be set aside as illegal on the basis of the principle enunciated by Cornish, J. in Latchan Naidu v. Ramakrishna Ranga Rao, AIR 1934 Mad 548 which has been followed and applied by Kalagate, J. of this Court in an unreported decision in Second Appeal (M) 60 of 1956 disposed of on 11th October 1960 (Orissa).

9. The principle stated by Cornish, J. is that the report of the Commissioner becomes evidence and part of the record in the suit by virtue of R. 10 (2) of O. 26 of the Code of Civil Procedure and that a report prepared without issue of notice to any party as required by R. 18 of the same Order would be

a report prepared behind the back of the party not so served and that therefore it would be unjust to treat it as evidence against him. There is a general observation that there is no power in the Court to issue an ex parte commission.

10. Now, Rule 18 of O. 26 of the Code of Civil Procedure reads as follows:

"18(1) Where a commission is issued under this order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence."

11. It is correct to say that the crux of the matter is that under Rule 10 (2) of Order 26 a Commissioner's report is made evidence available in the suit concerned. Now, a Commissioner is not required to be placed under an oath or to work under an oath as a witness is always required to do. Nevertheless, a report made by him is elevated to the position of evidence tendered on oath in open Court. It is a departure from the normal rule of taking evidence. Hence, the interpretation to be placed on such a legal provision making a definite departure from the normal rule is that before effect could be given to that special provision, every condition or every detail of the procedure prescribed by the law for the preparation of such a report should be strictly complied with.

12. The general statement that the Court has no power to make an ex parte order issuing commission cannot of course be accepted. The power of the Court to make interlocutory orders without giving notice to the opposite parties in the first instance is well-known and undoubted, because the law recognises that there are cases of emergency and expediency which make it necessary in the interest of justice to pass an ex parte order because, to issue notice in such circumstances would surely defeat justice by permitting unscrupulous parties to change or even to destroy evidence necessary for a proper disposal of the main controversy.

13. Even if the remark should be related to Rule 18, I do not think that there is any disobedience of the said rule or departure therefrom if the Court, upon making an ex parte appointment of the Commissioner, directs the Commissioner to issue notice to the parties interested before executing the commission. In such an event, the Commissioner would be the person specially appointed by the Court to serve notice on the parties of the type required by Rule 18 of Order 26.

14. Now, in the present case, defendants 1 and 2 have been served and were present at the time of the execution of the warrant. They could have no objection or statable case for getting the Commissioner's report set aside on the alleged contravention of or failure to obey Rule 18 of Order XXVI. Hence the case for a total invalidation of the

report is, even the facts of this case, impossible.

15. Even in the case of the third defendant who has not been served with notice and who was not present at the time of the execution of commission, the legal consequence would be not a total invalidation of the report but non-availability of the same as evidence under Rule 10(2) of Order 26. In other words, the report by itself, without anything more, cannot become or be available as evidence in the suit as against the third defendant.

16. But, that is not saying that that report cannot at all be made use of in any other way in the suit. The Commissioner, for example, can be examined as a witness in which case, the report prepared by him on a prior occasion regarding his observations of facts which are relevant to the disposal of the suit may be made use of either for corroboration of his oral evidence or for contradiction thereof in accordance with the relevant provisions of the Evidence Act.

17. In this case, it is pointed out on behalf of the respondent-plaintiff that the Commissioner was actually examined for purposes of these interlocutory applications and certain answers have already been elicited from him in regard to it. Whether and if so to what extent this evidence may be made use of for the purpose of the main trial of the suit, is not a matter on which I need express or do express any opinion at this stage.

18. In the case decided by Kalagate, J. there were two defendants in the suit and both of them were not served with the notice of the execution of the Commission. Hence, the report in that case could not be made use of as evidence against either of them. The general statement in that judgment to the effect that the Commissioner's report was neither legal nor valid in law must be limited to the facts of that case and understood in the light of the principles discussed above.

19. Civil Revision Petitions Nos. 537/67 and 538/67 are dismissed and Civil Revision Petition No. 536/67 is also dismissed subject to the observations made above, namely, that the report of the Commissioner, by itself, cannot be regarded as evidence against the third defendant under Rule 10(2) of Order 26 of the Code of Civil Procedure.

20. No order as to costs.

Order accordingly.

AIR 1970 MYSORE 46 (V 57 C 10)

A. NARAYANA PAI, J.

In the matter of last will and Testament of Eunice Annette Johnson, Deceased, Tadimalla Subbarao, Petitioner.

Probate Civil Petition D/- 8-8-1969.

Succession Act (1925), Ss. 224 and 311 — Testatrix appointing all partners of a Solicitor

IM/JM/E528/69/CWM/P

firm as executors of her will — Application by only one partner for grant of probate — Probate cannot be granted — All partners have to take out probate as joint grantees or other partners should stand out and renounce their executorship.

Section 224 provides, but does not dispense with the grant of probate in respect of or in favour of any one or more of the executors when there are several executors. The language itself makes it clear that the grant of probate is to be made in favour of all the executors; what the Section intends is to provide for contingencies, where it may not be possible for all the executors to make an application simultaneously by vesting a discretion in the Court, to be exercised in accordance with or in the light of the relevant circumstances, to make grants at different times in favour of one or more of the several executors, the ultimate idea being that at some point of time there should be a grant in favour of all the executors.

(Para 3)

It will be seen that the person who may under S. 311 and in the absence of direction contained in the will exercise the powers of executor, is the person who has proved the will. It cannot be said therefore that, by virtue of S. 311 when there are several executors and some only take out probate, and, therefore, answer the description of a person who has proved the will, the powers of the executors can be exercised by persons other than those who have taken out probate. Even the operative portion of S. 311, therefore, contemplates the existence of a grant.

(Para 4)

There is, apart from the effect of the language of the sections, a much higher principle which requires that grant should be made in favour of all executors appointed under the will and willing to act, and that is that executors are persons selected by the testator as deserving the trust he reposes in them; because those are persons trusted by the testator no security is taken from them for the execution of the will. When a testator appoints several executors, the normal inference should be that he expects all of them to act together, the opinion of the testator implicit in the appointment being that he expects that his will will be fully and properly executed when all the executors appointed by him act together. Of course, because the position is one of trust and appointment need not have been made after consultation it is open to anyone of the executors to decline to act or having started to act, renounce the executorship if circumstances are such that law would permit him to do so.

(Para 5)

Where the testatrix appoints the persons who shall be the partners of a solicitor firm at the time of her death, to be the executors and trustees of her will, the probate cannot be granted on the application made by one of the partners of the firm. All the partners should take out probate as joint grantees. If,

however, for reasons of convenience or otherwise, it is found not possible to do so, and one or some only apply for probate, then the others should stand out, and, renounce their executorship and refrain from doing anything thereafter as executors. AIR 1957 Mad 613, Discussed. (Para 7)

Cases Referred: Chronological Paras
(1957) AIR 1957 Mad 613 (V 44) =
ILR (1957) Mad 510, In re, James
Noel Anthony Hobbs 8

M. K. Viswanath, Advocate of M/s. King and Partridge Advocates, for the Petitioner.

ORDER: In this petition proposed to be filed, the prayer is for grant of probate in respect of the Will of one Eunice Anntee-Johnson. The application is by a single person, Mr. Tadimalla Subbarao, one of the partners of the firm of Solicitors and Advocates, by name King and Partridge. The terms of appointment in the Will are, "I appoint the person who shall be the partners of the firm of M/s. King and Partridge, Solicitors, Madras, Bangalore and Ootacamund at the time of my death (hereinafter called 'my Trustees'), to be the executors and trustees of this my Will". On scrutinising the papers, the Registrar of this Court raised an objection or suggestion whether it was not necessary for all the persons answering the description contained in the above appointment to make a joint prayer for grant of probate in favour of all of them. The learned counsel for the petitioner, however, has sought to answer the same by relying on the provisions of Section 224 of the Indian Succession Act.

2. So far as the facts are concerned, it is not disputed that at the time relevant for the appointment mentioned above, there were ten persons functioning as partners of the firm of King and Partridge namely, (1) C. Doreswamy, (2) D. K. Basu, (3) B. P. Ray, (4) P. Sengupta, (5) J. L. Armstrong, (6) P. K. Roy Chowdhury, (7) T. Subba Rao (Petitioner), (8) M. Uttama Reddy (9) S. C. Ghosh and (10) E. R. C. Davidar.

3. Now Section 224 of the Succession Act reads "when several executors are appointed, probate may be granted to them all simultaneously or at different times." By itself it does not, in my opinion, support the contention. It provides, but does not dispense with the grant of probate in respect of or in favour of any one or more of the executors when there are several executors. The language itself makes it clear that the grant of probate is to be made in favour of all the executors; what the section intends is to provide for contingencies, where it may not be possible for all the executors to make an application simultaneously, by vesting a discretion in the court, to be exercised in accordance with or in the light of the relevant circumstances, to make grants at different times in favour of one or more of the several executors, the ultimate idea being that at some point of time

there should be a grant in favour of all the executors.

4. It is however pointed out that such need not necessarily be the position, because Section 311 of the Succession Act says, "when there are several executors or administrators, the powers of all may in the absence of any direction to the contrary be exercised by anyone of them who has proved the will or taken out administration." It will be seen that the person who may under this section and in the absence of direction contained in the will exercise the powers of executors, is the person who has proved the will. It cannot be said, therefore, that when there are several executors and some only take out probate, and therefore, answer the description of a person who has proved the will, the powers of the executors can be exercised by persons other than those who have taken out probate. Even the operative portion of Section 311, therefore, contemplates the existence of a grant.

5. There is, apart from the effect of the language of the sections, a much higher principle which requires that grant should be made in favour of all executors appointed under the will and willing to act, and that is that executors are persons selected by the testator as deserving the trust he reposes in them; because those are persons trusted by the testator, no security is taken from them for the execution of the will. When a testator appoints several executors, the normal inferences should be that he expects all of them to act together the opinion of the testator implicit in the appointment being that he expects that his will will be fully and properly executed when all the executors appointed by him act together. Of course, because the position is one of trust and appointment need not have been made after consultation it is open to anyone of the executors to decline to act or having started to act, renounce the executorship if circumstances are such that law would permit him to do so.

6. With reference to the appointment made in this case, it is obvious that the testatrix trusted the firm of King and Partridge to act as her executors. The language of the appointment, namely, persons who would be the partners at the time of the will comes into operation, makes no difference because it is another way of saying that all the partners at time the will comes into operation should function as her executors. For some of the partners alone to apply for probate and thus acquire the power to act as executors and execute the will, and the rest not to act, would surely be a power exercised by the firm to modify the appointment. Such power cannot be permitted to be exercised. If one partner takes out probate and other partners as partners also act in the execution of the will, it would indeed be an exercise of power which is not permitted by law.

7. Hence the only position or attitude which the firm or its partners may properly take in cases of this nature is for all the partners to take out probate as joint grantees. If, however, for reasons of convenience or otherwise, it is found not possible to do so, and one or some only apply for probate, then the others should stand out, and, renounce their executorship and refrain from doing anything thereafter as executors.

8. The decision of the Madras High Court reported in Re James Noel Anthony Hobbs, AIR 1957 Mad 613 also supports the view stated above, because the proposition made is, "...Normally unless there is something in the law to prevent it one must give effect to the intention of the testator. It is clear that the intention of George Pelham White was all the executors should act jointly, which means, that he did not want one or some of them alone to act. Section 224 of the Act would, it seems to me apply only where the testamentary instrument is silent as to the manner in which the executors should act. If the document names several executors and says nothing more, then by reason of S. 224 some one or more of them may apply for probate. But, where the testamentary instrument requires that all the executors should act jointly Section 224 cannot be invoked to enable some of them alone to apply for probate."

9. I have already expressed my view as to the effect of the appointment in this case which makes it difficult for me to accept the suggestion that the wishes of the testator would be met by the grant of probate only in favour of one of the partners of the firm of King and Partridge when all of them as a body is the executor appointed under the will. The difficulty is inherent in the appointment of a firm because it is not an incorporated entity and its appointment is in effect of the several persons who are its partners, and no partner derives authority because he is a partner, but because he is appointed as executor.

10. If the last sentence in the extract given above from the judgment of the Madras High Court, should be interpreted as meaning that the firm of King and Partridge consisting of several partners can function as executors or exercise the powers of executor, when one or some alone among them apply and take out probate, with respect, I find it difficult to accept the ruling for the reasons already discussed.

11. The papers filed in this petition will, therefore, be returned to the petitioner to represent them after the partners decide whether all or which of them should apply and in the latter event make it possible for this court to grant the prayer, by the rest of the partners renouncing their executorship.

Order accordingly.

"The members of all the Grama Panchayats within the jurisdiction of the Samiti shall, in the prescribed manner, elect the Chairman of the Samiti from among persons who are elected as or are eligible to be elected as members of any such Gram Panchayat;"

Admittedly, the petitioner was not an elected member of a Grama Panchayat within the prescribed area, but he sought election as Chairman on the basis that he was eligible to be so elected.

'Eligibility to be elected as a member of the Grama Panchayat is provided for under the Orissa Grama Panchayat Act (Act 1 of 1965). Section 25 makes provision for disqualifications for membership of the Grama Panchayat, and sub-section (1) (1) thereof, as amended in 1967, provides,

"25(1). A person shall be disqualified for being elected or nominated as a Sarpanch or any other member of the Grama Panchayat constituted under this Act, if he—

xx xx xx
(1) has failed to pay any arrears of any kind accrued due by him, otherwise than as an agent, trustee, or an executor, to the Grama Sasan or being a member of a Co-operative Society to such society, before filing of the nomination paper in accordance with the provisions of this and the rules made thereunder:

provided that in respect of such arrears a bill or a notice has been duly served upon him and the time, if any, specified therein has expired;"

In the present case, the petitioner is said to have incurred the disqualification under Section 25 (1) (1) as referred to above on account of the fact that there was an enquiry along with audit under S. 67 of the Orissa Co-operative Societies Act (Act 2 of 1963) into the affairs of the Co-operative Stores. It is convenient to extract here the provisions of the said section,—

"67 (1). If in the course of an audit, inquiry and inspection or the winding up of a society, it is found that any person, who is or was entrusted with the organisation or management of such society or who is or has at any time been an officer or an employee of the society, has made any payment contrary to this Act, the rules or the bye-laws or has caused any deficiency in the assets of the society by breach of trust or wilful negligence or has misappropriated or fraudulently retained any money or other property belonging to such society, the Registrar may, of his own motion or on the application of the Committee, liquidator or any creditor, hold an inquiry himself or direct any person authorised by him, by an order in writing in this behalf, to inquire into the conduct of such person:

xx xx xx
(2) Where an enquiry is held under sub-section (1), the Registrar may, after giving the person concerned an opportunity of being heard, make an order requiring him to repay or restore the money or property or any part thereof, with interest at such rate, or to pay contribution and costs or compensation to such extent, as the Registrar may consider just and equitable and all such orders shall have effect without prejudice to any other action that may be lawfully taken against him."

The petitioner happened to be the cashier of the Khaira Co-operative Stores, and the auditor has, as is alleged, found that the petitioner is liable to disgorge a sum of Rs. 910-02 to the Society. No action has yet been taken under sub-section (2) of Section 67. Until liability raised in an audit report has been subjected to a surcharge proceeding and an order under sub-section (2) is passed, there is no determination of the dues which can be said to be payable by the petitioner to the Society. If action had been taken under Section 67 (2) of the Co-operative Societies Act, there would have been no need for the Board of Directors of the Stores to raise a dispute before the Assistant Registrar. The materials on record go to show that a dispute had been raised for realisation of the amount, but there does not seem to have been any determination and no award seems to have been passed creating a liability against the petitioner.

7. The relevant disqualification under the Grama Panchayat Act would arise if the following conditions are satisfied:

(a) Arrears to a Co-operative Society of which the person against whom disqualification is alleged was a member;

(b) He has failed to pay the arrears of any kind which have accrued due by him to such Society before filing of the nomination paper;

(c) A bill or notice in respect of such arrears has been duly served on him, and

(d) The time, if any, specified therein has expired and yet he continues to be in arrears.

It is well settled in election Law that the plea of disqualification has to be established by the election petitioner against his rival. The entire burden to establish such disqualification would be on the petitioner who seeks to challenge the election on the ground that a disqualification attached to the elected candidate and evidence required to establish an existence of such disqualification must be conclusive. In AIR 1954 SC 210 (211), Jagan Nath v. Jaswant Singh, His Lordship the Chief Justice speaking for the Court said,—

"It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law."

8. We now proceed to examine the materials on record. The nature of the relevant evidence led in this case, as would appear from the decision of the Election Commissioner, is mostly oral except that there are two resolutions (Exts. 2 and 3) of the Khaira Co-operative Stores, and a copy of the plaint in Dispute Case No. 334 of 1966-67 (Ext. 1). The said three documents do not go to show that the liability of the petitioner had been adjudged and the dues raised against him have "accrued". All that is available from the documents is that a demand had been raised by the Co-operative Stores and as the dues had not been paid as per the demand, a dispute has merely been raised before the Assistant Registrar of Co-operative Societies, Balasore. The oral evidence led in the case is from persons who have no personal knowledge about the matter, and each of the persons who claims to support the election petitioner on this score has clearly stated that he has no direct knowledge about the matter. In the circumstances, the oral evidence of P. Ws. 2 and 5 does not go to establish the contention of the election petitioner.

9. In terms of the requirements of Section 25 (1) (1), the arrears must have accrued due in order that the disqualification may arise. The use of the word "accrued" clearly goes to indicate that the legislature intended to provide that there must have been a due on the basis of a determination. "Accrued" means, according to the dictionary, "to arise or spring as a natural growth or result;" "coming as a natural accession or result; arising in due course". It refers to "the existence of a present enforceable right" or "fixed" or "assessed and determined". Tax accrues when all events have occurred which fix the amount of tax and determine the tax payer's liability to pay the tax. (See AIR 1966 All 370 at p. 374 Town Area Committee, Sirsaganj v. N. L. Churaman). The use of the word "accrued" in the aforesaid clause of the Gram Panchayat Act, therefore, clearly gives indication that the disqualification is contemplated to arise only when there has been an ascertainment of dues and the Society has the right in praesenti to recover the said amount and in spite of quantification of the liability and consequent notice of demand to pay, the concerned person has defaulted. A mere demand raised by the Co-operative Stores on the basis that a certain sum

of money is payable by the petitioner when he refutes his liability to pay the same cannot give rise to a position when it can be said that a certain amount has "accrued due" to the Stores.

10. On the aforesaid analysis of the provisions, it is difficult to accept the submission of Mr. Roy that merely because the Co-operative Stores on the basis of the audit report had raised a demand it has to be held that the requirements of clause (1) of Section 25 (1) have been satisfied and that it has to be held that the petitioner being a member of the Co-operative Stores had failed to pay the arrears due by him to the Stores before filing of the nomination paper. It is to be noted that neither the alleged audit report nor the notice of demand has been proved in this case. The Election Commissioner has said,

"It is true that the audit reports and the copy of the demand notice are not forthcoming in this case."

In the absence of these very relevant documents, it is difficult to accept the contention that the disqualification has been established. Each of the requirements as indicated above has to be proved in order to give rise to the disqualification and on the materials on record we must conclude that the election petitioner has failed to satisfy the requirements of clause (1) of Section 25 (1) in order to hold that the petitioner was disqualified under the aforesaid provision at the relevant time.

11. Mr. Roy contended that we were not exercising the powers of an appellate court in the matter, and as such the evidence was not available to be re-examined and re-assessed in order to differ from the Election Commissioner's conclusions. He further submitted that a remedy by way of review was available under the statute and it was open to the petitioner to have approached the Election Commissioner to review his decision. He further brought to our notice the provisions of the Act by which finality is attached to the decision of the Election Commissioner.

We have examined these aspects of Mr. Roy's submissions and we are not in a position to accept any of them. The provision of finality under the Act can be no bar to exercise of jurisdiction by this Court under Article 227 of the Constitution. The remedy of review in the Act can also not be raised as a bar to exercise of our jurisdiction in a writ of certiorari, if, on examination of the materials, we find that an error apparent on the face of the record of the court below is manifest. In a recent decision of the Supreme Court reported in AIR 1969 SC 556, Baburam v. Zilla Parishad, it has been indicated,—

"In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute."

In the instant case there is no right of appeal under the Act and what is provided is only the remedy of a review. We find that the Election Commissioner was not alive to the requirements of the statute to give rise to the impugned disqualification and upon a wrong construction of the statutory provisions failed to apply the law properly to the facts of the case. The mistake committed by the Election Commissioner has led him to come to an erroneous conclusion in the dispute and the error is manifest upon a mere reading of the judgment. We are satisfied that it is a fit case where we should exercise our jurisdiction under Article 227 of the Constitution.

12. The conclusion of the Election Commissioner that the petitioner incurred the disqualification under Section 25 (1) (1) of the Orissa Grama Panchayat Act, in the circumstances of this case, cannot be held to have been established.

13. In view of our finding that the Election Commissioner had jurisdiction to entertain the dispute, the proceeding before him was maintainable; but opposite party No. 1 was not entitled to succeed in the said election petition on account of the fact that the disqualification of the petitioner on the ground contained in Section 25 (1) (1) of the Orissa Grama Panchayat Act has not been established. The Election Commissioner did not act in accordance with law when he set aside the election of the petitioner.

14. We, therefore, allow the writ application, direct the issue of a writ of certiorari quashing the order of the Election Commissioner in Election Misc Case No. 1 of 1968 and we further direct that the election petition filed before him be dismissed. We, however, make no order as to costs of this case.

15. G. K. MISRA, C. J.: I agree.

Petition allowed.

AIR 1970 ORISSA 19 (V 57 C 8)

G. K. MISRA, C. J. AND
R. N. MISRA, J.

Anil Chandra Mitra, Petitioner v. State of Orissa and another, Opposite Parties.

O. J. C. No. 166 of 1966, D/- 6-8-1969.

IM/JM/E397/69/GGM/M

Constitution of India, Arts. 311, 14, 16, 309 and 226 — Equality of opportunity in the matter of promotion — Principles — Non-consideration for promotion — Ignoring the claim vitiates the exercise of jurisdiction by appropriate authority — Writ of mandamus can issue.

It is settled that no incumbent has a right to promotion, and promotion, as such, is not justiciable being a matter entirely within the discretion of the prescribed administrative superior. The combined effect of the provisions of Arts. 14 and 16 of the Constitution is that employees under Government are entitled to equality of treatment both at the time of recruitment and at all material stages during the continuance of their service. The appropriate authority is bound to take the claims of all persons entitled to promotion into consideration and in its discretion grant promotion. Non-consideration of the claim of an employee, otherwise qualified for consideration, vitiates the exercise of jurisdiction in the matter, and subjects the action of the appropriate authority in the matter of grant of promotion, to the scrutiny of the court. Once the Court is satisfied that an employee entitled to consideration has been left out, a case is made out for interference for breach of the guarantee conferred under Article 16 of the Constitution on the employee. To satisfy the requirements of completion of two years continuous service under R. 21 (1) (d) of Orissa Ministerial Service (Method of Recruitment and Conditions of Service of Clerks and Assistants in the District Offices and Offices of the Head of the Departments) Rules, 1963 it is not at all necessary that one should have worked as Junior Head Assistant in such post. One who has been granted pro forma promotion on account of the fact that he has been working somewhere else and has been continuing his lien in the parent post would also entitle himself to consideration for promotion as senior Head Assistant if two years have been completed since pro forma promotion is granted in the post of junior head Assistant and continuity of such promotion has been maintained for the prescribed period.

(Paras 3, 4 and 5)

R. Mohanty, S. C. Ghosh and U. N. Sahu, for Petitioner; Advocate General, for Opposite Parties.

R. N. MISRA, J.: The petitioner was recruited as a lower division assistant in the year 1940 in the establishment of the Revenue Commissioner of Orissa, and was confirmed in such post with effect from 1-3-48. Under Orissa Act 23 of 1951, a Board of Revenue for the State was constituted, and as would appear from the scheme of the said Statute, the Board created under the Act was a substitute

for the Revenue Commissioner, which post had been created under the Government of India (Constitution of Orissa) Order, 1936. The Board of Revenue and the Revenue Department of the State were amalgamated, and the petitioner was put as a Grade I assistant in the Revenue Department of the Orissa Secretariat.

The Scheme set out under Orissa Act 23 of 1951 was altered by Orissa Act 18 of 1957, and a Single Member Board was constituted, and bulk of the functions hitherto exercised by the Board of Revenue was transferred to the three Revenue Divisional Commissioners of the Northern, Central and Southern Divisions created under Orissa Act 19 of 1957, including the services of many of the employees. The petitioner continued under the Revenue Department even after the changes were introduced, but had his lien in the post under the Board of Revenue. The Board of Revenue confirmed the petitioner on 15-5-1959 as a Grade II assistant with retrospective effect from 13-9-54. The petitioner became a senior assistant in the Revenue Department in January 1958 and was placed in the District Gazetteer Section.

With effect from 2-8-60 the petitioner served in the Gazetteer Section as a senior assistant until June 1965. In the gradation list published by the Revenue Department on 11-8-1962, the petitioner was shown in the establishment, but the subsequent gradation list published did not include the petitioner. The petitioner was reverted to the office of the Revenue Divisional Commissioner, Central Division, with effect from 30-6-65, where he joined as a Junior Head Assistant in an officiating capacity on 6-7-65. While the petitioner was continuing as a senior assistant in the Gazetteer Section of the Revenue Department, he had been confirmed as a Grade I assistant in the office of the Revenue Divisional Commissioner with effect from 1-1-62.

The establishment of the Board of Revenue in 1951, the bifurcation of the functions in 1957 and the incorporation of four different establishments, that is, the Board and the three separate Revenue Divisional Commissioners brought about an uncertain situation and the question of distribution of the staff in the establishments was not finalised for many years, as would appear from paragraph 15 of the counter affidavit. The petitioner made representations for pro forma promotion to the post of Junior Head Assistant and was granted such pro forma promotion to the said post. Thereafter vacancies occurred in the post of Senior Head Assistant. The petitioner's claim was overlooked and other employees, as the petitioner alleges, superseded the petitioner and were allowed to serve as Senior Head

Assistants in the establishment. As the petitioner did not get any relief in spite of representations, he ultimately approached this Court under Article 226 of the Constitution of India.

2. The State Government filed a counter affidavit on 3-11-66 denying the allegations of the petitioner. From the said affidavit, however, the actual position relevant for determination of the dispute in question did not clearly emerge. At the time when the writ application was heard, the learned Advocate General appearing for the State contended that the petitioner had no lien in respect of his post that he held in the office of the Revenue Commissioner and ultimately in the establishment of the Revenue Divisional Commissioner. We called upon the State to file a further affidavit to clarify the matter, and a further affidavit was filed on 10-7-69. From paragraphs 17 and 18 of the said counter affidavit it clearly appears that the petitioner's lien in his substantive post had not been cancelled, nor suspended, and the petitioner was always borne on the cadre of his original establishment.

3. A set of rules entitled "The Orissa Ministerial Service (Method of Recruitment and Conditions of Service of Clerks and Assistants in the District Offices and Offices of the Heads of Departments) Rules, 1963, framed in exercise of powers conferred under the proviso to Article 309 of the Constitution of India, were introduced by the Governor. Rule 21 (1) (d) of the said Rules provides as under,—

"Promotion to the posts of Senior Head Assistants shall be made from amongst the Junior Head Assistants who have completed two years continuous services as Junior Head Assistants."

Keeping the said provision in view, it was stated in paragraph 18 of the counter affidavit as follows:

"That the question of promotion to the post of Senior Head Assistant in the Revenue Divisional Commissioner's office arose in the year 1964. By that time the Orissa Ministerial Service (Method of Recruitment and Conditions of Service) Rules 1963 came into force on 15th April 1963. Rule 21 provides that the post of Senior Head Assistant shall be filled up by promotion from among the Junior Head Assistants, who have completed 2 years of continuous service as Junior Head Assistants. The petitioner who got pro forma promotion to the post of Junior Head Assistant never worked as Junior Head Assistant far less to speak of completion of 2 years continuous service as Junior Head Assistant. In such circumstances the question of consideration of the petitioner for promotion as Senior Head Assistant does not

arise. However when the question of consideration for promotion to the post of Senior Head Assistant came in, the petitioner's case was considered. It was observed that 'But he is working in the Revenue Department of Government. He was given pro forma promotion on account of his seniority though he never worked in this office ever since the creation of the office of the Revenue Divisional Commissioner. We have separately moved Government at Flag X for suspending his lien as also of those other Assistants working in other offices but having lien in this office. So he need not be considered for promotion now.'"

The learned Advocate General appearing for the opposite parties did not any longer want to dispute the claim of the petitioner that he had subsisting lien in his parent post, and that too in an unsuspended state. We, therefore, do not propose to examine that aspect of the case, and we proceed to record a finding, on the admitted position, that the petitioner had subsisting lien in his post in the establishment of the Revenue Divisional Commissioner. It is also the admitted position that the petitioner, while serving in the Gazetteer Section of the Revenue Department, had been granted the pro forma promotion to the post of Junior Head Assistant. It was not seriously disputed that the petitioner was drawing a salary higher than what is provided for the post of Junior Head Assistant in the office of the Revenue Divisional Commissioner. The duties which he was discharging in his post under the District Gazetteer Section were at least equivalent to the duties attached to the post of Junior Head Assistant in his permanent establishment.

4. It was however contended by the learned Advocate General, on the basis of the allegations in paragraph 18 of the counter affidavit, that the petitioner having not completed two years of continuous service as Junior Head Assistant was not entitled to promotion to the post of Senior Head Assistant. It is well settled that no incumbent has a right to promotion, and promotion, as such, is not justiciable being a matter entirely within the discretion of the prescribed administrative superior. The petitioner's contention in this case before us has been that he was kept out of consideration and his claim was not taken into account. The note appended to paragraph 18 of the counter affidavit, which has been extracted above, is not a full extract of the relevant portion in the original file. Mr. Mohanty appearing for the petitioner canvassed that aspect of the matter before us, and we called upon the learned Advocate General to produce the relevant file before us when the matter was heard; we find that one important sentence appearing at the

end of what has been extracted in Paragraph 18 of the counter affidavit was left out. The said portion reads as follows:

"If he makes any representation, then the question of giving him pro forma promotion will be considered at that time."

The combined effect of what was extracted and what was left out as appearing above clearly is that the petitioner was not considered for promotion and in case he made a representation the question of giving him pro forma promotion was reserved to be considered. The non-consideration of the petitioner for promotion to the post of Senior Head Assistant is available for examination by this Court. It is now well settled that the combined effect of the provisions of Articles 14 and 16 of the Constitution is that employees under Government are entitled to equality of treatment both at the time of recruitment and at all material stages during the continuance of their service. The non-consideration of the petitioner at the material time for promotion to the post of Senior Head Assistant seems to have been based upon a wrong interpretation of Rule 21 (1) (d) of the Rules of 1963. To satisfy the requirement of completion of two years continuous service, it is not at all necessary that one should have worked as Junior Head Assistant in such post. One who has been granted pro forma promotion on account of the fact that he has been working somewhere else and has been continuing his lien in the parent post would also entitle himself to consideration for promotion as senior Head Assistant if two years have been completed since pro forma promotion was granted in the post of Junior Head Assistant and continuity of such promotion has been maintained for the prescribed period. If this is not the meaning to be put on the relevant provision, it is difficult to comprehend how a person who has been granted pro forma promotion is to be treated.

5. The Note extracted in paragraph 18 of the counter affidavit clearly goes to show that the petitioner was having subsisting lien at the material point of time and Government had been requested to suspend his lien. Orders suspending his lien did not seem to have been passed and the counter affidavit is particularly silent about it. The Note goes to show that the petitioner was entitled to consideration, but he was kept out of consideration, and consideration of the petitioner for promotion was conditioned upon his making a representation. The appropriate authority is bound to take the claims of all persons entitled to promotion into consideration and in its discretion grant promotion. Non-consideration

of the claim of an employee, otherwise qualified for consideration, vitiates the exercise of jurisdiction in the matter, and subjects the action of the appropriate authority in the matter of grant of promotion, to the scrutiny of the Court. Once the Court is satisfied that an employee entitled to consideration has been left out, a case is made out for interference for breach of the guarantee conferred under Article 16 of the Constitution on the employee. In the facts and circumstances of the case, we are, therefore, satisfied that the petitioner was entitled to be considered for promotion to the post of Senior Head Assistant at the relevant time, and either under a wrong construction put on the provision of Rule 21 (1) (d) or for some other reason best known to the concerned authorities, he was kept out of consideration for promotion. Non-consideration of the petitioner entitles him to the relief.

6. In the result, we allow this writ application and issue a writ of mandamus commanding the opposite parties to consider the petitioner's claim for promotion to the post of Senior Head Assistant, and to grant him all other consequential reliefs which he would have been otherwise entitled to, if he be promoted. The writ application accordingly succeeds with costs. Hearing fee of Rs. 100/- (Rupees one hundred).

7. G. K. MISRA, C. J.: I agree.
Petition allowed.

AIR 1970 ORISSA 22 (V 57 C 9)

S. ACHARYA, J.

Jogi Das and others, Appellants v. Fakir Panda, Respondent.

Second Appeal No. 3 of 1965, D/- 30-6-1969, against decision of 1st. Addl. Dist. J., Cuttack, D/- 8-8-1964.

(A) Registration Act (1908), Ss. 17 (2) (vi) and 49 — Expressions "subject matter of previous suit" in S. 17 (2) (vi) and "so far as it relates to the suit" in O. 23 R. 3, Civil P. C. — Distinction—Compromise decree in respect of immovable property not the subject matter of suit — Non-registration — Effect — Decree not enforceable though the decree would be evidence of the contract between parties.

The words "so far as it relates to the suit" in Order 23, Rule 3 are of wider import than the words 'subject matter of the suit or proceeding' in section 17 (2) (vi). The former would engulf within its scope terms which form the consideration for the adjustment of the matters in dispute and may contain within its scope extraneous matters whether they form the subject-matter of the suit or not. Thus

the words 'so far as it relates to the suit' in Order 23, Rule 3 C. P. C. cannot have the same implication as the words 'subject-matter of the suit or proceeding' in section 17 (2) (vi) of the Registration Act. In case of a non-registered compromise decree that part of the decree would at best be enforceable as a contract between the parties to it and the decree of which it formed a part would be evidence of the said contract but not enforceable as a decree. AIR 1964 Mys 277 and AIR 1948 Cal 179 and AIR 1957 Andh Pra 454 and AIR 1962 SC 903 and AIR 1960 Madh Pra 280 and AIR 1960 Andh Pra 56 Rel. on. (Paras 5 and 6)

(B) Registration Act (1908), S. 1—Scope — Object of the Act.

The object and purpose of the Registration Act, amongst other things, is to provide a method of public registration of documents so as to give information to people regarding legal rights and obligations arising or affecting a particular property, and to perpetuate documents which may afterwards be of legal importance, and also to prevent fraud. Registration lends inviolability and importance to certain classes of documents.

(Para 5)

Cases Referred: Chronological Paras
(1964) AIR 1964 Mys 277 (V 51)=

Govindagouda Narayanagouda
v. Madhava Rao Narsinga Rao 5

(1962) AIR 1962 SC 903 (V 49)=
1962 Supp (2) SCR 477, Munshi

Ram v. Banwari Lal 6

(1962) 1962 (4) OJD 349=1 East
LR 257, Lachhman Ram v.

Jagabandhu Sahu 7

(1960) AIR 1960 Andh Pra 56 (V 47),
Harak Chandas v. Hyderabad,

State Bank, Hyderabad 6

(1960) AIR 1960 Madh Pra 280
(V 47) = 1960 MPLJ 642, Ram

Juwan v. Devendra Nath Gupta 6

(1957) AIR 1957 Andh Pra 454
(V 44) = ILR (1956) Andh 137,

Ankamreddi Konda v. Ankamreddi
Pedademudu 6

(1948) AIR 1948 Cal 179 (V 35),
Byomkesh Mukherjee v. Bhupen-

dra Narayan Sinha Bahadur 5

S. S. Basu, for Appellants; B. K. Basu
and B. B. Prasad, for Respondent.

JUDGMENT: This is an appeal by the defendants against the judgment of the 1st Addl. District Judge, Cuttack, in Title Appeal No. 146 of 1962 confirming the judgment of the First Additional Subordinate Judge, Cuttack, in Title Suit No. 214 of 1959.

2. The plaintiff's suit, in short, was for declaration of title and confirmation of possession or in the alternative for recovery of possession in respect of 4 decimals 5 Kadis of land out of plot no. 620 and also for a permanent injun-

ction restraining the defendants from interfering with the plaintiff's possession of the aforesaid portion of the land. The plaintiff also claimed damages for Rupees 300/- and a direction on the defendants to demolish a certain construction. He claimed title to the disputed land on the basis of a compromise entered into between himself and defendants 3 and 4 and one Syamsundar Das (since dead) in a previous suit (T. S. No. 170/42 of 1955-57 in the Court of the 1st Munsif at Cuttack). The defendants contested the suit on various grounds, and I would refer to the same as and when necessary. The plaintiff succeeded in both the Courts below in getting a declaration that he acquired title to the disputed land on the basis of the compromise decree in the previous suit and was entitled to recover possession of the same from the appellants.

3. Mr. Basu, the learned counsel for the appellants, seriously contended at first that as title of plot No. 620 was not in dispute in the previous suit, the decree passed in the same suit on the basis of the compromise comprising terms for relinquishment of right in plot no. 620, would be a case within the exception contained in Section 17 (2) (vi) of the Registration Act, and the said decree not having been registered did not pass any title on plot no. 620 to the plaintiff. It was also contended that even in case the said decree was good and effective (which was challenged seriously) then the plaintiff should have proceeded in execution of the said decree without filing a fresh suit of this nature, which would be barred by *res judicata*; and that as the compromise petition forming a part of the said decree did not anywhere mention that 4 decimals 5 Kadis of plot no. 620 was transferred to the plaintiff, his right and title to the same could not be established on the basis of the said decree.

It was further submitted that the terms of the compromise in the previous suit, clearly provided that in case defendants 2, 3 and 5 in the said suit ever claimed their right in plot no. 620 then in the case the plaintiff would be entitled to claim his right over the said plot as he claimed in the plaint of the previous suit. On this it was contended that since one of the above mentioned defendants, namely defendant no. 3, asserted his right over plot no. 620, the plaintiff had the right only to pursue his original remedy in his previous suit, and did not by the said decree acquire any title to the suit land.

4. For the purpose of examining the legal aspect of the first contention regarding the registration of the decree in the previous suit as raised on behalf of the appellants, the facts relevant to this con-

tention as found by the court below should be mentioned. Plot no. 620 admittedly belonged to the defendants and deceased Syamsundar Das. In the previous suit the plaintiff *inter alia* claimed (i) a declaration of his right and title over plots nos. 622 and 625 and in the alternative a declaration of his right to use these two plots as passage along with the defendants; and (ii) a declaration that he had an easementary right to drain out water of his house in plot no. 623 through plot no. 622 and the present disputed plot no. 620. The suit was compromised between the plaintiff and appellants 3 and 4 (defendants 4 and 5 in the previous suit) and deceased Syamsundar Das who was defendant no. 1 in that suit.

In the said compromise petition the plaintiff relinquished his claim in respect of plot no. 625, and the aforesaid three defendants conveyed their right, title and interest over plot no. 620 in favour of the plaintiff. This later part of the compromise dealing with the defendant's conveyance of their right, title and interest in plot no. 620 was not embodied in the operative part of the judgment in the previous suit (Ext. 3) and also in the court's decree drawn up in accordance with the said judgment. It was submitted by Mr. S. S. Basu, the learned counsel for the appellants, that though both the courts below found that the defendants' -/12/- interest in plot no. 620 was conveyed by the compromise in the previous suit, the compromise petitions Exts. 1 and 2 would show that the entire plot no. 620 measuring 0.06 acres was given to the plaintiff by defendants 1, 4 and 5 of that suit.

It is seen from Exts. 1 and 2 that the entire -/16/- of plot no. 620 was relinquished by them in favour of the plaintiff. However, whatever that may be, it is an undisputed fact that these three defendants in the previous suit relinquished their right, title and interest in Plot No. 620 in favour of the plaintiff by the compromise which was arrived at in the previous suit. The question of title in plot No. 620 was not the subject-matter of the previous suit as the plaintiff in the aforesaid suit merely claimed an easementary right to drain out water through a defined channel of this plot of land, as can be seen from Ext. 3. I also find from the judgment of the lower appellate Court that "It has been conceded by the learned counsel for the plaintiff respondent no. 1 that the question of title to the disputed land was not the subject matter of the previous suit."

5. The object and purpose of the Registration Act, amongst other things, is to provide a method of public registration of documents so as to give information

to people regarding legal rights and obligations arising or affecting a particular property, and to perpetuate documents which may afterwards be of legal importance, and also to prevent fraud. Registration lends inviolability and importance to certain classes of documents. While any compromise arrived at between the parties has to be recorded as a whole under the adjective law in Order 23, Rule 3 C. P. C. and a decree has to be passed in accordance therewith 'so far as it relates to the suit', the provision contained in Section 17 (2) (vi) of the Registration Act would require only certain types of such decrees to be registered compulsorily, non-compliance of which would be effected by the substantive law contained in Section 49 of the said Act. By Section 17 (2) (vi) as amended in 1929, decrees or orders expressed to be made on a compromise and comprising immoveable property other than that which is the 'subject-matter of the suit or proceeding' have to be registered if covered by Section 17 (1). The words 'so far as it relates to the suit' in Order 23, Rule 3 are of wider import than the words 'subject-matter of the suit or proceeding' in section 17 (2) (vi). The former would engulf within its scope terms which form the consideration for the adjustment of the matters in dispute and may contain within its scope extraneous matters whether they form the subject-matter of the suit or not. *Govindagouda Narayanagouda v. Madhava Rao Narasinga Rao*, AIR 1964 Mys 277; *Byomkesh Mukherjee v. Bhupendra Narayan Sinha Bahadur*, AIR 1948 Cal 179. Thus the words 'so far as it relates to the suit' in Order 23, Rule 3 C. P. C. cannot have the same implication as the words 'subject-matter of the suit or proceeding' in section 17 (2) (vi) of the Registration Act.

6. The title to plot no. 620 was not the subject-matter of the previous suit which fact was conceded by the learned counsel for the plaintiff-respondent in the court below. The relief in respect of plot no. 620 in the plaintiff's previous suit was confined to his easementary right to discharge water through a defined channel on the said plot, as per sketch attached to the plaint and decree, and the entire plot no. 620 or even 12 annas interest thereof was in no way mentioned or concerned in the previous suit. That being the scope of the previous suit it cannot be said that the right, title and interest in plot no. 620 was the subject-matter of the previous suit. The terms in the said decree relating to relinquishment of plot no. 620 by the defendants may be consideration for the adjustment of the matter in dispute, but cannot at all be said to be the subject-matter of the previous suit. In *Ankamreddi Konda v. Ankam-*

reddi Pedademudu, AIR 1957 Andh Pra 454 their Lordships expressed their concurrence with the view expressed by Venkatarama Rao J. in another case regarding the clause 'subject-matter of the suit or proceeding' which is as follows:

"The question therefore is whether the two items of immoveable property which have been charged by the compromise decree. . . . can be said to be the subject-matter of the said suit. The expression 'subject-matter of the suit' is not defined in the Registration Act. It seems to me that what the clause contemplates is that specific immoveable property must be subject-matter of litigation. There must be a claim or right in or to the specific immoveable property asserted in the litigation and relief sought in respect thereof in order to make the said property the subject-matter of the suit."

In the present case there was no such assertion on plot no. 620 in its entirety or even to the extent of twelve annas interest of the same. Merely by claiming a right to discharge water through a strip or a portion of the plot it cannot be said that the entire plot was the subject-matter of the suit, as that may lead to various legal complications and unforeseen consequences.

Thus plot no. 620 was not the subject-matter of the previous suit. That being so the said compromise decree comprising the said plot no. 620 must have been registered under the provisions of S. 17 of the Registration Act, and non-registration of the same would not affect the immoveable property comprised therein or be received as evidence of any transaction affecting such property, as provided under Section 49 of the Registration Act. The learned Additional District Judge in his judgment has not been able to distinguish the difference between the connotation and implication of the above mentioned two clauses in the Civil Procedure Code and the Registration Act which led to his incorrect finding. Merely because he finds that all the terms in the compromise forming the consideration for the adjustment of the matters in dispute would relate to the suit and can be embodied in the decree, he holds that the decree as such is operative with regard to plot no. 620 even without registration.

As the parties entered into some agreement with regard to this plot no. 620 which agreement was included in the compromise petition in the previous suit, it could at best be said that the part of the decree would be enforceable as a contract between the parties to it and the decree of which it formed a part would be evidence of the said contract but not enforceable as a decree. *Munshi Ram v. Banwari Lal*, AIR 1962 S. C. 903; *Ram*

Juwan v. Devendra Nath Gupta, AIR 1960 Madh Pra 280; Harak Chandas v. Hyderabad State Bank, Hyderabad, AIR 1960 Andh Pra 56.

7. Mr. B. K. Basu on behalf of the respondent contended that the plaintiff in the previous suit claimed easementary right over plot no. 620, and as easementary right comes within the definition of immoveable property in the Registration Act, plot no. 620 should be considered as a subject-matter of the suit. In support of his above contention he depended on Section 2 (6) of the Registration Act and Section 4 of the Easements Act; and the decision reported in Lachhman Ram v. Jagabandhu Sahu, (1962) 4 O. J. D. 349. There is no force in this contention. Easementary right may be construed as immoveable property, but relinquishment of right, title and interest over the entire plot No. 620 or even to the extent of 3/4th of it, was neither contemplated nor was within the scope and purview of the previous suit. Moreover, only because easementary right is considered to be immoveable property, it cannot be said that plot no. 620, on a strip of which easementary right was claimed, became thereby in its entirety the subject-matter of the suit.

8. Thus under Section 49 of the Registration Act the decree in the previous suit not being registered would not in any way affect plot no. 620 and the same cannot be received as evidence of the relinquishment of right made by defendants in the said suit. Therefore in the present suit the plaintiff would not be entitled to the reliefs as claimed by him in respect of plot no. 620, on the basis of the decree passed in the previous suit.

9. The contention, regarding *res judicata*, raised on behalf of the appellants as mentioned in paragraph 3 above, is not tenable. This objection was not taken in the trial court and no issue on the same was framed. The first issue regarding the maintainability of the suit was not pressed and was given up by both parties at the hearing of the suit. The present suit is for a declaration of plaintiff's title to and confirmation or in the alternative for recovery of possession of a portion of plot no. 620 on the basis of the decree in the previous suit, and also for a direction on the defendants to demolish certain construction on plot nos. 622 and 620 and for a permanent injunction restraining the defendants from interfering with the plaintiff's possession in respect of plot no. 620 and for damages. On the other hand, the previous suit was for (i) declaration of plaintiff's right and title over plots nos. 622 and 625 or in the alternative for a declaration of plaintiff's right of common passage with the defendants over the said plots, (ii) for a declaration

of easementary right to discharge water over a portion of plot no. 620, (iii) for permanent injunction upon the defendants restraining them from interfering either with the plaintiff's right of passage or drainage, (iv) for a declaration that the defendants did not have any right to put up any obstruction over plot no. 625 and over the drain on plot no. 620, and (v) for damages arising therefrom. Thus it is evident that in scope and ambit the present suit, as framed, is different from the previous one, and as such this suit cannot be barred by *res judicata*.

The other contentions raised on behalf of the appellants, as stated in paragraph 3 above, pale into insignificance, and do not arise for discussion in view of my findings above on the appellant's first contention.

10. In the result, therefore, on my findings on the very first contention raised by Mr. S. S. Basu, the learned counsel for the appellants, the judgments and decrees passed by the courts below are set aside, and this appeal is allowed, but in the circumstances of the case there will be no order as to costs throughout.
Appeal allowed.

AIR 1970 ORISSA 25 (V 57 C 10)

B. K. PATRA
AND S. ACHARYA, JJ.

T. C. Panigrahi, Appellant v. Goru Satyarajulu and another, Respondents.

A. H. O. No. 8 of 1963, D/- 14-7-1969, against decision of G. K. Misra, J. in Misc. Appeal No. 118 of 1962, D/- 13-11-1963 reported in ILR (1964) Cut 274.

Provincial Insolvency Act (1920), S. 53 — Transfer in favour of wife — House gifted to wife — Gift deed with wife — Husband living with wife in same house after gift — Mere non-mutation of name of donee does not militate against genuineness of gift — (Benami) — (T. P. Act (1882), S. 123).

Where the parties are related to each other as husband and wife and were living in the house both before and after the execution of the gift deed, mere non-mutation of the name of the donee does not militate against the genuineness of the gift, when there were recitals in the gift deed indicating a complete transfer of ownership and possession of the properties devised and there was evidence to show that the gift deed was handed over to his wife. AIR 1964 Orissa 212, Foll.; AIR 1932 PC 13, Rel. on. (Para 2)
Cases Referred: Chronological Paras (1965) AIR 1965 Pat 472 (V 52) = 1965 BLJR 300 (FB), Sm. Asho Devi v. Dukhi Sao

(1964) AIR 1964 Orissa 212 (V 51),

Adhikari Narayanamma v. Adhikari Thabitinaidu

2

(1932) AIR 1932 PC 13 (V 19)=

59 Ind App 1, Nawab Mirza

Mohammad Sadiq Ali Khan v.

Nawab Fakr Jahan Begam

2

Y. S. N. Murthy, for Appellant; P. V. B. Rao, for Respondents.

PATRA, J.: This is an appeal against an appellate order of the learned single Judge of this Court allowing in part an appeal preferred against a judgment of the District Judge, Koraput. One Goru Neelakantham applied on 11-5-1957 to adjudge him insolvent and this application was allowed by the District Judge on 12-12-1959. Long before such adjudication, he had executed a deed of gift (Ex. 1) dated 16-11-1948 in favour of his wife, the present appellant in respect of eight items of property including a house situated in Kapur street, Jeypore town, which is item no. 8 of the schedule of the gift deed. On 26-5-1955, he also executed a sale deed (Ext. 2) in favour of his mother Goru Appayamma in respect of a house site situated in Jeypore town. After adjudication, a receiver was appointed and he filed an application under Section 4 of the Provincial Insolvency Act on 30-1-1961 averring that Exts. 1 and 2 are fictitious documents which were never acted upon and were created with a view to screen the properties from the clutches of creditors.

The learned District Judge after enquiry accepted the receiver's case and holding that the documents were fictitious, in nature, ordered that they stand annulled. Against this order, the wife and the mother of the insolvent preferred an appeal to this Court. During the pendency of the appeal, the mother died and the learned Advocate appearing for appellants did not also press the appeal regarding the finding of the District Judge on the sale deed. The learned single Judge of this Court after a very elaborate consideration of the evidence on record and the circumstances of the case, recorded the following findings:

(1) That the deed of gift (Ext. 1) was validly executed;

(2) That in 1948, when the deed of gift was executed, the insolvent had no loans outstanding against him and hence there was no occasion and much less any necessity for him to screen his properties from the clutches of creditors; and

(3) That after the execution of the deed of gift the wife remained in possession of the gifted properties.

In view of these findings, the learned Judge was satisfied that the receiver on whom the onus lay to prove that the transaction under Exhibit no. 1 was a

sham transaction failed to discharge the onus. He, therefore, set aside the order of the learned District Judge annulling the gift deed. The receiver has preferred this present appeal.

2. Mr. Y. S. N. Murthy, the learned Advocate appearing for the appellant does not challenge the correctness of the learned Judges' findings 1 and 2 referred to above. His entire attack is directed against the third finding regarding the possession of the properties covered by exhibit 1 after execution of the deed of gift. It seems that out of the eight items of property covered by the deed of gift, two items, being items nos. 6 and 7 are already alienated in favour of third parties who have not been impleaded in this litigation. Items nos. 1 to 5, according to Mr. Murthy are not very valuable items. He has therefore concentrated his entire submissions on item no. 8 which is a house situate in Kapur street, Jeypore town. Admittedly, the appellant (wife of the insolvent) had not so far got her name mutated in respect of this house, although the gift deed was executed in her favour as long ago as in 1948. Considerable reliance was placed on this single circumstance on behalf of the appellant to show that the gift deed had not been acted upon and that it was Benami in character. We are unable to hold that this circumstance is in any way decisive.

It should not be forgotten that the donee in this case is the wife and it is not disputed that even after the execution of the gift deed, the husband continued to live with his wife in this house. There is evidence to show that the gift deed was handed over to his wife and that it is from her custody that it was produced in Court. The position would have been different if the donee was a person not related to the donor or a relation who would not in the ordinary course live with the donor under the same roof. But, where, as in this case, the parties are related to each other as husband and wife and were living in the house both before and after the execution of the gift deed, the position is slightly different and mere non-mutation of the name of the donee does not militate against the genuineness of the gift. The same view was taken by Das, J. in AIR 1964 Orissa 212, Adhikari Narayanamma v. Adhikari Thabitinaidu. In AIR 1932 P.C. 13, Nawab Mirza Mohammad Sadiq Ali Khan v. Nawab Fakr Jahan Begam, the husband executed a deed of gift in favour of his wife. The gift deed contained the statement: "I deliver possession of the gifted property to my said wife" and the deed of gift was handed over to the donee as soon as it was registered. Their Lordships said that the

declaration in the deed was binding on the heirs of donor and that actual taking of separate possession by the wife was not necessary and that the declaration made by the husband, followed by the handing over of the deed to the wife was sufficient to establish a transfer of possession.

Similar recitals indicating a complete transfer of ownership and possession of the properties devised appear in the gift deed (Ex. 1). In these circumstances, we are satisfied that mere non-mutation of the name of the wife in respect of the disputed house is not sufficient to show that the gift deed was not in fact acted upon. An attempt was also made on behalf of the receiver to show that some time after the execution of the deed of gift, the insolvent had given the disputed house as security in a certain proceeding. The learned single Judge elaborately discussed this aspect of the case with reference to the boundaries, the extent and other particulars relating to the disputed house as mentioned in the deed of gift and the house that was given as security by the husband, and pointed out that the details differed so much from each other that it was impossible to hold that the house property which was offered as security by the husband is the same as the one covered by item no. 8 of the gift deed.

In fact, Mr. Murthy fairly conceded that in view of this evidence and specially having regard to the lack of evidence by the receiver that besides the disputed house the insolvent had no other house in Jeypore town, it will not be possible for him to maintain that the house offered as security by the insolvent is the same as the disputed house.

3. Mr. P. V. B. Rao, appearing for the respondents contended that the entire attack on behalf of the appellant is directly against the findings of fact recorded by the learned single Judge and that such a course is not permissible in this appeal. In support of this contention, he relied on a Full Bench decision of the Patna High Court reported in AIR 1965 Pat 472 (FB), *Sm. Asho Devi v. Dukhi Sao*. In view of the fact that on a perusal of the evidence on record we are satisfied that all the findings recorded by the learned single Judge are unassailable, it is unnecessary for us in this case to decide the further question whether it is open to the appellant in the present proceeding to assail these findings.

4. In the result, this appeal fails and is dismissed with costs.

5. **S. ACHARYA, J.:** I agree.

Appeal dismissed.

AIR 1970 ORISSA 27 (V 57 C 11)

A. MISRA, J.

Prasanna Kumar Samal and others, Petitioners v. Balbhadra Rout, Opposite Party.

Criminal Revn. No. 215 of 1966, D/- July 1969 against order of Sub-Divisional Magistrate, Kamakshyanagar, D/- 28-3-1966.

(A) Cattle Trespass Act (1871), Ss. 10 and 24 — Requisite for conviction under S. 24.

Though for a conviction under S. 24 of the Cattle Trespass Act there should be a specific finding that the cattle rescued were liable to be seized under S. 10 of the Act which necessarily includes proof of damage having been caused, the mere absence of a specific finding could not entitle the accused to an acquittal where there is acceptable evidence on record in support of the prosecution case and the cattle having damaged the crop or the person who effected the seizure being entitled or authorised to seize. AIR 1963 Pat 199, Foll. (Para 6)

(B) Cattle Trespass Act (1871), S. 10— Person authorised by cultivator or occupier to watch or seize cattle is himself cultivator or occupier — He is also entitled to seize cattle under S. 10. AIR 1922 Pat. 317, Foll. (Para 7)

Cases Referred: Chronological Paras (1963) AIR 1963 Pat 199 (V 50)=

1963 (1) Cri LJ 607, *Bhado Mondal v. State* 6

(1922) AIR 1922 Pat 317 (V 9), *K. Dusadh v. Sarati Dusadh* 7

A. K. Padhi, for Petitioners; *S. C. Mohapatra* and *S. Mohanty*, for Opposite Party.

ORDER: The petitioners have been convicted u/s 24 of the Cattle Trespass Act and each of them sentenced to pay a fine of Rs. 50/- and in default, to undergo simple imprisonment for 15 days.

2. The complainant's case, in brief, is that on 16-10-64, while P. W. 3, the watcher appointed by the villagers of Baligorada, with the help of P. W. 4 was taking some cattle of the petitioners to the cattle pound for having damaged paddy crop on complainant's land, petitioners forcibly rescued and took away the cattle. Petitioners in defence deny the allegations and allege that while some heads of cattle belonging to some of them were grazing on a waste land on the Baligorada side of the rivulet, P. W. 3 and some of his co-villagers seized them. On receiving information, petitioner no. 1 went there and protested against such action. On his protest, P. W. 8 attempted to assault him with an axe, but petitioner no. 1 managed to snatch it away

and apprehending assault left the place. Ultimately, he recovered the cattle from the jungle in the night. The other petitioners deny their presence at the place of occurrence.

3. In all, 8 witnesses were examined on the side of complainant and the defence examined two witnesses. The learned Magistrate, on a consideration of the evidence, accepted the complainant's version to be substantially true, convicted and sentenced the petitioners, as stated above.

4. The main contention of learned counsel for petitioners is that a conviction u/s 24 of the Cattle Trespass Act can be sustained only if the prosecution proves that the seizure was strictly in accordance with section 10 of the Act. In the present case, it is further contended that there is no specific finding that the cattle alleged to have been rescued were liable to be seized. In other words, there is no specific finding that (1) P. W. 3 was a person entitled to seize u/s 10 and (2) that actual damage to the crop had been caused by the cattle.

5. Reference is made to para 9 of the judgment where it is observed that the consistent story given by the P. Ws. also makes it believable that the occurrence actually took place not on the bank of the Joro, but at the deity's abode near the Bhuban road, and it is contended that the said finding refers only to the alleged place of occurrence and has nothing to do with the competency of P. W. 3 to effect the seizure or regarding the damage if any, alleged to have been caused to the paddy crop.

6. It is true that to justify a conviction u/s 24 of the Cattle Trespass Act, there should be a specific finding that the cattle rescued were liable to be seized u/s 10 which necessarily includes proof of damage having been caused. The mere absence of a specific finding would not entitle the petitioners to an acquittal where there is acceptable evidence on record in support of the prosecution case and the cattle having damaged the crop or the person who effected the seizure being entitled or authorised to seize—vide, AIR 1963 Pat 199, Bhado Mondal v. State.

7. Section 10 enumerates five categories of persons who are entitled to seize cattle and they include the cultivator as well as the occupier of any land. In this case, it has been contended that P. W. 3 not being the cultivator or occupier was not entitled to seize the cattle and a seizure by him will not be in accordance with law. In my opinion, such a contention has no merit. When section 10 provides that the cultivator or occupier may seize or cause to be seized

any cattle trespassing, I do not think, it is open to contend that he is not entitled to give general instructions to his watchman or other servant so instructed seizes cattle, it will not amount to the cultivator or occupier seizing or causing them to be seized within the meaning of that section. Such a contention, as the present one, was raised and negated in the decision reported in AIR 1922 Pat 317, K. Dusadh v. Sarati Dusadh.

8. Coming to the question of damage, it is the prosecution case that the cattle damaged the paddy crop on the land of complainant in Badagaham Chhak. There is a specific finding by the learned Magistrate regarding the damage caused by the cattle. At the end of para 8 of the judgment, it is observed:

"Therefore, the evidence of the P. Ws. that the paddy crops of P. W. 1 in Badagaham Chhak was damaged by the cattle of the accused persons appears to be true. There is absolutely no material in support of the defence that the accused Prasanna recovered his alleged buffaloes by a thorough search in the jungle at an expense of Rs. 25/-."

Thus, there is a finding that the cattle caused damage and P. W. 3 was entitled to seize them. This being so, the seizure was legal as it is in accordance with the provisions contained in section 10 and the contention that rescue of the cattle will not amount to an offence u/s 24 has no merit.

9. Coming to the sentence, each of the petitioners has been sentenced to pay a fine of Rs. 50/- which in the circumstances appears to be excessive. Therefore, while dismissing the revision and maintaining the conviction of petitioners, the sentence of fine of Rs. 50/- awarded against each of the petitioners is reduced to Rs. 25/-, and in default, to undergo simple imprisonment for 10 days.

Petition dismissed.

AIR 1970 ORISSA 28 (V 57 C 12)

G. K. MISRA, C. J.

Jagojoti Bose and another, Petitioners v. Bararuchi Bose and others, Opposite Parties.

Civil Revn. No. 297 of 1965, D/- 4-8-1969, against Order of Addl. Sub. J. Cuttack, D/- 26-7-1965.

(A) Civil P. C. (1908), S. 11 and O. 20, R. 18 (2)—Suit for partition — Defendants setting up will in their favour which excluded plaintiff from inheritance — Preliminary decree carving out rights of parties on basis of inheritance—Subsequently, defendants obtaining probate of will in their favour — Plaintiff's application for final decree — Defendant's objection

IM/JM/E394/69/HGP/D

to final decree could not be allowed — Rights of parties carved out by preliminary decree could not be varied or modified—Principle of constructive res judicata applied.

In a suit for partition filed by the plaintiff, the defendants set up in defence a will executed in their favour by their father divesting the plaintiff from inheritance. But they did not get the suit stayed though probate proceedings started by them were pending. The preliminary decree for partition carving out rights of parties was passed on 28-6-1961. Subsequently, probate of the will, after contest by the plaintiff was granted in favour of defendants on 28-11-1962. Later on, when plaintiff applied for final decree for partition, the defendants raised objection to it on the strength of the probate:

Held that having taken the defence under the will in the written statement defendant's claim on the strength of the Probate obtained subsequently to the preliminary decree was barred by the principle of res judicata, actual and constructive. It was open to defendants to get the partition suit stayed, proceed with the Probate proceeding and after obtaining the probate, to set it up in defence in the partition suit. When they failed to do so, they abandoned their right based on the Probate. The fact that the plaintiff contested the Probate proceeding and that in his presence probate was granted, was wholly immaterial, for the simple reason that by the time probate was granted the rights of the parties on the basis of inheritance had already been worked out and the stage of setting up the probate in defence had passed off.

(Para 4)

By the preliminary decree for partition the jural relationship amongst the parties inter se was finally decided and it was declared that the plaintiff had a certain interest in the disputed property. If the probate of the will was allowed to vary those rights, a conclusion must be reached to the effect that the plaintiff was not entitled to the property. This would affect the very basis of the preliminary decree and the rights carved out. The juristic theory underlying the reason why this could not be done was that defendants could have pressed into service the probate if they had been vigilant in time. AIR 1966 Orissa 160 and AIR 1963 SC 992, Rel. on; AIR 1958 Cal 472, Dist.

(Para 4)

(B) Succession Act (1925), S. 227 — Effect of Probate of will.

(Obiter) — Probate or Letters of Administration are not concerned with title to property but are only concerned with the due execution of the will. AIR 1962 SC 1471, Relied on.

(Para 3)

Cases Referred: Chronological Paras

(1966) AIR 1966 Orissa 160 (V 53)=

ILR (1965) Cut 799, Baman Chandra v. Balaram

3

(1963) AIR 1963 SC 992 (V 50)=

1963-2 Mad LJ (SC) 126, Venkata

Reddy v. Petty Reddy

3

(1962) AIR 1962 SC 1471 (V 49)=

1962-2 SCA 490, Hem Nalini v.

Isolyne Saroj Basini

3

(1958) AIR 1958 Cal 472 (V 45)=

100 Cal LJ 112, Billa Basini v.

Dulal Chandra

5

B. K. Pal, H. N. Sinha, S. N. Sinha and A. Mohanty, for Petitioners; P. C. Misra, for Opposite Parties.

G. K. MISRA, C. J.: The disputed property admittedly belonged to one Haricharan Bose who died on 7-8-50. He had three sons: plaintiff, defendant no. 4 and defendant no. 5. On 10-10-46 he executed a will in respect of the disputed property in favour of defendant no. 4 and defendant no. 5. Thus he divested the plaintiff from inheritance under the Will. On 30-10-58 plaintiff filed T. S. No. 60 of 1958 for partition of his one-third interest in the disputed property. Defendants 4 and 5 filed a written statement on 25-2-59 claiming the entire property to themselves on the strength of the will.

On 12-9-60, defendants 4 and 5 filed an application for Probate of the will which was registered as O. S. No. 28 of 1961 in the Court of the District Judge, Cuttack. On 28-6-61 a preliminary decree for partition was passed in favour of the plaintiff in T. S. No. 60 of 1958 in the court of the Subordinate Judge, Cuttack. On 28-11-62 Probate of the Will was granted after contest by the plaintiff. On 10-7-64, plaintiff filed an application in T. S. 60 of 1958 in the court of the Subordinate Judge for making final the preliminary decree for partition. On 12-2-65, defendants 4 and 5 filed an objection that plaintiff had no title in the disputed property after probate was granted and plaintiff's application for making the preliminary decree final should be rejected. This contention was negatived by the learned Subordinate Judge and it is against this order passed by him on 26-7-65 that this revision has been filed.

2. Mr. Sinha for the petitioners contends that the title of Haricharan Bose to the disputed property not being questioned, the probate conferred full title in the disputed property on the petitioners to the exclusion of the plaintiff (opposite party no. 1) and that the application for making the preliminary decree final should be dismissed and that though the probate was granted subsequent to the passing of the preliminary decree, the rights of the parties can be adjusted at the stage of the final decree, affecting or

modifying the preliminary decree. This contention has no substance as would be discussed hereunder.

3. Certain elementary propositions of law need be stated before the contention of Mr. Sinha is examined. Probate or Letters of Administration are not concerned with title to property but are only concerned with the due execution of the will see AIR 1962 SC 1471, Hem Nalini v. Isolyne Sarojbasini. In the present case however this question is academic inasmuch as the title of Haricharan Bose in the disputed property is admitted. After the grant of Probate on the basis that the will was genuine, defendants 4 and 5 were entitled to the entire property, to the exclusion of the plaintiff if the Probate had been set up in defence in the partition suit prior to the passing of the preliminary decree for partition. Defendants 4 and 5 however did not obtain Probate of the will until the preliminary decree for partition was passed, though they had set up in defence absence of title in the plaintiff in the disputed property on the basis of the will. The question for consideration is whether grant of Probate subsequent to the preliminary decree for partition becoming conclusive, could confer the same rights on defendants 4 and 5 which they could have got before the passing of the decree for partition if the Probate had been set up in defence. This position is fully answered in AIR 1966 Orissa 160, Baman Chandra v. Balaram where the significance of preliminary decree was construed. Therein this Court observed thus:

"The aforesaid three provisions newly introduced for the first time in the present Code bring into bold relief an important change that in a preliminary decree certain rights are conclusively determined, and unless the preliminary decree of a court is assailed in appeal, the rights so determined become final and conclusive and cannot be questioned in the final decree. In that limited sense the preliminary decree itself is a final decree so far as those rights are concerned."

Reference was also made to a passage in AIR 1963 SC 992, Venkata Reddy v. Petty Reddy wherein their Lordships laid down the following propositions:

"A preliminary decree passed, whether it is in a mortgage suit or partition suit, is not a tentative decree but must in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees, a preliminary decree and a final decree, the decree which will be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The Legislature in its wis-

dom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made, the decision of the Court arrived at, at the earlier stage, also has a finality attached to it."

Doubtless, in certain cases even after the passing of the preliminary decree there may be some adjustments in the course of the final decree proceedings. Some of those circumstances were indicated in the aforesaid Orissa decision. For instance, where a transferee is impleaded subsequent to the passing of the preliminary decree, or in case of death of parties whose rights were carved out in the preliminary decree, the interests of the transferee or the heirs of the deceased can be equally carved out. Such instances, however do not affect the fundamentals of the preliminary decree. In such cases, impleading of parties or carving out of interests is made on acceptance of the preliminary decree being correct and final in respect of all matters decided therein.

4. The position here is completely otherwise. By the preliminary decree the jural relationship amongst the parties inter se was finally decided and it was declared that the plaintiff had a one-third interest in the disputed property. If the Probate of the will is allowed to vary the rights, a conclusion must be reached to the effect that the plaintiff is not entitled to the property. This would affect the very basis of the preliminary decree and the rights carved out. The juristic theory underlying the reason why this cannot be done is that defendants 4 and 5 could have pressed into service the Probate if they had been vigilant in time. In fact, they had taken the defence under the will in the written statement. So, their claim on the strength of the will and the Probate subsequent to the preliminary decree is barred by the principle of *res judicata*, actual and constructive. It was open to defendants 4 and 5 to get the partition suit stayed, proceed with the Probate proceeding pending in the court of the District Judge and, after obtaining the Probate, to set it up in defence in the partition suit. That was the only course available to them. When they failed to do so, they abandoned their right based on the Probate. The fact that the plaintiff contested the Probate proceeding and that in his presence Probate was granted, is wholly immaterial for the simple reason that by the time Probate was granted the rights of the parties on the basis of inheritance had already been worked out and the stage of setting up the Probate in defence had passed off.

5. Mr. Sinha places reliance on AIR 1958 Cal 472, Billa Basini v. Dulal Chandra. This case is clearly distinguishable. Though the rights of the parties had been crystallised and were conclusively determined by the preliminary decree to that case, an objection under Section 14 (1) of the Hindu Succession Act as to the character of the property was set up during the final decree proceeding. Under that section, in any property possessed by a female Hindu, whether acquired before or after the commencement of the Hindu Succession Act, 1956, she acquires an absolute interest. The widow's share had been declared in the preliminary decree, she was in possession, and as such it was quite open to the Court to declare during the final decree proceeding that the interest which she had was absolute, on the basis of section 14 (1) of the Hindu Succession Act.

6. On the aforesaid analysis the contention of Mr. Sinha is rejected.

7. The civil revision fails and is dismissed, but in the circumstances parties will bear their own costs throughout.

Revision dismissed.

AIR 1970 ORISSA 31 (V 57 C 13)

**G. K. MISRA, C. J.
AND R. N. MISRA, J.**

Lokenath Panda, Petitioner v. Chairman, Paradeep Port Trust and another, Opposite Parties.

Original Jurisdiction Case No. 162 of 1969, D/- 8-8-1969.

Constitution of India, Art. 309—Promotion in service—Employee has right to be considered for—Maintenance of seniority list and roster — Value and necessity stated — (Paradip Port Employees (Recruitment, Seniority and Promotion) Regulations (1967), Regs. 11 (3) and 12).

Maintenance of seniority list and roster is an essential requisite on the basis of which the question of filling posts either by direct recruitment or by promotion is to be determined. Until that is done it will be difficult for a particular incumbent to know whether he has been superseded or not. Doubtless, promotion to a higher post is not a matter of right to any employee but every employee has right to be considered for such promotion, and when the time for considering him for such promotion arises these materials would constitute a major basis, though merit also would be taken into consideration. In view of Regulations 11 (3) and 12 of Paradip Port Employees (Recruitment, Seniority and Promotion) Regulations (1967), the contention that until a servant is superseded he has no

cause of action to put forth his grievance, has no substance. (Para 2)

Ranjit Mohanty, for Petitioner; M. N. Das, for Opposite Parties.

G. K. MISRA, C. J.: The petitioner is in service as an Assistant Engineer under the Paradip Port Trust. His main grievance is that the seniority list and the Roster have not been prepared and consequently his future chances of promotion are likely to be affected. A counter has been filed by the opposite parties accepting the position that the seniority list and the Roster have not been prepared.

2-A. Under Regulation 11 (3) of the Paradip Port Employees (Recruitment, Seniority and Promotion) Regulations, 1967 (hereinafter to be referred to as the Regulations), direct recruits shall be ranked inter se in the order of merit in which they are placed at the examination or interview on the results of which they are recruited, the recruits of an earlier examination or interview being ranked senior to those of a later examination or interview. Regulation 12 prescribes maintenance of roster and says that a roster shall be maintained for each grade to determine whether a particular vacancy should be filled by direct recruitment or promotion.

2. Mr. M. N. Das, on behalf of the opposite parties, contends that the petitioner has no grievance as yet, and until he is superseded he has no cause of action. The contention is devoid of substance. Maintenance of seniority list and roster is an essential requisite on the basis of which the question of filling posts either by direct recruitment or by promotion is to be determined. Until that is done it will be difficult for a particular incumbent to know whether he has been superseded or not. Doubtless, promotion to a higher post is not a matter of right to any employee but every employee has the right to be considered for such promotion, and when the time for considering him for such promotion arises these materials would constitute a major basis, though merit also would be taken into consideration. The petitioner therefore has a cause of action and the opposite parties are bound to maintain the seniority list and the roster in accordance with the Regulations.

3. We accordingly allow this writ application and issue a writ of mandamus directing the opposite parties to maintain the seniority list and the roster in accordance with the Regulations, within a reasonable time, or at any rate not later than six months from today.

3-A. In the circumstances there will be no order as to costs.

4. **R. N. MISRA, J.:** I agree.

Writ application allowed.

AIR 1970 ORISSA 32 (V 57 C 14)

S. K. RAY, J.

Hadu Parida, Appellant v. Sana Gobinda Misra, Respondent.

Second Appeal No. 336 of 1964, D/- 23-6-1969, from decision of Addl. Sub. J., Berhampur, D/- 31-3-1964.

(A) Civil P. C. (1908), O. 22 Rr. 4, 5, Ss. 146, 11—Widow — Principle of representation of estate — Binding nature of decree upon person not impleaded in action, stated — Mother representing minor son's estate — Mother impleaded in action but not minor — Principle held applied.

Ordinarily the Court does not regard a decree binding upon a person who was not impleaded eo nomine in the action. Exception to this rule is, where by the personal law governing the absent heir the heir impleaded represents his interest in the estate of the deceased. Another exception is that, if there be a debt justly due and no prejudice is shown to the absent heir the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate. The Court will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to over reach the Court. The Court will also enquire whether there was a real contest in the suit. But where on account of a bona fide error, the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff has a claim either at all or even partially, in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the person impleaded as heir binds the estate, even though other persons interested in the estate are not brought on the record. AIR 1966 SC 792, Rel. on.

(Para 9)

Suit property, which was already mortgaged with possession, was sold by the original owner A to one B who in his turn sold it to C. A, the mortgagor had transferred the equity of redemption to one D who filed a suit for redemption. At the time of the institution of that suit C had a son of about 2 years old but D, bona fide believing that C's widow was the only heir to him, had impleaded her alone and not her minor son. When D, in execution of his decree for redemption obtained possession of properties, C's son brought a suit for declaration of his right, title and interest in property.

Held, that the mother having represented her minor son's estate fully and satisfactorily in the suit for redemption, the

principle of representation of estate applied to the case and the decree was binding upon the son though he was not a party to that suit. (Para 9)

(B) Hindu Law — Joint family—Manager — Widow — Widow cannot be a karta of a joint family. AIR 1947 Nag 178 held Overruled by AIR 1966 SC 24 and no longer good law. (Para 10)

(C) Civil P. C. (1908), O. 14, R. 1; O. 6, R. 2 — Issue not raised in pleadings — Variance between pleadings and proof — Plaintiff trying to make out a case at the trial stage that during his minority upon the death of his father, though his mother was his natural guardian, his uncle-in-law was factually looking after the properties — Case not finding place in his pleadings — Omission of such a fact in pleadings discredits any evidence to the contrary to the pleadings. (Para 10)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 24 (V 53) =

(1965) 3 SCR 488, Commr. of Income Tax, M. P. v. Seth Govindram Sugar Mills 10

(1966) AIR 1966 SC 792 (V 53) =

(1966) 1 SCR 397, Mohammed Sulaiman v. Mohammed Ismail 9, 10

(1947) AIR 1947 Nag 178 (V 34) =

ILR (1947) Nag 299, Pandurang Vithoba v. Pandurang Ramchandra 10

H. G. Panda, for Appellant; Y. S. N. Murthy, for Respondent.

JUDGMENT: This is a plaintiff's second appeal against the reversing judgment dated 31-3-64 passed by Sri G. Panda, Additional Subordinate Judge in Title Appeal No. 39/64 (T. A. No. 119/61 G. D. C.).

2. The plaintiff filed Title Suit No. 2/59 in the Court of Munsif, Aska, for declaration of right, title and interest in respect of 10 Bharanams of suit-land fully described in the plaint schedule and for an injunction restraining the defendant from taking delivery of possession of the same in execution of the decree passed in T. M. S. No. 158/50 of the court of Munsif, Aska, or in the alternative for recovery of possession of the same, if it is found that the suit-lands have been delivered to the defendant on 9-12-58 in pursuance of the execution of the decree in T. M. S. No. 158/50.

3. Originally there were 12 items of property enumerated in the plaint schedule. The defendant joined issue only with regard to items 1, 6, 7 and 8 of the schedule covered by survey nos. 945 and 557 comprising an area of 2.15 Bharanams. Accordingly the decree of the Munsif in regard to other items of property viz., items 2 to 5 and 9 to 12 declaring the plaintiff's title and restraining the defendant from interfering with his possession

his contentions he has relied, apart from Rule 12 of the Bihar Service Code which has been quoted above, on Rules 56 and 72 of the Code, which read as follows—

"56. (a) The State Government may transfer a Government servant from one post to another; provided that, except—

(1) on account of inefficiency or misbehaviour; or

(2) on his written request;

(a) Government servant shall not be transferred substantively to, or except in a case covered by Rule 103, appointed to officiate in a post carrying less pay than the pay of the permanent post on which he holds a lien, or would hold a lien, had his lien not been suspended under R. 70.

(b) Nothing contained in clause (a) of this rule or in Rule 28, shall operate to prevent the re-transfer of a Government servant to the post on which he would hold a lien, had it not been suspended in accordance with the provisions of clause (a) of rule 70."

"72. Subject to the provisions of R. 56, the State Government may, transfer to another permanent post in the same cadre the lien of a Government servant who is not performing the duties of the post to which the lien relates, even if that lien has been suspended."

According to him, a lien can be transferred from one permanent post to another permanent post, but the cadre should be the same. He has further relied on rule 270 which reads as follows:

"270. (1) A Government servant transferred to foreign service shall remain in the cadre or cadres in which he was included in a substantive or officiating capacity immediately before his transfer, and may be given such substantive order (sic) promotion may decide. In giving promotion, such authority shall take into account—

(a) the nature of the work performed in foreign service; and

(b) the promotion given to juniors in the cadre in which the question of promotion arises.

(2) Nothing in the rule shall prevent a member of a subordinate service from receiving such other option in Government service as the authority who would have been competent to grant the promotion had he remained in Government service may decide."

He has referred to a decision of the Supreme Court in Nohiria Ram v. Director General of Health Services, Government of India, AIR 1958 SC 113 where their Lordships have observed that the post to which the appellant was appointed permanently in 1930, was a post outside the cadre of the regular establishment of the Director General, Indian Medical Service and as such he was not entitled to claim seniority in the depart-

ment. Their Lordships further held that since the appellant held a lien on additional post in which he was confirmed, his transfer on foreign service was admissible under Fundamental Rule 111. He did not, however, belong to a cadre immediately before his transfer, and Fundamental Rule 113 had no application in his case.

17. He has further relied on another decision of the Supreme Court in P. C. Wadhwa v. Union of India, AIR 1964 SC 423 where their Lordships while dealing with Indian Police Service (Pay) Rules (1954), Indian Police Service (Cadre) Rules (1954) etc., observed:

"Deducing the precise legal position from the Rules, it is clear beyond doubt that so far as the Indian Police Service is concerned there is only one cadre, and the transition of a member of the Service from the junior scale to the senior scale does not depend upon the consideration of the comparative merits of a group of officers in the junior scale inter se but only upon a consideration of their seniority. No element of selection is involved in promoting an Assistant Superintendent of Police to the post of Superintendent of Police. The whole scheme of the rules indicates that a person borne on the junior scale of pay has a right to hold a post on the senior scale of pay depending upon the availability of a post and his seniority in the junior scale of pay. If a person holding a post in the senior scale, though in an officiating capacity, is found to be unfit to hold that post, action will have to be taken against him as required by R. 5 of Discipline and Appeal Rules because his reversion to a post in the lower scale would amount to reduction in rank within the meaning of Art. 311 of the Constitution."

18. Learned counsel has also submitted that in the level Lists the irrigation department officers shown as on deputation in the R. V. P. D. also indicate that there was separate cadre in the R. V. P. D. because the word "deputation" implies existence of separate cadre, as it is obvious that there can be no deputation within the cadre (vide Rule 70 (b) of the Bihar Service Code). According to him, change of cadre is possible only in case of proved necessity and he relies on Fundamental Rules 14 and 40 which read as follows:—

"F. R. 14(a) A local Government shall suspend the lien of a Government servant on a permanent post which he holds substantively if he is appointed in a substantive capacity—

(1) to a tenure post, or

(2) to a permanent post outside the cadre on which he is borne, or

(3) provisionally, to a post on which another Government servant would hold a lien had his lien not been suspended under this rule.

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"F. R. 40. When a temporary post is created which will probably be filled by a person who is already a Government servant, its pay should be fixed by the Local Government with due regard to—

(a) the character and responsibility of the works to be performed, and

(b) the existing pay of Government servants of a status sufficient to warrant their selection for the post."

He has further submitted that the Irrigation Department officers are not allowed to cross the efficiency bar without prior sanction of the Irrigation Department. He has also contended that the Officers of the R. V. P. D. are not allowed to go to the Irrigation Department; whereas the officers of the Irrigation Department are frequently appointed to the R. V. P. D., blocking the chance of future promotion of the officers of the R. V. P. D.

19. It will also be relevant to refer to paragraph 13 of the petition filed by the petitioners in C. W. J. C. 716 of 1967 where they have more or less similar grievance that although there is a separate cadre in the R. V. P. D. the officers of the Irrigation Department were being appointed in the R. V. P. D. ignoring the claims of the officers. In paragraph 13 they have stated:

"That the effect of such manipulation was that the officers of Irrigation Department having only three to four years of experience in Executive Engineers' rank were proposed to be promoted as Superintending Engineers, in R. V. P. Department in preference to those officers of the River Valley Project Department cadre who had more than seven years experience as Executive Engineers besides having specialised technical knowledge and experiences in major construction works. This in addition gave scope to the Administration to promote anybody of choice belonging to Irrigation Department in River Valley Project Department irrespective of seniority."

The State Government, respondent no. 1, in their counter-affidavit dated 1-3-68 have stated in paragraph 10,

"That with reference to paragraph 13 of the petition, it is stated that since the promotion is being given according to the combined gradation list there is no ground for apprehension as mentioned in this paragraph. Since the petitioners have not specifically mentioned the names of the officers who have been promoted earlier than others, it is difficult to examine the question."

20. From this it appears that the stand of the State in this case was that a combined gradation list of the two departments was made. Therefore, learned counsel has submitted that the State Government has substantially admitted the case of the petitioner that there were two separate cadres in the Irrigation Department and R. V. P. D. because, he has submitted that only when there are two cadres the question of combined gradation list arises. Further he has contended that the State of Bihar has taken different stands in all these cases, from time to time.

21. On the other hand, the learned Advocate General appearing on behalf of the State has submitted that the submissions made on behalf of the petitioners are untenable as they presuppose that there is a separate and duly constituted cadre in the R. V. P. D. At the very outset he contended that no separate cadre in R. V. P. D. has been constituted. According to him, it has been clearly and categorically stated on affidavit on behalf of the State that there has been no formal constitution of a cadre in the R. V. P. D. He invited our attention to Paragraphs 4, 8 and 17 of the counter-affidavit, the last two of which have already been quoted earlier. In Paragraph 4 it is stated that there has been no formal constitution of a cadre. He emphasised that formal constitution is mandatory and it is a condition precedent to the existence of a cadre, which will give right to the petitioner to a post in the cadre. He further argued that Annexure Q which has been referred to by learned counsel for the petitioner, instead of supporting the submissions made on behalf of the petitioner, corroborates the statements made in the counter-affidavit filed on behalf of the State, because in Annexure Q it is clearly mentioned that although the cadre of the R. V. P. D. is separate (yet it is not duly constituted).

He submitted that the expression in the brackets clearly shows that no formal constitution of a cadre had been made. The civil list which has been relied on behalf of the petitioner can only indicate the different departments and different posts held by the persons working in the different departments and the budgets also are similarly based upon the Civil list. On the basis of these, it cannot be held that a duly constituted cadre exists. According to him, the constitution of a cadre and the breaking up of one cadre into two, virtually means determining the condition of service of those included in the cadre. As such, cadre can only be constituted either by an Act of the Legislature or by a rule made by the Governor under Article 309 of the Con-

stitution. He emphasised that admittedly this had not been done. Article 309 of the Constitution of India reads as follows:

"Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

22. He further submitted that this does not mean that the State cannot act in the matter of appointment, promotion, etc. or in giving administrative instructions in the absence of cadre, or, in the absence of rules. There may be administrative difficulties. Therefore, the State derives power under Article 162 of the Constitution of India to issue administrative instructions and to act in the matter of appointment, promotion etc. in such circumstances. In order to support his contention he has relied on a decision of the Supreme Court in *Sant Ram v. State of Rajasthan*, AIR 1967 SC 1910 where their Lordships at page 1914 observed:

"... It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

In *B. N. Nagarajan v. State of Mysore*, AIR 1966 SC 1942, it was pointed out by this Court that it is not obligatory under the proviso to Art. 309 of the Constitution to make rules of recruitment, etc.,

before a service can be constituted or a post created or filled, and secondly the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power to make laws. It follows from this that the State Government will have executive power in respect of Sch. 7, List II, Entry 41, State Public Services and there is nothing in the terms of Article 309 of the Constitution which abridges the power of the executive to act under Article 162 of the Constitution without a law"

23. He further contended that even assuming that there was a separate cadre, admittedly no rule has been framed by the State Government regulating the mode of the appointment. In the absence of such a rule he urged that there would be three normal methods of recruitment, (a) by direct recruitment, (b) by promotion, and (c) by inter se transfer, subject to any violation of constitutional provision or any statutory rule governing the matter of appointment. If the State has exercised such a power bona fide, the petitioner has no right to challenge it. He further contended that the whole assumption of the argument advanced on behalf of the petitioner was that in the matter of appointments of superior posts State is confined merely to make a choice from the existing members of the cadre which, according to him, is unsound and untenable.

He submitted that there is neither a principle nor any authority has been cited on behalf of the petitioner to support the argument. The learned Advocate General has referred to a decision of the Supreme Court in the *State of Punjab v. Joginder Singh*, AIR 1963 SC 913 (at pp. 921-922) wherein their Lordships observed:

"The second also, is, in our opinion, unsound. If, for instance, an existing service is recruited on the basis of a certain qualification, the creation of another service for doing the same work, it might be in the same way but with better prospects of promotion cannot be said to be unconstitutional, and the fact that the rules framed permit free transfers of personnel of the two groups to places held by the other would not make any difference. We are not basing this answer on any theory that if a Government servant enters into any contract regulating the conditions of his service he cannot call in aid the constitutional guarantees because he is bound by his contract. But this conclusion rests on different and wider public grounds, viz., that the government which is carrying on the administration has necessarily to have a choice in the constitution of the services to man the administration and

that the limitations imposed by the Constitution are not such as to preclude the creation of such services. Besides, there might for instance, be a temporary recruitment to meet an exigency or an emergency which is not expected to last for any appreciable period of time. To deny to the government the power to recruit temporary staff drawing the same pay and doing the same work as other permanent incumbents within the cadre strength but governed by different rules and conditions of service, it might be including promotions, would be to impose restraints on the manner of administration which we believe was not intended by the Constitution. . . ."

He has further relied on a decision of the Supreme Court in Govind Dattatray v. Chief Controller of Imports and Exports, AIR 1967 SC 839, where their Lordships in paragraph 12 at page 842 have observed:

" The concept of equality in the matter of promotion can be predicated only when the promotees are drawn from the same source. If the preferential treatment of one source in relation to the other is based on the differences between the said two sources, and the said differences have a reasonable relation to the nature of the office or offices to which recruitment is made, the said recruitment can legitimately be sustained on the basis of a valid classification. . . ."

They have further observed at page 843 in paragraph 16:

"But, it is said that if the system of rotation was necessary, the Government should have applied the ratio of 50 : 50 and not 75 : 25. When the recruitment to certain posts is from different sources, what ratio would be adequate and equitable would depend upon the circumstances of each case and the requirements and needs of a particular post. Unless the ratio is so unreasonable as to amount to discrimination, it is not possible for this Court to strike it down or suggest a different ratio. Nothing has been placed before us to show that the ratio of 3:1 is so flagrant and unreasonable as to compel us to interfere with the order of the Government."

24. He has also submitted that certain cases of the All India Service Rules referred to on behalf of the petitioner have no application to the instant case, because those are cases where the service rules restricted the choice within the cadre itself. There is no restriction in the rules applicable in the present case. He has invited our attention that the petitioner has himself cited numerous instances where the appointments of Chief Engineers have been made of persons who were not working in the de-

partment and he has referred to paragraphs 4, 5 and 6 of his petition. It will be relevant to quote here paragraphs 4 and 5 of the petition:

"4. That the Projects under the charge of this Department are too big in magnitude and require special technique and experience for their execution. Engineers specially experienced in heavy constructional works and specially trained in the art of harnessing rivers are its dire necessities for the successful implementation of the schemes in the charge of this Department.

5. That in view of the aforesaid requirements and for the purpose of appointments in the River Valley Project Department, very experienced and renowned Engineers like Shri K. V. Ekambaram, Shri Malhotra and Shri D. Mukherjee, who were engineers of country fame, having specialised knowledge in river valley projects works were brought from Madras, Punjab and Bengal, respectively, and were appointed as Chief Engineers".

25. He has urged that in such circumstances the only right that the petitioner could possibly claim is that he should have been considered for the post of Chief Engineer before another person was appointed and he has invited our attention to a decision of the Supreme Court in the High Court Calcutta v. Amal Kumar Roy, AIR 1962 SC 1704 where their Lordships at page 1708 in paragraph 5 have observed:

"At the threshold of his arguments, the learned Counsel for the appellants contended that the suit was not maintainable because the controversies raised by the plaintiff are not justiciable. We have therefore, to determine the question whether the issues raised in the pleadings of the parties were justiciable. The answer to this question must depend upon the answer to the questions whether the plaintiff had a right to promotion, which right had been withheld from him, thus giving him a cause of action. Was the plaintiff subjected to a penalty, without taking the necessary proceedings, as contemplated by Art. 311 (2) of the Constitution, or the Service Rules? Was there any breach of procedure, laid down by law, in determining the plaintiff's right, if any? . . ."

Their Lordships have held in the same paragraph:

" . . . One thing is clear with reference to Art. 235 read with the service rules, that there is no right of promotion which the plaintiff could have claimed to enforce by action in a Court. . . ."

26. He also referred to Annexure Q in order to show that the case of the petitioner was considered elaborately

before the appointment of respondent no. 2 was made.

27. Mr. Raman in reply to the Advocate General's contentions has submitted that no doubt people from outside could be brought by direct appointments by open advertisement, but if it is a case of promotion the cadre officers have the right to be considered for the same. He further submitted that since no rules have been framed for appointments and promotions in the R. V. P. D., rules regulating conditions of employment of analogous services should apply as a general fundamental principle. Therefore, Bihar Engineering Service Rules should apply in the R. V. P. D. Further, he also contended that Article 309 of the Constitution has not excluded the powers which the State Government have under Article 162. Article 162 reads as follows:

"Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

For his contention he has relied on a decision of the Supreme Court in AIR 1966 SC 1942, wherein their Lordships at page 1944, paragraph 5 have observed:

"It would be convenient to deal with this argument at this stage. Mr. Nambiar contends that the words 'shall be as set forth in the rules of recruitment of such service specially made in that behalf' clearly show that till the rules are made in that behalf no recruitment can be made to any service. We are unable to accept this contention. First it is not obligatory under proviso to Art. 309 to make rules of recruitment etc. before a service can be constituted or a post created or filled. This is not to say that it is not desirable that ordinarily rules should be made on all matters which are susceptible of being embodied in rules. Secondly, the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power, to make laws. It follows from this that the State Government will have executive power in respect of List II, Entry 41, State Public Services . . ."

Therefore, basing his argument on the above observations of their Lordships, he contended that the State Government can create cadre by executive power and under rules of executive business, under Article 162 of the Constitution of India,

He further urged that in the absence of any local rule, the fundamental Rules prevail and regulate the conditions of employment because they have been framed under Section 96(b) of the Government of India Act, 1915 and are saved by the subsequent constitutional enactment and he refers to Articles 313 and 366(10) of the Constitution of India.

28. Mr. Basudeva Prasad appearing for the petitioner in C. W. J. C. Nos. 706, 716 and 774 of 1967, who has advanced similar argument regarding the existence of separate cadre in the R. V. P. D., has relied upon rule 12 of the Bihar Service Code, which has been quoted earlier. He also urged that the R. V. P. D. admittedly being a separate department has a separate cadre, and, therefore, there can be no recruitment to it by deputation of officers from the Irrigation Department. He has referred to paragraph 5 of the counter-affidavit filed on 1-3-68 by the State of Bihar in C. W. J. C. 716. Although it is a long paragraph it will be useful to quote it in extenso:—

"5. That with reference to paragraphs 6 & 7 of the petition, it is stated that for the execution of the Kosi Project, a separate Department of Government has been created which is now called the River Valley Project Department. This Department had to manage the work particularly in the initial stages, with the staff recruited from diverse sources, such as open recruitment, through advertisement or deputation of officers from the sister Irrigation Department. Because of rapid expansion that took place in the volume of work, and for various other reasons, such as absence of a properly constituted combined gradation list, recruitment even at the level of Executive Engineer has been made sometime by open competition through advertisement, on the advice of the Bihar Public Service Commission. Some of the directly recruited officers had worked elsewhere, for example, in the Damodar Valley Corporation besides, of course, in the Irrigation Department. It has also happened that where officers at the level of Executive Engineer were directly recruited, the Commission did not follow the seniority of the candidates in their present cadres, whether of the Irrigation Department or of the River Valley Projects Department and recommended names in order of preference, strictly on merit, as assessed by the Commission.

As a result of appointments made in this manner and considering the diverse sources from which the officers were drawn to man this department as also their experience, it is but obligatory for the River Valley Projects Department to provide promotional opportunities to the

officers working in this Department in respect of their service. For the purpose of fixing seniority and deciding promotion, a provisional gradation list has been prepared and in doing so the rankings made by the Commission have been kept in view. So far direct recruits were concerned, whether of the River Valley Projects Department or of the Irrigation Department, seniority in a particular grade has been determined on the basis of length of continuous officiation. It is, therefore, incorrect to say that promotional opportunities are being mostly utilised by the Irrigation Department and its officers. It is also denied that there has been organised mala fide efforts to fill up posts in the River Valley Projects Department with the officers of the Irrigation Department ignoring the claims of the officers of the River Valley Projects Department."

29. Therefore, he has contended that the State of Bihar has admitted in the above paragraph that for the execution of Kosi Project a separate department of the Government was created which was then known as Kosi Project and now called the River Valley Projects Department.

He emphasised that Rule 12 of the Bihar Service Code defines "cadre" to mean "the length of the service or a part of the service sanctioned as a separate unit". Thus, according to him, it would be clear that the R. V. P. D. from the very time it was created being a new service, had a new cadre. He also submitted that a cadre need not necessarily be constituted separately after the creation of a new service in exercise of powers under Article 162 read with item 41 of List II of the Constitution of India. A cadre, according to him, may, however, be created under a statute and also under Article 162 of the Constitution. No formal constitution of cadre is necessary. He has also referred to Rule 56 read with Rule 72 of the Bihar Service Code, which has already been quoted earlier, in order to show that there could be no recruitment to a department by transfer of an officer from another department, because transfer is permissible only from one post to another in the same cadre.

30. Mr. J. N. P. Verma, who appeared on behalf of the petitioner in C. W. J. C. 681, has adopted the argument advanced by Mr. Raman and further relying on Rules 12, 56 and 72 of the Bihar Service Code, has urged that all these rules have been framed under Article 309 of the Constitution. Further he submitted that notifications contained under Annexures C, C/1 and C/2, by which the new department was constituted under Article 162 read with Article 166 of the Constitution of India, will also amount to creation of

a separate cadre for the R. V. P. D. He has also submitted that a non-cadre man has no claim over the post and has relied on a decision of the Supreme Court in AIR 1958 SC 113.

31. Mr. Dayal who has appeared on behalf of M. G. Sharan in C. W. J. C. 591, has also contended that in the absence of the rules framed under the R. V. P. D., the Bihar Engineering Service Rules should be made applicable and he has referred to rules 19, 20 and 27 thereof. He has laid stress upon rule 27 which has already been quoted earlier. Further he contended that promotion is a fundamental right of the petitioner.

32. In view of the above discussions and in the circumstances of the instant case, I am inclined to agree with the submissions made on behalf of the State. It appears to me that cadre has not been formally constituted by the State Government for the R. V. P. D. It is true that there are various documents to indicate that from time to time the State Government treated R. V. P. D. as having a separate cadre; but, in my opinion, that is not enough. In order to confer legal right upon the petitioner, it is essential that cadre should also be legally constituted under Article 309 of the Constitution. It cannot be assumed that due to the notification contained under Annexures C, C/1, and C/2 by which the new department was constituted under Article 162 read with Article 166 of the Constitution of India, a separate cadre was created for the R. V. P. D. In my view, a cadre has to be expressly created as it is of vital importance for conferring fundamental rights upon the employees. It is true that although it may be under Article 309 of the Constitution, or it can be created by the State Government under the executive power conferred under Article 162 of the Constitution as observed by their Lordships of the Supreme Court in AIR 1967 SC 1910 (supra), the relevant passage of which I have already quoted earlier. The learned Advocate General has also relied on it. But even under Article 162 of the Constitution, it is essential that the cadre should be formally constituted. This view is also supported by a recent decision of Andhra Pradesh in P. Radhakrishna v. State of Andhra Pradesh, AIR 1968 Andh Pra 350 where Gopal Rao Ekbote, J., at page 352 in paragraph 7 while dealing with the question whether a particular Government order can be treated as a rule made under Article 309 of the Constitution, has said:—

"..... While the source of power can be taken into account merely because such a source exists, every act done by the authority cannot be said to be law. In order to have the validly made rule under

Article 309, the Governor and not the Government must first of all exercise the powers vested in him under Article 309 and made a rule regulating the recruitment, etc., to the services and then publish the same in the official gazette or in any other prescribed manner for the purpose of informing the public. If in the instant case, it is found that the Governor has not made any rule in exercise of the power under Article 309, nor was it intended to be a rule under that provision of the Constitution and that it was not published in the official gazette, there could be little difficulty in reaching the conclusion that the G. O. lacks all the postulates of a rule under Article 309 of the Constitution."

It is also admitted case of the parties that no rules regarding recruitment, promotion etc. for the employees of the R. V. P. D., have yet been framed by the State Government. It is also admitted case of the parties that the projects under the charge of this department are big in magnitude, and require special technique and experience for their execution. Engineers specially experienced in heavy construction works, and specially trained in the art of harnessing rivers for the successful implementation of the scheme were required to be appointed. Therefore, experienced engineers like Shri K. V. Ekambaram, Shri Malhotra and Shri D. Mukherjee, who were engineers of country fame, having specialised knowledge in river valley project works, were brought from Madras, Punjab and Bengal respectively and were appointed as Chief Engineers in the past (vide paragraphs 4, 5 & 6 of the petition in C. W. J. C. 572) (See paragraphs 5 & 7 of the counter-affidavit filed on behalf of the State in C. W. J. C. 572—See also paragraph 5 of the counter-affidavit filed on behalf of the State in C. W. J. C. 716 which has already been quoted earlier). From this it is apparent that the State Government was anxious to bring in best men in this department even from outside the State as also from the Irrigation Department, mainly on the basis of merit, as the project and the scheme to be executed were of immense importance and that may be the reason that the State was not anxious to formally constitute a cadre and to frame rules under Article 309 of the Constitution, because, in that event the hands of the State Government would have been fettered.

Since a long time has now elapsed to the creation of this department by the aforesaid notifications, which have been marked as Annexure C series referred to above, in my opinion, it was desirable for the State Government to have formally constituted a cadre and framed the rules for the recruitment, promotion etc.

of the officers in the R. V. P. D. also under Article 309 of the Constitution. Unless this is done, the petitioner has no legal right to claim for promotion to a post in the department.

33. Now I will turn to the consideration of ground no. (iv) wherein learned counsel for the petitioner has challenged the impugned notifications on the ground that they are violative of Articles 14 and 16(1) of the Constitution of India. Learned Counsel for the petitioners has urged that the State Government has not followed the procedure while making the appointments and promotions in R. V. P. D. which they follow in case of other departments. According to them, even if there is no rule framed for this department, Articles 14 and 16(1) of the Constitution are there, as safeguards, and these articles are equally applicable in the matter of selection grade posts. Reliance has been placed on various decisions of the Patna High Court and the Supreme Court, viz., in *Sukhnandan Thakur v. State of Bihar*, AIR 1957 Pat 617 and in *General Manager, Southern Railway, v. Rangachari*, AIR 1962 SC 36. In the latter, their Lordships at pages 40-41 in paragraph 15 observed:—

"This equality of opportunity need not be confused with absolute equality as such. What is guaranteed is the equality of opportunity and nothing more. Art. 16(1) or (2) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. Any provision as to the qualifications for the employment or the appointment to office reasonably fixed and applicable to all citizens would certainly be consistent with the doctrine of the equality of opportunity; but in regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment, and even in regard to such a promotion to a selection post all that Art. 16(1) guarantees is equality of opportunity to all citizens who enter service."

Further, reliance was placed on a decision in *Kishori Mohanlal v. Union of India*, AIR 1962 SC 1139 but in that case their Lordships have observed that it may very well be that 'matters relating to employment or appointment to any office' in Art. 16(1) are wide enough to include the matter of promotion. Inequality of opportunity for promotion as between citizens holding different posts in the same grade may, therefore, be an infringement of Art. 16. Thus, if of the Income-tax Officers of the same grade, some are eligible for promotion to a superior grade, and others are not, the

question of contravention of Art. 16(1) may well arise. But no such question can arise at all when the rules make Income-tax Officers of Class I, eligible for appointment as Assistant Commissioners, but make Income-tax Officers of Class II eligible for promotion as Income-tax Officers of Class I, but not for promotion to the post of Assistant Commissioners. There is no denial in such a case of equality of opportunity as among citizens holding posts of the same grade. As between citizens holding posts in different grades in Government service there can be no question of equality of opportunity. Article 16 does not forbid the creation of different grades in the Government service. Their Lordships were considering the rules regarding promotion in respect of Income-tax Officers. As their Lordships further held that Article 16 does not forbid the creation of different grades in the Government service, this case, in my view, does not help the petitioners.

34. In *S. G. Jaisinghani v. Union of India*, AIR 1967 SC 1427 their Lordships relying on AIR 1962 SC 36 (supra), observed at page 1431 in paragraph 9:—

"The relevant law on the subject is well settled. Under Art. 16 of the Constitution, there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State or to promotion from one office to a higher office thereunder. Article 16 of the Constitution is only an incident of the application of the concept of equality enshrined in Art. 14 thereof. It gives effect to the doctrine of equality in the matter of appointment and promotion. It follows that there can be a reasonable classification of the employees for the purpose of appointment or promotion. The concept of equality in the matter of promotion can be predicated only when the promotees are drawn from the same source. If the preferential treatment of one source in relation to the other is based on the differences between the said two sources, and the said differences have a reasonable relation to the nature of the office or offices to which recruitment is made, the said recruitment can legitimately be sustained on the basis of a valid classification"

In my opinion, their Lordships have clearly held that the concept of equality in the matter of promotion can be predicated only when the promotees are drawn from the same source, and they are similarly circumstanced. But, in the instant case we have seen that they have not been drawn from the same sources and they are not similarly circumstanced. Therefore, in my view, this case does not help the petitioner. He has further relied on another decision reported in the same

volume which begins at p. 1910 (of AIR 1967 SC) (supra) where their Lordships at page 1914 in paragraph 6 held:—

"...In our opinion, the respondents are right in their contention that the ranking or position in the Gradation List does not confer any right on the petitioner to be promoted to selection post and that it is a well-established rule that promotion to selection grades or selection posts is to be based primarily on merit and not on seniority alone. The principle is that when the claims of officers to selection posts is under consideration, seniority should not be regarded except where the merit of the officers is judged to be equal and no other criterion is, therefore, available."

In my opinion, this judgment also does not help the petitioner because, in the case before their Lordships there were specific rules which were violated. Even then their Lordships held that the ranking or position in the gradation list does not confer any right on the petitioner to be promoted to the selection post. Further, reliance was placed on the latest decision of the Supreme Court in the *State of Mysore v. P. Narasinga Rao*, AIR 1968 SC 349 where their Lordships at pages 351-52 have observed:—

"...Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection. It is true that the selective test adopted by the Government for making two different classes will be violative of Articles 14 and 16 if there is no relevant connection between the test prescribed and the interest of public service. In other words, there must be a reasonable relation of the prescribed test to the suitability of the candidate for the post or for employment to public service as such. The provisions of Article 14 or Article 16 do not exclude the laying down of selective tests, nor do they preclude the Government from laying down qualifications for the post in question"

So, this observation also, in my opinion, is of no assistance to the petitioner in this case. Then, reliance was also placed on a Full Bench decision of the Punjab High Court in *Brijlal Goswami v. State of Punjab*, AIR 1965 Punj 401 where their Lordships have observed that it is fairly well settled that the equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State is confined not only to the initial appointments but includes also the terms and conditions of service as well as promotion to selection posts and that the words of Article 16(1) are wide enough to include all matters relating to employment including promotion. Their Lordships relied on AIR 1962 SC 36 (supra) and AIR 1962 SC 1139 (supra). It may be

noted that in this case also their Lordships were dealing with Punjab Service Integration Rules, 1957. Therefore, this also does not help the petitioners because, we have seen that in the instant case neither cadre has been constituted nor any rules have been framed by the State Government.

35. The learned Advocate General has, therefore, rightly contended that every case which has been cited by the petitioners relates to violation of certain rules. According to him, Article 16 cannot be violated unless there is certain rule. A right can arise only from a statute, statutory rules or from the provisions of the Constitution. It being a selection post appointment could not have been made on the ground of seniority alone. Merit is also an important consideration in such posts. Therefore, according to him the only right that the petitioner could possibly claim is that he should have been considered for the post of Chief Engineer before another person was appointed. Relying on the judgment of the Supreme Court in AIR 1962 SC 1704 (supra) the relevant passage of which has been quoted earlier, he has urged that this has been done, as it will appear from Annexure Q, the contents of which have been set out earlier in extenso. It clearly indicates that after thorough consideration the conclusion arrived at was that neither Shri M. G. Sharan nor Shri Prasad were suitable to be promoted to the high and responsible post of Chief Engineer. The opinion contained in Annexure Q was again considered and accepted by the Government. In the circumstances, according to him, the petitioners cannot challenge the validity of the appointment of Shri Banerji.

In my view, the contention of the learned Advocate General is well founded. Reference may be made to a decision of the Supreme Court in *Probhudas Morarjee Rajkotia v. Union of India*, AIR 1966 SC 1044 where their Lordships at page 1047 in paragraph 8 have observed:

"... The plea of violation of equal protection of laws under Art. 14 of the Constitution has not been properly pleaded in this case. It cannot be too strongly emphasised that to make out a case of denial of the equal protection of the laws under Art. 14 of the Constitution, a plea of differential treatment is by itself not sufficient. An applicant pleading that Article 14 has been violated must make out that not only he had been treated differently from other but he has been so treated from persons similarly circumstanced without any reasonable basis and as such, differential treatment is unjustifiably made."

Therefore, this ground of the petitioner also fails. Hence, the notifications cannot

be challenged on the ground that they are violative of Articles 14 and 16 of the Constitution.

36. Now I take up ground nos. (v) and (vi) together. Learned counsel appearing on behalf of the petitioner has contended that the adverse remark in the character roll, if any, was not communicated to the petitioner. Some of the adverse remarks which were against the petitioner, were communicated after the writ applications were filed and much beyond the prescribed time. He further contended that it was against the natural justice that the adverse remark, if any, was considered by the sub-committee in Annexure Q without informing the petitioner or giving the petitioner opportunity to show cause to that adverse remark. He has further urged that the adverse remarks which were against the petitioner prior to his promotion as Superintending Engineer, would be deemed to have been washed out along with his promotion as Superintending Engineer. He has further laid stress that adverse remarks must be communicated within three months failing which it will not affect the concerned officer in any way and he has drawn our attention to paragraph 10 of the affidavit of the petitioner dated 4-12-67 which was filed in reply to the counter-affidavit of respondent no. 1. In the said paragraph inter alia he has stated that the Government had made it clear by memos dated the 11th November, 1958 and 1st. of October, 1966, that an adverse remark must be communicated within three months and if not communicated within the said specified period, it will not have any adverse effect on the career and promotion and the officer concerned will not be made to suffer on that account; the true copies of which have been marked as Annexures D and D/1 to the said affidavit. He has further submitted that these memos have the force of law as held by the Supreme Court in *State of Uttar Pradesh v. Babu Ram Upadhyaya*, AIR 1961 SC 751. Further, he has urged that it cannot be considered without giving opportunity to the concerned officers. It is against the principles of natural justice. For his contention, he has relied on a decision of the Supreme Court in *State of Orissa v. Dr. (Miss) Binapani Dei*, AIR 1967 SC 1269 where their Lordships have observed at page 1272:—

"... It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent

of being heard and meeting or explaining the evidence. . . ."

In order to support his contention, he has also referred to some other judgments viz., *State of Jammu and Kashmir and others v. Bakshi Gulam Mohammad*, AIR 1967 SC 122, *State of Mysore v. K. Manche Gowda*, AIR 1964 SC 506. He has also drawn our attention to the observation made in *Gopalrao Damodarji v. State Government of Madhya Pradesh*, AIR 1954 Nag 90 which is as follows:—

"It was not disputed that the competent authority is entitled to take into consideration the record of a civil servant's past service in order to determine the quantum of punishment. What however, was contended was that if the civil servant is not at all apprised of the record of his past service, nor is he informed that it will be taken into account in order to decide the question of punishment, he cannot be deemed to have been given a 'reasonable opportunity' to show cause against the proposed action."

He has further submitted that the remarks in the character roll were given by Shri U. K. Verma whose seniority he has challenged. Therefore, according to him, the adverse remarks given by Shri U. K. Verma were due to bias.

37. Lastly he submitted that the sub-committee while giving the opinion in Annexure Q have acted mala fide. The service record and the qualification of the petitioner were better than those of Shri Banerji. Moreover, the committee have exceeded its jurisdiction because, the question of Shri Banerji's promotion was not before them. He further argued that when Shri Banerji was not considered more suitable than Shri Verma and Shri Dutta, how could Shri Banerji be considered more suitable than the petitioner who had better record and was senior to Shri Verma. According to him, the sub-committee could not assume the jurisdiction of the Public Service Commission.

38. On the other hand, the learned Advocate General has urged that the sub-committee which gave opinion under Annexure have thoroughly gone into the question and have found the petitioner not a fit person to be appointed to the post of Chief Engineer. According to him, they were entitled to look into the adverse remarks in the service record of the petitioner. The remarks made in the service record were communicated to the petitioner who, after the receipt of the said remark, even made representation in that regard which was rejected (vide paragraph 9, wrongly numbered as paragraph 8, of the counter-affidavit of respondent no. 1 in C. W. J. C. 572). He has further submitted that even if the adverse remark was not communicated to the

petitioner within the prescribed time that will not make the petitioner suitable for the appointment to the selection post. The basic policy for such appointment is service to be rendered to the society. The adverse remark against the petitioner will not disappear due to delay in communication to the petitioner. It does not become barred by limitation. The three months' period mentioned in Annexure D/1, on which the petitioner has relied, is merely advisory in character. It does not say what will happen if the adverse remark is not communicated. He further urged that it cannot be legitimately argued on behalf of the petitioner that since he was promoted as Superintending Engineer the adverse remark which was against the petitioner in 1958 was washed out. The entire record of the various officers including that of the petitioner were before the sub-committee, which, after thorough investigation made the recommendation on merit-cum-seniority and the State on the receipt of that recommendation and after due consideration, made the appointment in administrative capacity. Which of the adverse remarks against the petitioner weighed with the committee, it is difficult to say. It will be mere speculation in the absence of any materials to show the uncommunicated remarks were taken into consideration by the committee. Even if there was any such uncommunicated remark before the committee it would not vitiate the appointment made by the State Government. In order to support his contention he has relied on the recent unreported judgment dated the 22nd of August, 1967, of the Supreme Court in Writ Petn. No. 233 of 1966 (SC), *Prakash Chand Sharma v. Oil and Natural Gas Commission*. In that case also the petitioner had referred to a memo relating to the confidential reports, their preparation and maintenance. According to para 8 of the memo it was necessary that every employee should know what his defects were, so that he could remove the same, if possible. Paragraph 9 of the memo indicated that it was open to an employee to make representation against adverse remarks. Therefore, the petitioner in that case places reliance upon that paragraph of the memo for showing that if the petitioner had been given an opportunity of making representation against the adverse remarks, he might easily have satisfied the higher authorities that the remarks were uncalled for and unjustified. In that case also, the petitioner had alleged that it was only when the affidavit in opposition was filed that he came to know that he had not been given promotion because of those remarks. He had also submitted that there was a clear violation of the instruction regarding confiden-

tial remarks and the petitioner had been discriminated against, on the basis of the remarks which should never have been made or should never have been allowed to remain in the confidential reports or stand in the way of his promotion, if an opportunity had been given to him to explain the same.

Their Lordships, however, held:—

"It was not disputed that the instructions as to confidential reports have not been properly observed in this case. It is not suggested that the departmental promotion committee acted mala fide. If the adverse remarks were there in the confidential reports it was the duty of the departmental promotion committee to take note of them and come to a decision on a consideration of them. The committee could not be expected to make investigation about the confidential report. It appears to us that in this case there was no discrimination, purposeful or otherwise, and at the best, the committee taking into consideration confidential reports with respect to which the petitioner had been given no chance to make a representation was merely fortuitous. In such a state of affairs, we are not satisfied that any interference is called for and the rule will therefore be discharged."

As directed by this Court, the entire character roll from the very beginning was made available to us by respondent no.1 and we have perused them. Some of the remarks are very much adverse against the petitioner. No doubt, some of the remarks are also in his favour but nothing turns on that, as this court under its writ jurisdiction will not examine these materials to find out as an appellate Court as to whether the sub-committee was right or wrong, in giving the recommendation contained in Annexure Q. The Advocate General, in reply to the allegation of mala fide, has submitted that the petitioner has not made any concrete allegation of mala fide against the members of the sub-committee or against the respondent no. 1. The mala fide is a question of fact and the same has been denied by the State Government. He further submitted that there was heavy onus on the petitioner to establish the allegation of mala fide. He also contended that the sub-committee was competent to make the said recommendation and in fact they fairly considered the case of all the officers concerned. In this case he submitted that the State Government itself would have made the appointments, but in order to be fair to all the officers concerned the State Government got the above sub-committee constituted so that there may not be any prejudice to any of the officers concerned. In my view, there is great force in the contention of learned

Advocate General which has got to be accepted. Therefore, these grounds which were submitted on behalf of the petitioners have no substance.

39. Lastly, I turn to ground no. (ii) under which the petitioner has challenged the appointment of respondent no. 2, because the Bihar Public Service Commission was not consulted as required under Article 320(3)(b) of the Constitution. Learned Counsel has submitted that in the instant case the commission was not consulted either for rejecting the claim of the petitioner or for making the appointment of Shri S. K. Banerji (respondent no. 2). The relevant provisions of Article 320(3)(b) of the Constitution read as follows:—

"(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted—

(a) ** ** *

(b) On the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

** ** *

Learned counsel has submitted that the above provisions contained under Article 320 are mandatory. He has also drawn our attention to regulations 7 and 8 of the Bihar Public Service Commission (Limitation of Function) Regulation, 1957, which clearly mentions the cases in which the consultation with the commission is mandatory. He has argued that it was the legal right of the petitioner to get his claim considered by the commission. According to him, the appointment of respondent no. 2 amounted to transfer as well as promotion. He was only a Superintending Engineer, and was holding officiating charge of the Chief Engineer in the State Electricity Board. As such, he contended, that his appointment as Chief Engineer in the R. V. P. Cadre amounted to transfer as well as promotion. On the other hand, the learned Advocate General has submitted that the provisions contained under the said Article are not mandatory. He has also urged that the aforesaid regulations 7 & 8 are only applicable to the three methods of appointment, namely, appointment by promotion, or transfer from another service, or in case of direct recruitment. According to him, the impugned appointment is not covered by any of the three categories. He has drawn our attention to paragraph 22 of the counter-affidavit which has been filed on behalf of the State in C. W. J. C. 572 where it has been stated:—

"22. That with reference to paragraphs 26 and 27 of the petition I say that the River Valley Projects Department is en-

trusted with the execution of major irrigation projects and in the interest of the work of this Department most suitable Engineers with brilliant service records have been selected for the post of Chief Engineer. Even Engineers from outside the State had to be appointed in the present case Shri S. K. Banerjee was found most suitable as has been mentioned in para 14 above. Since Shri Banerjee was holding "equivalent post of Chief Engineer with effect from December 1963 and then appointed as Chief Engineer (civil) Bihar State Electricity Board, question of taking concurrence of the State Service Commission does not arise. It is also not necessary to obtain concurrence of political department for such appointment. Since Shri Banerjee was already holding the post of a Chief Engineer the question of supersession of Shri Sharan is not involved."

He has submitted that when an appointment is made from one service to another, as for instance, from the Bihar Engineering Service Class II to the Bihar Engineering Service Class I, the Commission is invariably consulted but where a person holding a permanent post in Bihar Engineering Service Class I is appointed to a higher or equivalent post, the consultation envisaged in the rules is not necessary. According to him, the petitioner could possibly make a valid complaint if the commission had been consulted in other instances of similar appointments, but had not been consulted in the instant case. The petitioner has not made any such allegation in his petition. On the other hand, affidavit has been filed on behalf of the State stating in clear term that where officers who are confirmed in Bihar Engineering Service Class I are appointed to a higher post, consultation has not been made with the State Public Service Commission. Thus, there is no departure from the established practice in the present appointment. He has further argued that even if it is assumed that the above article and the rules are applicable in the instance case, according to him, it is now well established by the decision of the Supreme Court that the consultation envisaged under Article 320 is not mandatory. He submitted that it has been held by the Supreme Court that in default of consultation with the service commission the action of the Government in making the appointment does not become null and void. In order to fortify his contention he has relied on a decision of the Supreme Court in State of U. P. v. Manbodhan Lal, AIR 1957 SC 912 where their Lordships in paragraph 11 at page 917 have observed:—

"As examination of the terms of Art. 320 shows that the word 'shall' appears in

almost every paragraph and every clause or sub-clause of that article. If it were held that the provisions of Art. 320(3)(c) are mandatory in terms, the other clauses or sub-clauses of that article, will have to be equally held to be mandatory.

If they are so held, any appointments made to the Public Services of the Union or a State, without observing strictly the terms of these sub-clauses in Cl. (3) of Art. 320, would adversely affect the person so appointed to a Public Service without any fault on his part and without his having any say in the matter.

This result could not have been contemplated by the makers of the Constitution. Hence, the use of the word 'shall' in a statute though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid."

Their Lordships further observed in paragraph 12:—

"We have already indicated that Art. 320(3)(c) of the Constitution does not confer any right on a public servant so that the absence of consultation or any irregularity in consultation, should not afford him a cause of action in a court of law, or entitled him to relief under the special powers of a High Court under Art. 226 of the Constitution or of this Court under Art. 32. It is not a right which could be recognised and enforced by a writ."

Their Lordships, therefore in para 13 on the same page i. e. at page 918, held:—

"In view of these considerations, it must be held that the provisions of Art. 320(3)(c) are not mandatory and that non-compliance with those provisions does not afford a cause of action to the respondent in a Court of law."

40. He has also referred to another decision of the Supreme Court in U. R. Bhatt v. Union of India, AIR 1962 SC 1344 where their Lordships in paragraph 3 at page 1346 have held:—

"The question whether the order dated December, 3, 1947, discharging the appellants from service was void because of failure to consult the Public Service Commission is not now open to be canvassed in view of the decisions of this Court, and has, therefore, rightly not been raised by the counsel for the appellant. In 1958 SCR 533=AIR 1957 SC 912 this court held that Art. 320(3)(c) of the Constitution of India, (which is substantially the same as S. 266 of the Government of India Act) is not mandatory and that it does not confer any rights on the public servant, and the absence of consultation or any irregularity in consultation does not afford him a cause of action in a

Court of law. It was also held that Art. 311 of the Constitution is not controlled by Art. 320. The content of the protection afforded to civil servants under S. 240, Cl. (3) of the Govt. of India Act was the same as afforded by Art. 311 of the Constitution, to civil servants."

41. In reply to the above argument Mr. Raman appearing on behalf of the petitioner has contended that the above decisions of the Supreme Court related to Article 320(3)(c) of the Constitution on disciplinary matters. Therefore, they are not applicable to Article 320(3)(b) which relates to the matter of appointment, transfer and promotion and in order to support his contention he has relied on a decision of the Supreme Court in Chandra Mohan v. State of Uttar Pradesh, AIR 1966 SC 1987. But in my opinion, this decision related to the interpretation of Article 233 of the Constitution. Therefore, this cannot be of any assistance to the petitioner. In the instant case, we are concerned with Article 320. It has been held in AIR 1957 SC 912 (supra) that the word 'shall' occurring in the several clauses of Article 320 does not indicate that the provisions contained therein are mandatory. Similarly, he has further relied on a decision of the Supreme Court in the State of Assam v. Ranga Mohammad, AIR 1967 SC 903; but this case also related to the interpretation of Articles 233, 234 and 235 of the Constitution. For the same reasons. In my opinion, this case also does not help the petitioners.

42. In my view, there is no reason why the ratio in the case reported in AIR 1957 SC 912 (supra) should also not be extended to clause (b) of Article 320(3) of the Constitution as the language of both these clauses (b) and (c) is the same. This view also finds support from the decision in State of Bombay v. Dr. N. T. Advani, AIR 1963 Bom 13 where his Lordship at page 16 in paragraph 14 observed:

"It has been very seriously argued by Mr. Kotwal that since while making his appointment the procedure of referring the matter to the Public Service Commission was not followed, the appointment was invalid. He relies on Article 320 of the Constitution, para (3)(b). It has been held by the Supreme Court in 1958 SCR 533=AIR 1957 SC 912, that the provisions of Art. 320(3)(c) of the Constitution of India are not mandatory and that they do not confer any rights on a public servant so that the absence of consultation or any irregularity in consultation does not afford him a cause of action in a court of law. There is no reason why the ratio in that case should not apply to para (b), language of which is the same as that of para (c). I am not, therefore, prepared to hold

that on this ground the order dated 14th October 1953, was an invalid order and therefore inoperative."

In view of the above observations, the contentions of the learned Advocate General are well grounded and have got to be accepted. Thus, ground no. (ii) raised on behalf of the petitioner also fails.

43. However, learned counsel appearing on behalf of the petitioner has further raised an additional ground that only the officers of the Irrigation Department are given higher posts in the R. V. P. D. whereas the officers of R. V. P. D. are not married (sic) which has caused injustice and the action of the State Government is violative of Article 311(2) of the Constitution. He has relied on a decision of the Supreme Court in Purshotam Lal Dhingra v. Union of India, AIR 1958 SC 36; but in my opinion this decision is not applicable to the instant case. I have already held that the sub-committee and the State Government after due consideration appointed respondent no. 2 as Chief Engineer of R. V. P. D. I have already indicated earlier that in the instant case we cannot sit as an appellate court and examine the opinion which the sub-committee has given in Annexure Q, or interfere with the order of the State Government appointing respondent no. 2 as Chief Engineer, particularly when there is no violation of rules, regulations or the provisions of the Constitution. It may be possible that by co-incidence so far only, the officers of the Irrigation Department have been found suitable for the appointment in the R. V. P. D. But that is no reason for holding that it is due to any bias that none of the officers of the R. V. P. D. has so far been selected for being appointed in the Irrigation Department. Therefore, this contention of learned counsel cannot be accepted.

44. In conclusion, therefore, there is no merit in the application in C. W. J. C. nos. 562 and 681.

45. Now I will revert to the consideration of the application in C. W. J. C. 535, which was filed by Shri R. S. Pathak praying therein for a writ of quo warranto ousting Shri S. K. Banerji respondent no. 2, from the office of the Chief Engineer, about which I have already referred earlier in paragraph ante. Since I have already held while dealing with C. W. J. C. 572 that the appointment of Shri S. K. Banerji is valid, this application is also devoid of any merit and it has got to be dismissed.

46. Then I revert to C. W. J. C. 591 about which I have referred in paragraph 3 ante. It may be recalled that this application was also filed by N. G. Sharan impleading the State of Bihar as respondent No. 1 and Shri U. K. Verma as respon-

dent no. 2 and the ground of attack on his appointment is also more or less similar, which I have dealt in C. W. J. C. 572. But in the instant case even the Public Service Commission was consulted. Some of the contentions raised by Mr. Dayal, learned counsel for the petitioner in this case, have already been referred earlier. Most of the facts stated in the petition have been controverted by the State Government in the counter-affidavit which was filed on the 4th November, 1957" (vide paragraphs 11, 15, 17 and 18 of the said counter-affidavit). A supplementary counter-affidavit dated 28-3-68 was also filed on behalf of the State of Bihar the relevant portion of which is contained in paragraph 2 in which it is stated:—

"That as regards paragraph 3 of the reply to counter-affidavit, I say that there has been no supersession of the petitioner by the notification Annexure 'A' inasmuch as the petitioner is junior to Sri U. K. Verma. The representation filed by the petitioner challenging the promotion of Sri U. K. Verma as Chief Engineer, Tenughat was examined in all its aspects and after careful consideration the representation was rejected. Since the decision rejecting the representation was based on office records of unimpeachable character, the question of providing opportunity to the petitioner before rejecting the representation does not arise. All the same the petitioner was personally heard by the Chief Administrator as admitted by the petitioner in his petition dated 6-9-1966."

It will also be useful to quote paragraphs 3 and 4 which read as follows:—

"3. That with reference to paragraph 4 of the reply to counter-affidavit, I say that in the initial stages, this department had to manage the work with staff recruited from diverse sources, such as, open recruitment through advertisement, appointment by selection and deputation of officers from State Irrigation Department. In the interest of the Project work and in recognition of good work, promotion had to be given to officers according to their length of service and merit irrespective of the source from which they were drawn. It has also happened that where officers at the level of executive Engineers were directly recruited, the commission did not follow the seniority of the candidates in their parent cadres whether of the Irrigation Department or River Valley Projects Department and recommended names in order of preference, strictly on merit as assessed by the Commission. For the purpose of promotion a combined gradation list has been adopted and officers drawn from different sources have been given seniority according to length of service rendered either to the River Valley Projects

Department or in their parent Department.

4. That the petitioner was given officiating promotion in leave vacancy of Shri P. R. Guha, Superintending Engineer in this department notification no. 4998, dated 21-6-1956, copy of which is enclosed as Annexure 1. It was made clear in that notification that this officiating promotion would not mean supersession of any senior Executive Engineer in the Department and would not entitle the petitioner to any special claim for promotion on this account in vacancy of longer duration. In pursuance of this notification the petitioner officiated as Superintending Engineer only from 16-6-56 to 24-6-56 and made over charge again to Shri P. R. Guha on 25-9-56. It is incorrect to say that this officiating promotion was given against long term vacancy. It is also incorrect to say that there was no senior officer above the petitioner who could be considered for promotion. As has been mentioned above no separate cadre for River Valley Projects Department has been formally constituted either for Civil Engineers or for Mechanical Engineers. There are some posts which have been manned by Civil Engineers as well as Mechanical Engineers according to suitability of the officers for the post. As regards Shri U. K. Verma, it may be stated that he has all along continued to work as Civil Engineer in this Department.

Further, in this affidavit it is specifically stated that no separate cadre for the R. V. P. D. has been formally constituted either for Civil Engineers or for Mechanical Engineers. The learned Advocate General has contended that by the Government Notification dated 21-6-56, which has been marked as Annexure 1 to this affidavit, only a stop-gap arrangement for eight days was made and that will not give a right to the petitioner.

46-A. In this case it was also urged on behalf of the petitioner that U. K. Verma was appointed as Executive Engineer in the R. V. P. D. on 22-11-56, whereas the petitioner was appointed as Executive Engineer on 9-8-54 and, therefore, the petitioner being senior to Verma, he should have been appointed as Chief Engineer in preference to Verma. Learned Advocate General in reply to the said submission has drawn our attention to paragraph 6 of the supplementary affidavit filed on behalf of the State on 5-8-68 which reads as follows:—

"That Shri Verma was confirmed as Executive Engineer with effect from 1-3-1958 and notification dated 1-2-1963 was issued to the said effect and published in the official gazette. A copy of the said notification is enclosed and marked by

letter 'X'. Since there was some objection by the Accountant General in respect of the actual language of the notification, substituted notification was issued on 31-8-1966/2-9-1966 (a copy of the substituted notification has been annexed as Annexure B to the petition for amendment of the writ petition filed by the petitioner.)"

He has urged that the petitioner has not annexed the above notification to his petition. No doubt, he has enclosed the notification dated 31-8-66 marked as Annexure I to his supplementary affidavit dated 3-7-68. The Advocate General has submitted that this notification was issued by the State Government only because the Accountant General objected to the language of the earlier notification dated 1-2-63. This is why the notification dated 31-8-66 also refers to the date 1-2-63. Therefore, he has contended that Verma having been confirmed as Executive Engineer by the said notification dated 1-2-63 (annexure 'X') with effect from 1-3-58, the petitioner cannot claim to be senior to Verma unless he can successfully show that the confirmation of Verma as Executive Engineer was invalid and the petitioner had a right to challenge the said notification of confirmation. He has further submitted that previously both petitioner and Verma were working in the Damodar Valley Corporation. Although in the said corporation the petitioner was appointed earlier than Verma as Assistant Engineer, Verma was appointed as Executive Engineer on 1-12-50, whereas the petitioner was promoted as Field Engineer (equivalent to Executive Engineer), three years later on 13-6-53 vide paragraph 4 of the affidavit dated 5-8-68. He has also invited our attention to paragraph 11 of the counter-affidavit filed on behalf of the state dated 4-11-67, wherein it is mentioned that the services of Verma were obtained in the public interest and in the interest of the department, because of his past experience, and length of service in the Damodar Valley Corporation. He was given a starting salary of Rs. 895/-. Further, he urged that his appointment was made with full concurrence of the Public Service Commission, which fact is stated in the supplementary counter-affidavit dated 28th of March, 1968, filed by the State (vide paragraph 6 thereof and its Annexures 3 and 4). He also submitted that at the time of confirmation of Verma two posts of Executive Engineer were vacant. A copy of the gradation list of the temporary Executive Engineers of the Department along with the upto date character rolls of the first six officers including that of the petitioner was forwarded to the Commission. The State Government according to the recommendation of the Commission, appointed Verma and

Dutta as two permanent Executive Engineers (vide paragraph 7 of the counter-affidavit dated 5-8-68). He also urged that since the confirmation of Verma was made by the notification dated 1-2-63, if there was any grievance against his confirmation the petitioner ought to have filed a writ application much earlier than 19-9-67 when it was actually filed. According to him, on the ground of delay alone this application deserves to be dismissed. In reply to this, it has been submitted on behalf of the petitioner that he had filed representation against the same which was disposed of by the State Government in 1967. Therefore, according to him, there was no delay in filing this writ application. Even assuming that this may be a sufficient explanation, but as indicated above, Verma was appointed Superintending Engineer with effect from the year 1958 and the petitioner has not specifically alleged that he made any representation against the said appointment. Apart from these considerations, from the facts stated above, it is evident that Verma was appointed as Superintending Engineer in 1958, while the petitioner was appointed as such about four years later, i. e. on 5-1-62, which clearly establishes the seniority of Verma.

Learned counsel for the petitioner has also contended that Verma was not adequately qualified, whereas the petitioner was better qualified and experienced. In my opinion, these facts cannot be examined by us because these things have been duly considered by the Public Service Commission, before they made the recommendation. We have also looked into the character roll of Verma, wherein we find good as well as adverse remarks against him, but as indicated above nothing will turn upon the character rolls. He cannot sit as an appellate court and examine the merits and demerits of recommendation of the Public Service Commission. In my opinion, the contentions of the learned Advocate General are well grounded. Besides, all the other points raised in this application have already been covered while dealing with C. W. J. C. 572. Therefore, this application also cannot be entertained.

47. Now, I revert to the consideration of the writ application filed by the various petitioners in CWJC 706 referred to in paragraph 4 ante, CWJC 716 referred to in paragraph 5 ante and CWJC 774 referred to in paragraph 6 ante. In all these three applications, Mr. Basudeva Prasad, learned counsel for the petitioners, has raised more or less similar contentions which were raised by Mr. Raman in CWJC 572. It will be relevant also to mention the contentions in these three applications, raised by Mr. Prasad which are:—

(i) The R. V. P. D. admittedly being a separate department, has a separate cadre and, therefore, there can be no recruitment to it by deputation of the officers from the Irrigation Department.

(ii) If there be a combined gradation list of officers of the two departments, the Government in operating it only partially for promotions or appointments of officers from Irrigation Department to R. V. P. D. and not vice versa overlooking the claims of some of petitioners for promotion to higher posts in R. V. P. D. and in derogation of the rights of some others to maintain their prospects of promotion by retaining their seniority in the list of officers of R. V. P. D. have acted in violation of the fundamental rights of equal treatment guaranteed to the petitioner by Arts. 16(1) and 14 of the Constitution of India.

(iii) The two Departments having admittedly not merged into one, no combined gradation list of officers of the two Departments which even in fact was not prepared could be legally prepared, and so the promotion and appointments of officers from the Irrigation Department to the R. V. P. D. on the basis of an imaginary combined gradation list amounted to denial of equality in matters relating to prospects of promotion guaranteed to the petitioners under article 16(1) of the Constitution of India.

(iv) The impugned appointments being admittedly only deputations from the Irrigation Department to the R. V. P. D. which at the most amounted to appointments merely on officiating basis in the R. V. P. D. posts, the respondents concerned did not in the eye of law acquire any seniority in the cadre of R. V. P. D. and, therefore, their promotions or appointments in derogation of the rights of the petitioners to the prospects of promotion in their cadre amounted to violation of equality guaranteed in Arts. 14 and 16(1) of the Constitution of India. Further, even if by any stretch of imagination deputation be considered as a method of recruitment, it falls in category of direct recruitment and as the ratio of the decision in AIR 1967 SC 52 at p. 55 suggests the seniority inter se direct recruitments must be determined with reference to their actual date of recruitment.

As regards his contention no. (i) I have already held while dealing with C. W. J. C. Nos. 572 and 681 that no cadre has been formally constituted in the R. V. P. D. Therefore, his this contention fails.

48. Now I will take up points nos. (ii) to (iv) together for consideration. The main contention of learned counsel is that the impugned order making the appointments of respondents are violative of

Articles 14 and 16(1) of the Constitution of India. In my opinion, in order to make out a case of denial of equal protection of laws under Article 14 of the Constitution, a plea of differential treatment is by itself not sufficient. A petitioner pleading that Article 14 has been violated must make out that not only he had been treated differently from others but he has been so treated differently from similarly circumstanced without any reasonable basis and as such differential treatment has been unjustifiably made. Therefore, in the petition the petitioners must give such data and it must also be admitted by the respondents. But in the instant case I find that the State has filed counter-affidavit denying allegations regarding unequal treatment and had disputed these facts vehemently. In these circumstances it is difficult to hold that the impugned orders are violative of Articles 14 and 16 of the Constitution. This view also finds support from the judgment of the Supreme Court reported in AIR 1966 SC 1044 at p. 1047 (supra), the relevant portion of which I have already quoted earlier while dealing with CWJC Nos. 572 and 681. Besides, Article 16 cannot be violated unless there is a rule; but in the instant case we have already seen that the State Government has neither framed the cadre nor the rules for governing the recruitment, promotion, etc. in the R. V. P. D. Learned counsel in absence of specific rules for the R. V. P. D. has relied on rules 56 and 72 of the Bihar Service Code. I have already quoted these rules earlier. Learned Advocate General has contended that Rule 56 is not applicable to the instant case and he has referred to exceptions to Rule 56 and has contended that it applies to a disadvantageous transfer. For example, if a person carrying higher pay is transferred to post of lesser pay, then only the person who has been so appointed can make a grievance. He urged that the main part of the rule gives power to the State to transfer Government servant from one post to another. As regards Rule 72, he has submitted that this rule is subject to Rule 56 and then it will be applicable only when if it is held that R. V. P. D. has a separate cadre. But it has already been held as mentioned earlier, that no separate cadre has been formally constituted for the R. V. P. D. Therefore, in my opinion, the contention of the learned Advocate General is well founded. Besides, these rules do not specifically apply to the facts and circumstances of the instant case. In all these three cases the Bihar Public Service Commission was also consulted and after obtaining the opinion of the Commission the appointments were made. In paragraph 5 of the counter-affidavits filed on

behalf of respondent no. 1, the State of Bihar. In C. W. J. C. 716, it has been clearly stated that the commission have recommended the names in order of reference strictly on merit and the appointment has been made in accordance with the recommendation of the commission. In that very paragraph the allegation of mala fide has also been specifically denied. Further, reference may be made to paragraph 10 of the counter-affidavit which I have quoted earlier in paragraph 19 ante, in which it has been clearly stated on behalf of the State of Bihar that the petitioners have not specifically mentioned the names of the officers who have been promoted earlier than others and it will be difficult to examine the question. Further, in that very paragraph it is stated that since the promotion was given according to the combined gradation list there was no ground for apprehension on behalf of the petitioner. Therefore, it is clear that even if there was no separate cadre for the R. V. P. D., the State Government in order to safeguard the interest of the petitioners considered the seniority of the officers of the two departments and referred the matter to the Public Service Commission for their recommendation and after such recommendation the State Government have made the appointments. Therefore, in my opinion, the order of the State Government cannot be set aside on that ground. Further, reference may be made to paragraph 7 of the counter-affidavit where it is specifically stated that there has been no formal constitution of separate cadre for the R. V. P. D. Therefore, the stand of the State of Bihar so far cadre is concerned, is consistent in all the cases under consideration, i. e. that there have been no formal contention of the cadre. It has further been repeated in paragraph 8 of the counter-affidavit that inter se seniority in the combined gradation list has been fixed up on the basis of the date of commendations and the ranking given by the Commission. Therefore, the question of supersession does not arise. Further, reference may be made to paragraph 9 of the counter-affidavit where it is stated that the commission, however, concerned is the promotion of the Executive Engineers to the rank of Superintending Engineers on the basis of their seniority in the combined gradation list and they did not accept the proposal of the Government for promotion of one from each of the lists alternatively. Government have accepted the advice of the commission and so the question of fixing 50% quota for Irrigation Department officers does not arise.

49. Similarly, in C. W. J. C. 774 the State of Bihar, respondent no. 1 has filed

counter-affidavit. In paragraph 6 it is stated that there has been no formal constitution of cadre in the R. V. P. D. and has denied the statement made by the petitioners in paragraph 8 of their counter-affidavit and the State of Bihar has given in tabular form the correct dates of promotion and deputations of the officers concerned and further it has been stated that the officers deputed to this department were mostly experienced and senior officers and there was nothing wrong in their retention in R. V. P. D. after they got promotion in their parent department. Again, it has been repeated in paragraph 7 that there has been no formal constitution of separate cadre for the R. V. P. D. it is further stated in this paragraph that it is correct to say that about 75% of promotional opportunities in the R. V. P. D. have been given in favour of the officers of the Irrigation Department. Since Engineers from diverse sources were brought to man this department in the initial stage, promotions have been decided stating the entire strength of Engineers irrespective of their sources and in the best interest of the R. V. P. D. Further in paragraph 11 it has been stated that since the promotion was given according to the combined gradation list there is no ground for apprehension. In this very paragraph it is also stated that there has been no formal constitution or separate cadre in the R. V. P. D. The claim of the officers of the R. V. P. D. have not been ignored. In many cases there have been quick promotions in the R. V. P. D. There is no discrimination against any officer. In paragraph 10 of the counter-affidavit it is also stated that Shri Sarjoo Sharan Singh, respondent no. 2, was already a Superintending Engineer and so the question of a reference to the Public Service Commission did not arise in that case.

50. In C. W. J. C. 706 also I find that a counter-affidavit has been filed on behalf of the State of Bihar, respondent no. 1 and Shri S. K. Banerji, respondent no. 2. The stand of the State of Bihar in this case is also similar to that in C. W. J. C. 774 and the statement in the counter-affidavit is also more or less the same.

In my opinion, there has been no violation of Articles 14 and 16 of the Constitution of India. Therefore, there is no merit in these three applications also.

51. In the result, all the seven writ applications are dismissed, but there will be no order as to the costs.

52. MISRA, C. J.:— I agree to the order proposed. Annexure Q to which reference is made no doubt mentions that River Valley Projects Department is separate (although it is not duly constituted) and that a proposal that the cadres of Irriga-

tion Department and that of River Valley Projects Department be amalgamated has not materialised owing to certain difficulties. But even on this assumption, the petition of Shri Sharan cannot succeed. Shri Banerji's appointment may well be treated as appointment. Even so the contention that direct recruitment could only be made in consultation with the Public Service Commission is not in consonance with the view of the Supreme Court as it has been held that failure to consult the Public Service Commission is a condonable irregularity unless it can be made out that it was a deliberate action on the part of the department concerned, (vide AIR 1957 SC 912). In the present case a strong sub-committee of senior officers was appointed to go into the matter and the committee recommended the appointment of Shri Banerji to the post of Chief Engineer of Gandak (Sone Barrage) Project on a consideration of the records of the officers including the petitioner Shri Sharan and others who were found definitely unfit for appointment to the post of Chief Engineer. In the circumstances, failure to consult the Public Service Commission under clause 3(b) of Article 320 of the Constitution cannot vitiate the appointment of Shri Banerji.

As to the existence of an independent cadre for the R. V. P. D. which is the sheet anchor of all the petitions and upon which the entire argument of the petitioners in all the applications has been substantially built up, I may state that State of Bihar is in the best position to say whether it is regularly constituted as a cadre. Annexure Q itself shows that in the opinion of Government it is not yet duly constituted, whatever the reason for it may be and that being so none of the applications has any substance and they must be dismissed.

Petition dismissed.

AIR 1970 PATNA 50 (V 57 C 7)

TARKESHWAR NATH AND

K. K. DUTTA, JJ.

Narain Das, Appellant v. Banarsi Lal and others, Respondents.

A. F. A. D. No. 396 of 1965, D/- 20-2-1969, from decision of 2nd Addl. Sub-J., Patna, D/- 12-3-1965.

(A) Limitation Act (1908), S. 14 — Pendency of civil proceeding — Court must ascertain period during which proceeding actually remained pending — Only this period has to be excluded under S. 14(1) and nothing more — AIR 1963 Pat 62 held to be not good law in view of AIR 1958 SC 827; AIR 1965 Andh Pra 388 (FB), Dissented from.

IM/IM/D882/69/SSG/D

The real purpose of S. 14 is to extend the period of limitation prescribed by adding the period during which the suit or other proceeding has been prosecuted with due diligence and in good faith in a Court which, either on account of defect of jurisdiction or other cause of a like nature, was unable to entertain it.

(Para 7)

The prosecution of a civil proceeding, whether in a Court of first instance or in a Court of appeal is absolutely necessary and the time spent during that prosecution alone has to be excluded under S. 14. There is nothing in S. 14(1) which can justify the view that the time taken by a party in taking steps for invoking the aid of the Court should also be excluded while computing the period of limitation. Explanation I to Section 14 clearly provides that in excluding the time during which a former suit or application was pending, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted. S. 14 has to be read as a whole along with the Explanation to that section. It is true that in S. 14(1) the word 'prosecution' has been mentioned, but in Explanation I the word 'pending' has been mentioned. Thus reading Section 14(1) along with Explanation I, it is the pendency of a civil proceeding, either in a court of first instance or in a Court of appeal, which has to be enquired into and then the Court has to ascertain the period during which the proceeding actually remained pending. AIR 1963 Pat 62 held to be not good law in view of AIR 1958 SC 827; AIR 1965 Andh Pra 388 (FB), Dissented from; AIR 1963 Ker 137 (FB) & (1913) 17 Cal WN 515, Foll. (Paras 11, 12)

Held under the circumstances and facts of the case that the plaintiff in suit under O. 21, R. 103, C. P. C. could claim exclusion only of the period which was taken in the prosecution of the civil revision application in High Court and he could not exclude the period between the date of the order of the executing Court and the date of filing of the revision petition. (And in so computing it was conceded that suit was barred by limitation).

(Paras 14, 8)

(B) Civil P. C. (1908), S. 11 — Parties claiming under parties in previous suit — Mortgagee and mortgagee — Mortgagee is not bound by decision against mortgagee in legal proceeding instituted after date of mortgage.

A person can be said to claim under another if he derives his title through the other one by assignment or otherwise, but his title must have arisen subsequently to the commencement of the previous suit. The entire object is that if the proceeding originally instituted was right and

proper, then any decision obtained therein would bind all persons on whom that right or interest might devolve, provided the latter set of persons derived any title through the persons who were parties to the previous proceeding. A mortgagee is a transferee from the mortgagor of an interest in the property mortgaged, and as such in respect of the interest conveyed the principle of *res judicata* is applicable. In other words, the mortgagee would be bound by a decision against his mortgagor in respect of the property mortgaged, provided the decision was arrived at in a suit which was instituted prior to the mortgage. Thus the mortgagee is not bound by a decision against his mortgagor, in legal proceedings instituted after the date of mortgage. AIR 1949 Cal 666 & AIR 1953 Mys 111 & AIR 1935 All 351, Foll.

(Para 15)

(C) Civil P. C. (1908), S. 100 — Question as to when there was partition among four brothers is entirely one of fact — Finding given by Addl. Sub-Judge cannot be interfered with in second appeal. (Para 16)

Cases Referred: Chronological Paras

- (1965) AIR 1965 Andh Pra 388 (V 52)
= (1965) 2 Andh LT 62 (FB), Tirumareddi Rajarao v. State of Andhra Pradesh II
- (1963) AIR 1963 Kerala 137 (V 50) =
1962 Ker LT 955 (FB), Thycattuseri Church v. Sicillyamma II
- (1963) AIR 1963 Pat 62 (V 50),
Mt. Bibi Aziman v. Mt. Saleha 8, 9, 14
- (1958) AIR 1958 SC 827 (V 45) =
1959 SCR 811, Raghunath Das v. Gokal Chand 9, 10
- (1953) AIR 1953 Mys 111 (V 40) =
ILR (1953) Mys 98, Doddarangappa v. Kenchegowda 15
- (1949) AIR 1949 Cal 666 (V 36),
Chandi Prosad Ganguli v. Gajadhar Singha 15
- (1949) AIR 1949 Pat 293 (V 36) =
ILR 28 Pat 102 (FB), Lal Bihari Lall v. Beni Madhava Khatri 9
- (1937) 1937 Mad WN 465(2), Alagappa Chettiar v. Somasundaram Chettiar II
- (1935) AIR 1935 All 351 (V 22) =
1934 All LJ 597, Mt. Katori v. Om Prakash 15
- (1915) AIR 1915 Mad 405 (V 2) =
ILR 39 Mad 62, Baiznath Lala v. Ramadoss II
- (1913) 17 Cal WN 515 = 18 Ind Cas 121, Haridas Roy v. Sarat Chandra Dey 13
- (1912) 17 Ind Cas 593 (Mad), Venkatragayya Appa Row v. Sriramulu II
- Lalnarayan Sinha (Advocate General) and Ramnandan Sahai Sinha, for Appellant; R. S. Sinha, Purnendu Narayan Prasad and Jagdish Pandey, for Respondent

No. 1; Ashok Kumar for Choudhary, S. N. Mishra, for Respondent No. 6.

TARKESHWAR NATH, J.— This appeal by the plaintiff arises out of a suit for a declaration that the decree passed in Mortgage Suit No. 176 of 1943 was illegal, collusive, fraudulent and not binding on him and his interest was not affected by the said decree. The plaintiff further asked for a decree for recovery of possession in respect of a land measuring 0.91 acre being a portion of plot no. 575 of khata no. 171 (not 137 as mentioned in the plaint) of village Jathuli, touzi no. 66. The plaintiff wanted a decree for mesne profits as well.

2. The plaintiff stated that one Lakshman Mistry had four sons, namely, Srichand, Tulsi and Daroga (from one wife) and Jagarnath (from another wife). All of them were members of a joint Mitakshara family and Daroga happened to be the Karta of that family. It will be necessary to state here the names of the other members of that family. Srichand had two sons, Dhupnarain and Sadhu. Dhupnarain left a son, Ramchandra. Tulsi left two sons, Banwari and Dargahi. Daroga also had two sons, Ramlagan and Bhagwan. Hari (defendant no. 3) is the son of Ramlagan, whereas Parbhu and Ramdayal (defendants 4 and 5) are the sons of Bhagwan Lakhan Lal (defendant no. 6) is the minor son of Hari. Banarsi Lal and Mukha Lal (defendants 1 and 2) do not belong to this family. Sometime either in the year 1911 or 1912 dispute arose among the three sons of Lakshman on one hand and the fourth son, Jagarnath, on the other in respect of the joint family properties, and those three full-brothers were trying to deprive Jagarnath of his share in the family properties even to the extent of executing some fictitious documents in favour of strangers. The family, however, continued to be joint till August, 1924, but by an Ekranama dated 22-9-1924 those members separated amongst themselves, with the result that Srichand, Tulsi and Daroga got 2/7th share each in the joint family properties, whereas Jagarnath got 1/7th share only. Defendants 3 to 6 were described as the defendants second party.

On 20-4-1942 the plaintiff purchased by a sale deed executed by Banwari and Dargahi, the sons of Tulsi, of their interests in certain properties, including their interest in plot no. 575 of khata no. 171 and plot no. 1023 of another khata. Defendants 3 to 5 raised a dispute with regard to the possession of the land bearing plot no. 1023 of khata no. 410, with the result that there was a proceeding under Section 145 of the Code of Criminal Procedure in respect of the disputed area. An adverse order was passed

against the plaintiff on 20-11-1945, and hence he and 12 others instituted Title suit no. 189 of 1945 in the Court of Munsif against Ramprasad, Bihari Lal (who are not parties to the suit giving rise to this appeal), Hari, Parbhu and Ramdayal (who are defendants 3 to 5 in the present suit also) and two others, namely, Bhagwan and Ramlagan (who were described as defendants second party in that suit) for adjudication of their title, recovery of possession, mesne profits and other reliefs. The plaint was, however, returned as the valuation of the suit was increased and the plaint was then refiled in the Court of Subordinate Judge on 9-5-1949 and the suit was numbered as Title Suit 27 of 1949. That suit was decreed by the Additional Subordinate Judge, 2nd Court, Patna, on 22-9-1950. The title of the plaintiffs (of that suit) was declared, and a decree for recovery of possession and mesne profits was passed in their favour. The amount of mesne profits was to be determined in a subsequent proceeding. Later on, Execution Case No. 39 of 1952 was filed to execute that decree for mesne profits (after ascertainment) and 0.91 acre out of plot no. 575 was purchased by the plaintiff-decree-holders of Title Suit No. 27 of 1949 on 19-5-1953.

3. It appears that on 31-1-1917 Tulsi and his two sons, Banwari and Dargahi, had sold their 2/7th share in plot no. 575 to Daroga, with the result that Daroga acquired, all told, 4/7th share. On 24-1-1936 Daroga executed a mortgage bond in respect of 3/7th share of plot no. 575 in favour of Mukha Lal (present defendant no. 2), and the mortgagee (defendant no. 2) filed Title Suit No. 176 of 1943 to enforce that mortgage against defendants 3, 4 and 5 (the grandsons of Daroga). A preliminary mortgage decree was passed on 20-11-1944 and the final decree was passed on 29-9-1948. Defendant no. 2 filed Execution Case No. 585 of 1951 to execute that decree, and the present defendant no. 1 (Banarsi Lal) purchased 1.35½ acres of plot no. 575 on 18-6-1953 and the sale was confirmed on 18-7-1953. Later on, defendant no. 1 applied for delivery of possession in respect of the land purchased by him, but the plaintiff resisted the delivery of possession and hence the petition of defendant no. 1 complaining about the resistance was registered as Miscellaneous Case No. 281 of 1954 and it was allowed on 17-8-1954, with a direction to issue a fresh writ for delivery of possession in respect of the land purchased by him. The plaintiff, being aggrieved by the said order, filed Civil Revision No. 913 of 1954 in this court, but it was dismissed on 7-9-1955. The plaintiff further alleged that the sale deed dated 31-1-1917 was a fictitious and fraudulent

one and the said mortgage bond and the proceedings in the mortgage suit also were fraudulent and collusive. The case of the plaintiff was that he was not at all a party to the Title (Mortgage) Suit No. 176 of 1943, and hence the decree passed in that suit was not binding on him. The suit giving rise to this appeal was instituted on 6-9-1956 for the reliefs already indicated.

4. Defendant no. 1 contested the suit on grounds inter alia that the four sons of Lakshman had separated long before the year 1917 and they were dealing with the properties separately from time to time. The Ekrarnama of the year 1924 referred to by the plaintiff was not a valid one and, in any event, by that Ekrarnama there was only an adjustment of certain disputes amongst the four brothers and it did not, in any way, affect the right acquired by Daroga by virtue of the sale deed dated 31-1-1917. That sale deed was executed by Tulsi and his two sons for legal necessity and Daroga acquired a valid title in respect of 4/7th share in the disputed plot no. 575. He further stated that Daroga had validly executed the mortgage bond dated 24-1-1936 in respect of 3/7th share of plot no. 575, and on his failure to pay the mortgage dues Title (Mortgage) suit no. 176 of 1943 was rightly instituted and a decree obtained in that suit. The auction sale in respect of 1.35½ acres of plot no. 575 on 18-6-1953 as well was quite valid and legal. He challenged the sale deed dated 20-4-1942 in favour of the plaintiff as having been collusive and fictitious, inasmuch as Banwari and Dargahi had no subsisting right at all to transfer the property by that sale deed. The other plea taken by defendant no. 1 was that the suit was barred by limitation.

5. The Additional Munsif held that the suit was barred by time under Article 11(i) of the Limitation Act, as it was instituted more than a year after the order passed by the executing court on 17-8-1954. But besides this, he further held that the sale deed in favour of the plaintiff dated 20-4-1942 executed by the sons of Tulsi was invalid and illegal, as those heirs of Tulsi had no right to transfer the land mentioned in that sale deed. In other words, the plaintiff had acquired no title. In view of those findings, he dismissed the suit. Being aggrieved by the dismissal of the suit, the plaintiff filed an appeal, but he was unsuccessful and the appeal was dismissed by the Additional Subordinate Judge. Hence, the plaintiff has filed this second appeal.

6. The learned Advocate General for the appellant raised two points in this appeal. The first one was that the Courts below had taken an erroneous view on

the question of limitation and the suit in fact was not barred by time. The second point was that the decision in the previous Title Suit No. 27 of 1949 operated as *res judicata* and it was not open to the Courts below to hold that there was any separation among the four brothers, Srichand, Tulsī, Daroga and Jagarnath before the year 1917. It will be convenient to deal with these points in the order in which they have been urged.

7. In order to appreciate the contention of the learned Advocate General on the first point, it is necessary to mention the relevant dates once again, Miscellaneous Case No. 281 of 1954 under Order 21, Rule 97 was allowed on 17-8-1954. Thereafter, the plaintiff filed Civil Revision No. 913 of 1954 in this Court on 28-9-1954 but it was dismissed on 7-9-1955. The present suit was filed on 6-9-1956. The contention was that the suit was within one year of the order of this Court in the said Civil revision and in any event the plaintiff was entitled to get the benefit under Section 14(1) of the Limitation Act (before the present amendment of the said Act) in respect of the entire period commencing from 18-8-1954 and ending on 7-9-1955. Section 14(1) of the Limitation Act, 1908, reads thus:

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in a court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

Explanation I of that section reads thus: "In excluding the time during which a former suit or application was pending the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted."

The real purpose of this section is to extend the period of limitation prescribed by adding the period during which the suit or other proceeding has been prosecuted with due diligence and in good faith in a Court which, either on account of defect of jurisdiction or other cause of a like nature was unable to entertain it. In other words, if a person has tried his level best to get his case tried on the merits but, if on account of defect of jurisdiction or other cause of a like nature, his case cannot be tried, then he should get the benefit in respect of the period during which he diligently prosecuted that suit or other proceeding.

8. According to Article 11A of the Limitation Act, 1908, a suit has to be instituted by a person within one year of the date of the order passed against him in a proceeding under Order 21, Rule 97 of the Code of Civil Procedure. In the present case, the order of the executing Court against the plaintiff was passed on 17-8-1954 and, therefore, the period of one year has to be calculated from 18-8-1954 itself.

The plaintiff, is, however, entitled to get the benefit under Section 14 of the Limitation Act, in the sense that the period during which his application (civil revision) was pending in this court, has to be excluded. The contention of the learned Advocate General, however, was that before the filing of the Civil revision in this court the plaintiff had to obtain the certified copy of the order dated 17-8-1954 (Ext. Anga) and, besides that, he had to make necessary preparations for the filing of the civil revision and as such the plaintiff was entitled to exclude the entire period commencing from 18-8-1954 and till the filing of the application in revision. He, however, fairly conceded that if that period would not be excluded, then this suit under Order 21, Rule 103 of the Civil Procedure Code was obviously barred by time, as it was not instituted within one year of the order dated 17-8-1954. According to Article 11A of the Limitation Act, the present suit ought to have been instituted within one year of the said order. The learned Additional Subordinate Judge relied on the decision in *Mt. Bibi Aziman v. Mt. Saleha*, AIR 1963 Pat 62 and held that the plaintiff was not entitled to exclude that period and hence the suit was barred by time.

9. The short question for consideration is as to whether the plaintiff was entitled to exclude the said period according to the provisions of Section 14(1) of the Limitation Act. The learned Advocate General submitted that it was true that in the case of *Mt. Bibi Aziman*, AIR 1963 Pat 62, only the actual period during which an application in revision filed earlier remained pending was excluded under Section 14(1), but this view was not a sound one on account of the earlier decision of the Supreme Court in *Raghunath Das v. Gokal Chand*, AIR 1958 SC 827. It is thus necessary first, to consider the Division Bench decision of this court in the case of *Mt. Bibi Aziman*, AIR 1963 Pat 62. The Miscellaneous Case No. 42 of 1953 was dismissed on 14-5-1954 and hence the plaintiffs had filed Civil Revision No. 699 of 1954 on 3-8-1954 but it was dismissed summarily on 16-9-1954. The suit giving rise to that appeal was then filed on 14-9-1955. A question arose whether

the suit was barred by time. Reliance was placed on the Full Bench decision of this court in *Lal Bihari Lall v. Beni Madhava Khatri*, ILR 28 Pat 102=AIR 1949 Pat 293 and it was held that the plaintiffs were entitled to deduct the period from 3rd August, 1954 to 16th September, 1954 only, but even then the suit instituted on 14-9-1955 was barred by time, inasmuch as they had made a long delay for a period of one year in instituting that suit after the dismissal of their application in revision.

In order to get rid of that difficulty, learned counsel for the appellants had submitted that the "date of order" in Article 11A of the Indian Limitation Act should be taken to mean the date of the final order, from which the period of one year, prescribed for a suit under that Article, should commence. But this submission was not accepted and it was pointed out that the order passed in the miscellaneous case in fact gave a cause of action to the plaintiffs for a suit to establish the right which they claimed in respect of possession of the property in question. I held distinctly in that case that the order dated 14-5-1954 being adverse to the plaintiffs their cause of action accrued on that date, and the period of limitation for the suit commenced immediately after the passing of that order but they could take the benefit of Section 14(1) so far as the period between 3rd August, 1954 and 16th September 1954 was concerned.

10. The learned Advocate General laid great stress on the decision of the Supreme Court in the case of *Raghunath Das*, AIR 1958 SC 827. The order of the Court accepting the award with certain modification was passed on 18-11-1936. On 15-11-1939 *Raghunath Das* filed an application in the court of the District Judge for execution of the decree passed in terms of the modified award, but the said application was dismissed on 23-12-1942 on the objection of *Gokul Chand*.

On appeal by *Raghunath Das* to the High Court, a learned Single Judge accepted the appeal on 5-4-1944, but on Letters Patent Appeal filed by *Gokul Chand*, the Division Bench reversed the order of the learned Single Judge on 15-3-1945 and restored the order of dismissal passed by the Subordinate Judge (to whom the execution had been transferred). *Raghunath Das*, having failed to get relief granted to him by the said decree instituted suit no. 80 of 1945 against *Gokul Chand* on 21-8-1945 for recovery of a certain sum still due out of the sum awarded in his favour. That suit was decreed on 22-12-1945 and there being no appeal that decree became final. On 5-6-1946 *Raghunath Das* filed Suit No. 239 of 1946

claiming inter alia that *Gokul Chand* be ordered to transfer G. P. Notes of a certain value. A question arose in the appeal arising from that suit as to whether that suit was barred by time. It was pointed out in that case that the period of limitation fixed by Article 120 was six years from the date when the right to sue accrued. The plaintiff in that case, in order to be within the period of limitation claimed to exclude the period, November 15, 1939 to March 15, 1945, spent in the execution proceedings. Their Lordships quoted the provisions of Section 14(1) of the Indian Limitation Act and thereafter observed as follows:—

"The respondent contends that the above section has no application to the facts of his case. We do not think that such contention is well founded. The execution proceedings initiated by *Raghunath Das* were certainly civil proceedings and there can be no doubt that he prosecuted such civil proceedings with due diligence and good faith, for he was obviously anxious to have his share of the G. P. Notes separately allocated to him. He lost in the execution court but went on appeal to the High Court where he succeeded before a single Judge, but eventually he failed before the Division Bench which reversed the order the Single Judge had passed in his favour. Therefore, there can be no question of want of due diligence and good faith on the part of *Raghunath Das*. In the next place the section excludes the time spent both in a court of first instance and in a court of appeal. Therefore, other conditions, being satisfied the entire period mentioned above would be liable to be excluded."

The learned Advocate General submitted that in that case their Lordships had excluded the entire period, November 15, 1939 to March 15, 1945. His further submission was that some time must have elapsed between the order of the executing court and the filing of an appeal in the High Court which was put up before a Single Judge, and similarly a few days must have intervened between the date of order of the Single Judge and the date when the Letters Patent Appeal was filed. According to him, even those intervening periods also were excluded under Section 14(1) and that was really the effect of the decision of their Lordships. With regard to this contention, it is necessary to point out that the question as to whether the intervening periods should be excluded or not does not seem to have been raised and it can not thus be said that their Lordships dealt with that question and expressed their opinion on that question. On the other hand, they observed that the time spent both in a court of first instance and in a

Court of appeal had to be excluded. The position thus is that only the period during which the proceeding actually remains pending either in the court of first instance or in the court of appeal can be excluded under Section 14(1). The decision of the Supreme Court cannot be interpreted in the manner suggested by the learned Advocate General.

11. The learned Advocate General referred to Tirumareddi Rajarao v. State of Andhra Pradesh, AIR 1965 Andh Pra 388 (FB), to support his contention that the provisions of Section 14 should be interpreted liberally and the plaintiff in the present case was entitled to exclude the period which intervened between the date of the order of the executing court and the date of the filing of the application in revision.

In that case the appellants had filed an application under Order 21, Rules 100 and 101 of the Civil Procedure Code claiming the properties as their own and seeking to dispossess the Government as representing the decree-holder-auction-purchaser. That application was rejected by the executing court on 9-7-1953. Instead of having recourse to Order 21, Rule 103 of the Code the appellants filed a civil revision petition in the High Court of Judicature at Madras on 23-9-1953. But the petition was dismissed on 18-10-1955 presumably for the reason that it did not involve any question relating to jurisdiction within the connotation of section 115 of the Code.

The appellants then filed a suit on 15-10-1956 for the setting aside of the adverse order dated 9-7-1953, but the suit having been instituted more than one year after the date of the impugned order as prescribed by Article 11A of the Indian Limitation Act, the appellants sought the aid of Section 14 of that Act. The defendants pleaded that Section 14 (1) of the Limitation Act enabled the plaintiffs to deduct only the period between the date of the filing of the civil revision petition and the disposal thereof, i. e., from 23-9-1953 to 18-10-1955. This defence prevailed with the Courts below and the suit was dismissed as it was not brought within one year (excluding the period of pendency of the civil revision petition), although the finding on the question of title was in favour of the appellants. The aggrieved plaintiffs filed a second appeal which was ultimately referred to a Full Bench, inasmuch as the decision of that appeal turned entirely on the provisions of Section 14 of the Limitation Act. The question to be answered by the Full Bench was formulated in these words:

"Whether the consistent view as held in Venkatragayya Appa Row v. Sriramulu (1912) 17 Ind Cas 593 (Mad); Baiznath Lala v. Ramadoss, ILR 39 Mad 62=AIR

1915 Mad 405 and Alagappa Chettiar v. Somasundaram Chettiar, 1937 Mad WN 465(2) that only the pendency of the infructuous revision should be excluded under Section 14(1) of the Limitation Act, requires re-consideration in view of Rule 41-A(2) of the Appellate Side Rules prescribing the period of 90 days for civil revision petitions, or for any other reason, so as to exclude the entire period from the date of the adverse order to the date of disposal of the infructuous revision under the said provision of the Limitation Act."

Dealing with this question their Lordships observed as follows:

"It is also to be borne in mind that sub-section (1) makes no reference to the pendency of the suit, appeal or other proceeding in a Court of Law. The legislature has used words of general import and of widest amplitude. So, we do not find any justification for reading as restriction into that sub-section and to hold that the time during which a party was engaged in taking steps for invoking the aid of the Court falls outside the contemplation of that section. If we give effect to the contention urged on behalf of the respondents while the pendency of a proceeding in a Court could be deducted in computing the period of limitation, the time occupied in obtaining certified copies of the judgment, which is an essential requisite for the filing of an appeal or revision in the higher Court has to be disregarded for purposes of Section 14. We do not think that the legislature would have contemplated such a situation. It would certainly result in an anomaly to hold that the time covered by taking steps absolutely necessary for initiating proceedings in a Court should be included in calculating the period of limitation while the time during which a former suit or application was pending in a Court should be excluded. In our considered judgment, the Section does not make any distinction between the steps which a litigant has to take to initiate proceedings in a Court and the actual pendency of those proceedings in the Court."

The ultimate conclusion of their Lordships was that there was no scope for limiting the ambit of Section 14 to pendency of infructuous proceedings in a Court of Law and to disregard the time taken for taking the indispensable and preparatory steps to institute proceedings which ultimately proved to be fruitless. The answer to the question was given in this manner. With great respect, I am unable to share the view taken by their Lordships, inasmuch as the prosecution of a civil proceeding, whether in a Court of first instance or in a court of appeal is absolutely necessary and the time spent during that prosecution alone has to be

excluded under Section 14. There is nothing in Section 14(1) which can justify the view that the time taken by a party in taking steps for invoking the aid of the Court should also be excluded while computing the period of limitation. Explanation I to Section 14 clearly provides that in excluding the time during which a former suit or application was pending, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted. Section 14 has to be read as a whole along with the Explanation to that section. It is true that in Section 14 (1) the word 'prosecution' has been mentioned, but in Explanation I the word 'pending' has been mentioned. The position thus is that reading section 14(1) along with Explanation I, it is the pendency of a civil proceeding, either in a Court of first instance or in a Court of appeal, which has to be enquired into and then the Court has to ascertain the period during which the proceeding actually remained pending. The view which I am taking is in consonance with the principles laid down in *Thycattuseri Church v. Sicillyamma*, AIR 1963 Ker 137 (FB). The majority view in that case was expressed in these terms:

"Assuming, without deciding, that Section 14, Limitation Act, applies, it allows exclusion only of 'the time during which the plaintiff has been prosecuting. . . . another civil proceeding, which is the revision petition in this case. The period of actual pendency of the revision petition can alone be thus excluded from computation . . . Plaintiff can therefore claim exclusion only of the period which with his filing of the revision petition and ended with the passing of the order thereon. He cannot exclude the period between the date of the order of the executing Court and the date of his filing the revision petition, for he could not have been prosecuting a proceeding while he was merely making up his mind to apply for revision."

Govindan Nair, J., took the view that under Article 11A the period of one year provided by that Article should be computed from the date of the order of the revision in the High Court and not the date of the order of the execution Court, and as such his Lordship did not go into the question as to whether Section 14 of the Limitation Act was attracted. In other words, his Lordship refrained from expressing any opinion on that point. So far as the contrary view taken by Govindan Nair J., is concerned, it has not been urged in the present case that the period of one year should be counted from the date of the order in revision, and it is thus not necessary to deal with that aspect.

12. The provisions of Section 14 (1) of the Limitation Act are quite clear and there is absolutely no difficulty in interpreting those provisions. This section provides for exclusion of time. A question arises as to which time has to be excluded? The answer is furnished by Section 14 itself, inasmuch as it envisaged that the time during which a civil proceeding has been prosecuted with due diligence, whether in a Court of first instance or in a court of appeal, has to be excluded. There must be actual prosecution of the civil proceeding, either in the Court of first instance or in the Court of appeal. What should be deemed to be the period during which a proceeding can be said to have been prosecuted? In order to get an answer to this question Explanation I to Section 14 is helpful. A proceeding should be deemed to have started on the date of the presentation of the plaint or application. In other words, the date of prosecution can be safely said to be the date when the proceeding commenced. The date when the proceeding came to an end can be said to be the date of termination of the proceeding. The entire period from the date of institution of the suit till its disposal can alone be said to be the period during which the suit or the civil proceeding was prosecuted. This period has to be excluded under Section 14(1) and nothing more.

13. I would now refer to *Haridas Ray v. Sarat Chandra Dey*, (1913) 17 Cal WN 515. The plaint in that case was filed on 25th February, 1907 (24th February being a Sunday), that is to say, on the last day of the period of limitation. The Subordinate Judge raised and tried an issue on the question of valuation and held that the value of the suit was less than Rs. 1000. He accordingly returned the plaint to the plaintiff on 30-1-1908 for presentation to the proper Court within a week. The proper Court was the Court of the Munsif of Ranaghat, and the plaint was filed in that Court on 4th February, 1908. The defendant took the plea that the suit was barred by limitation and contended that the plaintiff was entitled only to the allowance for the period during which the suit was actually being tried in the Court of the Subordinate Judge as provided under Section 14 of the Limitation Act and the Subordinate Judge could not extend that period by his order directing the plaintiff to file the plaint in the proper Court within a week.

Five days had elapsed between the return of the plaint by the Subordinate Judge and the re-filing of the same in the Court of the Munsif of Ranaghat, with the result that the period of limitation was exceeded by five days. The Munsif held that the suit was barred by limitation and he dismissed it. On first appeal,

the District Judge set aside the judgment and decree of the Munsif and remanded the suit to him for trial. Against the order of the District Judge an appeal was filed before the High Court. Their Lordships held that the view taken by the Munsif was quite correct and only the period during which the suit was pending in the Subordinate Judge's Court without jurisdiction could be excluded under Section 14 of the Limitation Act, and, in that view of the matter, the suit of the plaintiff stood dismissed with costs.

14. On a consideration of the question of limitation I am of the opinion that the plaintiff could claim exclusion only of the period which was taken in the prosecution of the civil revision application in this Court and he cannot exclude the period between the date of the order of the executing Court and the date of filing of the revision petition (28-9-1954). The learned Additional Subordinate Judge has rightly excluded the period during which the application in revision was pending in this Court. But even after that exclusion the suit filed on 6-9-1956 was barred by time. I would thus affirm this finding of the learned Additional Subordinate Judge. The learned Advocate General had further suggested that this second appeal should be referred to a larger Bench in order to examine further the provisions of Section 14 of the Limitation Act and to ascertain the correctness or otherwise of the view taken in the case of *Mt. Bibi Aziman*, AIR 1963 Pat 62. But I do not find any justification for adopting that course.

15. The second point which arises in this appeal is as to whether the decision in Title Suit No. 27 of 1949 dated 22nd September, 1950, operated as *res judicata*. The plaintiff (who was plaintiff no. 1 in that suit) and plaintiffs 2 to 13 (of that suit) had described the properties in Schedule I of the plaint of that suit in the following manner:

"16 annas share in Mauza Sambalpore Makhdumpore bearing tauzi No. 16 C Lakhraj including garden known as 6 (six) Bigha was measuring 3.18 acres in Plot No. 1023 under Khata No. 410 . . ."

The plaintiffs there wanted a declaration of their title, recovery of possession and mesne profits, besides other reliefs in respect of that property. Their case was that after the death of Lakshman Mistry his sons, Srichand, Daroga, Tulsi and Jagarnath partitioned the family properties. Daroga, Tulsi and Srichand took 2/7th share each, viz., 4 annas 6 pies each, whereas Jagarnath took 1/7th share, viz., 2 annas 6 pies, in the joint family properties. They further stated that plaintiff No. 1 was the purchaser of 4 annas 6 pies and odd share of the property in suit

by a registered sale deed dated 20-4-1942 (not 2-4-1942, as stated in the plaint) executed by Dargahi and Banwari, sons of Tulsi. The position thus was that that suit was not in respect of any portion of plot No. 575 (which is in dispute in the present suit giving rise to this appeal). The case of defendant No. 3, Hari Mistry, in that suit, on the other hand, was that the sons of Lakshman Mistry separated during the lifetime of Lakshman and the property in dispute (that suit) was acquired in the year 1896 by Daroga alone out of his self-acquired income and that the brothers of Daroga had absolutely no concern with that property. Issue No. 4 in that suit was as to whether the sale deed dated 2-4-1942 (which ought to be 20-4-1942) and the *ijara* dated 8-11-1943 were valid and genuine?

Issue No. 6 was whether Daroga and his two brothers were separate from Lakshman? The case of the plaintiffs in that suit was that all the sons of Lakshman were joint amongst themselves till the year 1924 and the separation took place in that year. The Additional Subordinate Judge, 2nd Court, Patna, tried the suit and decreed the suit on 22-9-1950. He believed the case of the plaintiffs that Jagarnath and his brothers were joint till the year 1924 and separation took place in that year. He disbelieved the case of defendant No. 3, that Daroga and his brothers were separate in the lifetime of Lakshman. He further found that the defendants had failed to prove that the disputed property was the self-acquired property of Daroga. The sale deed relied upon by the plaintiffs in that case was treated as valid and the ultimate conclusion was that the plaintiffs had proved their title and possession in respect of the disputed property in which plaintiff No. 1 had 9 annas share, whereas plaintiffs 2 to 9 had 7 annas share. The learned Advocate General pressed that these findings operated as *res judicata* and the same question could not be reagitated by the present defendants in the suit which had given rise to this appeal. Section 11 of the Civil Procedure Code, omitting the Explanations, reads thus:

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

It is quite clear that the present defendants 1 and 2 were not parties to Title Suit No. 27 of 1949. The next question which arises for consideration is as to

whether these defendants were making any claim under persons who were parties to that suit and whether they were litigating under the same title. A person can be said to claim under another if he derives his title through the other one by assignment or otherwise, but his title must have arisen subsequently to the commencement of the previous suit. The entire object is that if the proceeding originally instituted was right and proper, then any decision obtained therein would bind all persons on whom that right or interest might devolve, provided the latter set of persons derived any title through the persons who were parties to the previous proceeding. A mortgagee is a transferee from the mortgagor of an interest in the property mortgaged, and as such in respect of the interest conveyed the principle of *res judicata* is applicable. In other words, the mortgagee would be bound by a decision against his mortgagor in respect of the property mortgaged, provided the decision was arrived at in a suit which was instituted prior to the mortgage. Some relevant dates have to be noticed once again in this connection. The mortgage bond by Daroga was executed in favour of the present defendant no. 2 on 24-1-1936 in respect of 3/7th share of plot No. 576, and on the basis of that mortgage bond defendant No. 2 instituted Title Suit No. 176 of 1943 against defendants 3, 4 and 5 (the grandsons of Daroga). In execution of that mortgage decree defendant No. 1 purchased 1.35½ acres (corresponding to 3/7th share) of Plot No. 576 on 18-6-1953. In other words, instead of the decree-holder (defendant No. 2) having purchased the property, there was a stranger purchaser, such as defendant No. 1. Title Suit No. 27 of 1949 was decided on 22nd September, 1950, and this was long after the execution of the mortgage bond in the year 1936. The position thus is that neither the mortgage (defendant No. 2) nor the auction purchaser (defendant No. 1) can be bound by the decision in Title Suit No. 27 of 1949. If defendant No. 2 had acquired the mortgagee's interest after the decision of that suit, the position would have been quite different; but it is not so in the present case. I would refer in this connection to Chandi Prosad Ganguly v. Gajadhar Singha, AIR 1949 Cal 666. On a review of a catena of decisions Das Gupta, J., who delivered the leading judgment, observed in paragraph 17 as follows:

"In the face of this long line of decisions of this Court, and also of other High Courts in India the question whether the mortgagee is bound by a decision against his mortgagor, in legal proceedings instituted after the date of the mortgage is no longer open to discussion. The question is concluded by authority. We may

add that we respectfully agree with the proposition laid down in these decisions, and hold that the mortgagee is not bound by a decision against his mortgagor, in legal proceedings instituted after the date of mortgage."

A similar view was taken in *Doddarangaappa v. Kenchegowda*, AIR 1953 Mys 111. Mallappa J. quoted the following observations made in *Mt. Katori v. Om Prakash*, AIR 1935 All 351:

"Any decision obtained against a mortgagor after the execution of a mortgage-deed cannot operate as '*res judicata*' against the mortgagee, if he (the mortgagee) was not a party to the suit. Much less will a decision between a transferee of the mortgagor and a third person operate as '*res judicata*' between the mortgagee and such transferee when the same question arises in a subsequent suit. The mortgagee cannot be considered to be litigating under the same title in the subsequent as the mortgagor did in the earlier suit. Nor can he be said to be litigating under the same title as the transferee of the mortgagor."

This view was adopted by his Lordship. I am in full agreement with the principles laid down in these decisions, and I have not the least hesitation in holding that the decision in Title Suit No. 27 of 1949 cannot operate as *res judicata*, and it was open to the Courts below to consider the case of the respective parties on the question of separation among the four sons of Lakshman.

16. The case of the plaintiff was that the said four brothers remained joint till the year 1924 and thereafter there was a partition in the same year. The case of the contesting defendants, on the other hand, was that there was a separation among the four brothers even before the year 1917 when Tulsi and his two sons sold 2/7th share in Plot No. 575 to Daroga. Subsequently, Daroga had executed a mortgage bond on 24-1-1936 in favour of defendant No. 2 in respect of 3/7th share of the same plot. On a careful consideration of the oral and documentary evidence, the Courts below disbelieved the case of the plaintiff and accepted the case of the defendants. The case of the contesting defendants having been accepted, it is quite clear that the vendors of the plaintiff, Banwari and Dargahi, sons of Tulsi were not entitled to execute the sale deed dated 20-4-1942 in favour of the plaintiff and the plaintiff acquired no title in respect of the land in suit on the basis of the said sale deed, inasmuch as Tulsi had already parted with his share in Plot No. 575 in favour of Daroga. The learned Additional Subordinate Judge gave a categorical finding in view of the oral and documentary evidence that Tulsi's sons had neither title

nor possession in respect of Plot No. 575 and hence the plaintiff acquired neither title nor possession in respect of the disputed land. Mr. Ramnandan Sahai Sinha, who also appeared on behalf of the appellant, submitted towards the close of the argument that the evidence of D. Ws. 1 and 3 had not been properly considered by the learned Additional Subordinate Judge and, therefore the finding given by him was vitiated.

I do not find any justification for accepting this contention, inasmuch as the learned Additional Subordinate Judge has referred to the evidence of D. W. 1 and pointed out that he was a competent witness and he had deposed that there was partition in the family of Tulsi. His testimony was accepted by the learned Additional Subordinate Judge, as, according to him, it fitted in with the circumstances and other documents. The question as to when there was a partition among the four brothers was entirely one of fact and the finding given by the learned Additional Subordinate Judge cannot be interfered with in this second appeal. Learned counsel for the appellant has not been able to point out that any error of recording was committed by the Court before giving that finding. I am of the opinion that the Courts below have rightly dismissed the plaintiff's suit.

17. In the result, the appeal is dismissed with costs payable to respondent No. 1 (defendant No. 1).

18. DUTTA, J.:— I agree.

Appeal dismissed.

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(V 57 C 8)

S. C. MISRA, C. J. AND B. D. SINGH J.

Hansraj Bagracha and others, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jurisdiction Cases Nos. 520 and 759 of 1967 with Civil Writ Jurisdiction Cases Nos. 6 and 34 of 1968, D/- 4-1-1969.

Sales Tax — Bihar Sales Tax Act (19 of 1959), Ss. 3A, 5A, 42 and 46(1)(ii) — Bihar Sales Tax Rules (1959), Rr. 31B and 8C — Constitution of India, Arts. 301, 304(b) Proviso and 245 — Central Sales Tax Act (1956), S. 15 — Ss. 3A and 5A do not contravene Art. 301 of Constitution or S. 15 of Central Act — Ss. 42 and 46 not invalid on ground of excessive delegation of legislative functions — Rr. 31B and 8C are reasonable and valid — Fresh assent of President not necessary merely because Ss. 42 and 46 have been used for new purpose.

A non-discriminatory tax on intra-State sales does not, per se, offend Art. 301 of the

GM/IM/D113/69/JHS/D

Constitution, unless it directly impedes the very movement or transport of the goods. Under the Bihar Sales Tax Act, 1959, the tax imposed by Ss. 3A and 5A, which were introduced from 1-4-1967, is non-discriminatory. It places the burden uniformly on goods without reference to the territory or the source wherefrom they may be derived. The tax being a tax on intra-State sale is not with reference to movement, and does not otherwise impede movement. S. 42 and Rule 31B of the Bihar Sales Tax Rules (1959) do not impede movement at all. Even assuming that they do so the tax is not conditioned by or with reference to movement. The tax burden does not impede movement. Ss. 3A and 5A were made at a different point of time than S. 42 and R. 31B and the former were quite independent of the latter. Ss. 3A and 5A are completely independent and separate and they do not depend upon the existence of S. 42 and Rule 31B. The burden of the tax arises immediately when a first purchase by the registered dealer takes place, which has been made abundantly clear in Rule 8C. The movement may or may not take place at all of such purchased goods. They may be consumed in the State itself, and if at all they are moved, that is an event distinct and separate from the purchase. Ss. 3A and 5A are not attracted to a case where the purchase is connected with movement and where the movement is in pursuance of a contract of sale or purchase. When such transactions become inter-State sales, they are expressly excluded under the provisions of S. 4 of the Bihar Act. Ss. 3A and 5A have no application to such inter-State sales. These two sections are attracted only to the transactions which are taxable as intra-State purchases, which are transactions distinct from the movement. Under the Bihar Act, the impact of the tax is unequivocally, definitely and clearly placed, at the point of the first purchase, made from a person other than a registered dealer. The first purchase by registered dealer is clearly and definitely made by the Act as the taxable event and no subsequent purchase of the same commodity is taxable under Ss. 3, 3A, 5A, 6(3) and Rule 8C. In regard to a scheme of taxation where the last sale is sought to be taxed, possibly some machinery might be needed. But as regards the Bihar Act, which provides for the taxation of the very first sale or purchase by a registered dealer, no machinery is required because the tax is unequivocal and definite. There is no uncertainty about it. As soon as a registered dealer makes his first purchase, he is bound to know that his purchase is taxable. He knows it and needs no investigation. Thus the provisions contained under Ss. 3A and 5A of the Bihar Act do not

contravene S. 15 of the Central Sales Tax Act nor are they violative of Art. 301 of the Constitution of India: Case law discussed. (Paras 16, 17, 20, 21 and 24)

The assumption that S. 42 and R. 31B have the effect of completely prohibiting transport or at least they make transportation of goods dependent on permit granted by the authority in their absolute discretion is entirely erroneous. Neither S. 42 nor Rules 31B and 8C require that the person who intends to transport goods should be registered as a dealer. The only requirement is that such a person shall obtain a permit before attempting to transport. Rule 31B clearly provides that once the authority is satisfied about the particulars furnished, it shall sign copies of the applications and prepare a permit and shall return to the applicant true copies of the application along with the permit. The rule, therefore, does not forbid transportation nor does it require that the person intending to transport shall get himself registered as a dealer. The rule does not vest any discretion in the authority. Once the particulars are properly filled up the authority shall be bound to grant a permit. His only jurisdiction is to scrutinise the application and the particulars which are mentioned in the application. Such a rule does not substantially impede movement. These provisions are purely regulatory measures and they are valid. These rules have been introduced simply for plugging the various loopholes for evasion of tax. These are not meant for levying any tax on inter-State transactions or for impeding genuine inter-State transactions. Section 4 of the Bihar Act is sufficient safeguard for it. Besides, S. 15(b) of the Central Act clearly provides that where a tax has been levied under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in course of inter-State trade or commerce, the tax so levied shall be refunded to such persons in such manner and subject to such conditions as may be provided in any law in force in that State. Judging from all aspects the rules framed under Ss. 42 and 46 of the Bihar Act are reasonable, valid and legal. (Para 25)

The word 'transport' in S. 42 cannot be given a narrow construction and it is not correct to say that R. 31B does not come within the purview of that section. Besides, S. 46(1) (ii) by which the rule-making power is derived, is wide enough to include such a rule which specifically provides "any other matter for which there is no provision or no sufficient provision is in the opinion of the State Government necessary for giving effect to the purposes of this Act." The contention that there is excessive delegation of its essen-

tial legislative functions provided in S. 42 and S. 46 in that these sections do not define the goods in respect of which the section is to operate or the principles with reference to which the goods can be selected is not sound. S. 42 in the very nature of the things could not limit the process of scrutiny to specified goods. All goods which are subject to tax need scrutiny, and the problem of evasion is common to all of them. With that object in view it was necessary to give such power under Section 46(1) (ii) of the Act in order to give effect to the purposes of the Act. Otherwise rules could not have been made in order to secure evasion. This has uniformly been the legislative practice for giving such guidance, while granting rule-making power for carrying out the purposes of the Act and the matters ancillary and incidental thereto: AIR 1964 SC 925 & AIR 1966 SC 1729, Foll. (Para 26)

The contention that fresh assent of the President will be required under the proviso to Art. 304(b) of the Constitution as Ss. 42 and 46 of the Bihar Act are being used for completely new purpose is also not sound for the reason that regulatory measures, as in the instant case, do not come within the purview of restrictions contemplated by Art. 301 and such measures need not comply with the requirements of the proviso to Art. 304(b) of the Constitution. Besides, Ss. 42 and 46 have not been amended. Had they been so amended fresh assent might have been required depending upon the nature of its amendment. Further, Ss. 3A and 5A in themselves do not require assent, because they do not contravene Art. 301 of the Constitution. The President had already given assent for the Sales Tax Act, 1959 on 24-4-1959. That assent still continues to hold good. Moreover, the problem of evasion of the tax law, and the need to prevent evasion are not necessarily related to Ss. 3A and 5A imposing purchase tax. Assuming that instead of imposing the purchase tax a sales tax, as provided in the original Act, was levied on jute, the problem of evasion would still be the same problem. The fact that the law has shifted the burden of the tax from the seller to the purchaser makes no difference to the problem. This shifting has not made the least difference to Ss. 42 and 46 under which Rule 31B has been made. In that view of the matter S. 42 or S. 46 has not altered qualitatively, nor they have imposed a larger burden quantitatively. Therefore, the contention regarding the assent of the President must fail. (Paras 27 and 28)

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21 STC 1, State of Madras v. T.
Narayanadaswamy Naidu 4, 21

1970	Hansraj v. State (B. D. Singh J.)	[Prs. 1-2]	Pat. 61
(1968) AIR 1968 SC 339 (V 55)= 1968-1 SCR 381, State of Madras v. A. Habibur Rahman & Sons	5	(1961) AIR 1961 SC 232 (V 48)= 1961-1 SCR 809, Atiabari Tea Co. Ltd. v. State of Assam	12, 16, 27
(1968) AIR 1968 SC 599 (V 55)= 1968-1 SCR 705, Andhra Sugar Ltd. v. State of Andhra Pradesh	16	(1961) AIR 1961 SC 751 (V 48)= 1961(1) Cri LJ 773, State of U. P. v. Babu Ram Upadhyaya	25
(1968) Writ Petn. No. 133 of 1968 D/- 29-10-1968 (SC), Ratanlal & Co. v. Assessing Authority	21, 22	(1960) AIR 1960 SC 554 (V 47)= 1960 Cri LJ 735, Hamdard Dawa- khana v. Union of India	10
(1968) AIR 1968 Pat 329 (V 55)= 1968 Pat LJR 241 (FB), Shanker- jee Raut Gopalji Raut v. State of Bihar	5, 17, 24	(1955) AIR 1955 SC 661 (V 42)= 1955-2 SCR 603, Bengal Immunity Co. Ltd. v. State of Bihar	5
(1968) 22 STC 365=ILR (1969) 1 Funj 426, Niamat Rai Milk Raj Ahuja v. State of Punjab	4, 19, 20	A. K. Sen, Dilkishore Prasad Singh, S. B. Sanyal, Braj Kishore Prasad No. 2, Choudhary, S. N. Mishra and Kamal Nayan Choubey, for Petitioners (in all appeals); Advocate General and M/s. S. Sarwar Ali and P. K. Bose, for Respon- dents (in all appeals).	
(1967) AIR 1967 SC 829 (V 54)= 1967-1 SCR 1012, Hari Chand Sarda v. Mizo Dist. Council	11	B. D. SINGH, J. :— These four writ applications were heard together on the request of the parties because common questions of law are involved in all of them, and this judgment will govern all of them. The various petitioners are dealers in raw jute and they have filed applications under Articles 226 and 227 of the Constitution of India challenging Section 3A read with Sections 5A and 42 and 46 of the Bihar Sales Tax Act, 1959 (Bihar Act 19 of 1959) (hereinafter referred to as 'the Bihar Act') and Rule 31B of the Bihar Sales Tax Rules, 1959 (hereinafter referred to as 'the Bihar Rules') which rule was introduced after filing of the application in C. W. J. C. 520. During the pendency of the hearing of the applications the State of Bihar have fur- ther amended the Bihar Rules by insert- ing Rule 8C published in Notification No. LSH-2058/67-3482-F.T. issued by the State of Bihar in the Bihar Gazette dated the 6th of April 1968. The petitioners have challenged the said Rule 8C also.	
(1967) AIR 1967 SC 1401 (V 54)= 1967-2 SCR 751, Tata Enginee- ring & Locomotive Co. Ltd. v. Asstt. Commr. of Taxes	5	2. In order to appreciate the questions involved in these applications it will be necessary to summarise the facts men- tioned in the application in C. W. J. C. 520. As indicated above, the petitioners are dealers in raw jute. In this applica- tion the business of Hansraj Bagrecha has been stated to be mainly of two cate- gories, viz., (a) buying raw jute from the agriculturists or Farihas in West Bengal bringing it to Bihar at Kishanganj Rail- way Station and re-exporting it to West Bengal to the purchasers there who are either merchants or mill owners; and (b) buying goods from jute growers in Bihar and exporting it to the merchants or mill owners in West Bengal. Under the Bihar Act, which came into force with effect from 1-7-59, there was no provision for charging purchase tax from the dealers in jute, but two new sections, namely, Sections 3A and 5A were introduced with effect from 1-4-67 by Sections 16 and 18 respectively of the Bihar Finance Act,	
(1967) AIR 1967 SC 1616 (V 54)= 1967-3 SCR 577, Bhawani Cotton Mills Ltd. v. State of Punjab	4, 18, 19, 20, 21		
(1967) AIR 1967 SC 1895 (V 54)= 1967-3 SCR 557, Devidas Gopal Krishnan v. State of Punjab	10		
(1966) AIR 1966 SC 376 (V 53)= 1964-6 SCR 691, Shree Bajrang Jute Mills Ltd. v. State of A. P.	5		
(1966) AIR 1966 SC 1686 (V 53)= 1966-1 SCR 865, Kalyani Stores v. State of Orissa	12		
(1966) AIR 1966 SC 1729 (V 53)= 1966-3 SCR 631, Caltex India Ltd. Calcutta v. Presiding Officer Labour Court, Patna	26		
(1964) AIR 1964 SC 925 (V 51)= 1964-5 SCR 975, Khyerbari Tea Co. Ltd. v. State of Assam	12, 26		
(1964) AIR 1964 SC 1006 (V 51)= 1964-6 SCR 261, State of M. P. v. Bhailal	13, 16		
(1964) AIR 1964 SC 1729 (V 51)= 1964-8 SCR 217, A. Haji Abdul Shakoor & Co. v. State of Mad- ras	13, 16		
(1964) AIR 1964 SC 1752 (V 51)= 1964-15 STC 753, Ben Gorm Nil- giri Plantations Co., Conoor (Nil- giris) etc. v. Sales Tax Officer	5		
(1963) AIR 1963 SC 928 (V 50)= (1963) Supp 2 SCR 216, A. T. B. Mehtab Majid and Co. v. State of Madras	13, 16		
(1962) AIR 1962 SC 1406 (V 49)= 1963-1 SCR 491, Automobile Trans- port (Raj) Ltd. v. State of Rajas- than	12, 25, 27		
(1961) AIR 1961 SC 4 (V 48)= 1961-1 SCR 341, Vasanlal Magan- bhai Sanjanwala v. State of Bom- bay	10		
(1961) AIR 1961 SC 65 (V 48)= 1961-1 SCR 379, Tata Iron & Steel Co. Ltd. v. S. R. Sarkar	5		

1966, and certain changes were also made in other sections like Sections 2 and 38 of the Bihar Act. Sections 3A and 5A run as follows:—

"3A. Goods liable to purchase tax — The State Government may from time to time, by notification declare any goods to be liable, to purchase tax on turnover of purchases:

Provided that general sales tax and Special Sales Tax shall not be payable on the sale of goods or class of goods declared under this section."

"5A. Point in the series of purchases at which purchase tax shall be levied.— The purchase tax on goods declared under Section 3A, shall be levied at the point of purchase made from a person other than a registered dealer."

By Notification No. 10523 FT, dated 14-9-66, which came into force from 15-9-66, the Governor of Bihar declared "jute" as liable to purchase tax at the rate specified in the notification. A copy of the said notification is marked as Annexure 'A' to the application. However, by an order referred in letter dated 24-11-66 issued by the Government of Bihar in the Finance Department, the schemes of levy of purchase tax on jute was stayed (vide Annexure B).

Subsequently, the State of Bihar withdrew the stay order and decided to impose purchase tax on jute at the rate of 2 per cent to be realised from the first purchaser in the transaction. Accordingly the authorities of the Sales Tax Department sought to levy the purchase tax from 1-7-67. Thereafter the Superintendent of Commercial Taxes addressed letters to the Railway authorities, Kishanganj, prohibiting from loading of any goods or despatching them from any railway station within the Purnea district of Bihar, by making restriction on the ground that no despatches should be allowed to be made in fictitious or 'benami' names, and in order to recognise a genuine trader, registration certificate issued by the Superintendent of Commercial Taxes should be taken as a vital proof and jute should be booked only on production of such certificate. Accordingly by a letter dated the 10th of July, 1967, the Station Master, Kishanganj informed the Secretary, Jute Merchants Association, Kishanganj, to produce the certificate before loading was commenced and also stated therein that in case of failure wagon allotted will be cancelled and the registration fee shall also be forfeited and necessary demurrage will be charged. A copy of the letter is marked Annexure D.

The petitioner also wanted to despatch jute and he requested the Railway authorities, Kishanganj to despatch the same, in specified form, which was refused by

the letter with an endorsement which reads:

"In this connection a registration certificate issued by the Superintendent, Commercial Taxes, Purnea is required for the movement of jute from the place."

Hence, the petitioner has filed the aforesaid application, which was admitted on 1-9-67, wherein he has challenged the provisions contained in Sections 3A and 5A of the Bihar Act which have been quoted above, and has also challenged Rule 31B of the Bihar Rules which reads as follows:—

"31B. Conditions regarding despatch of certain class of goods — (1) No person shall tender at any railway station, steamer station, airport, post office or any other place, whether of similar nature or otherwise, notified under Section 42, any consignment of such goods, exceeding such quantity, as may be specified in the notification, for transport to any place outside the State of Bihar, unless such person has obtained a despatch permit in Form XXVIII D from the appropriate authority referred to in the Explanation to Rule 31 and no person shall accept such tender unless the said permit is surrendered to him.

(2) An application for the said permit shall be made in Form XXVIII C, in triplicate, to the appropriate authority. The said authority shall, on receipt of such application and on being satisfied about the particulars furnished in triplicates countersign all the three copies of the application and prepare a permit in form XXVIII D. One copy of the countersigned application and the permit shall be retained by the said authority and the other two copies shall be returned to the applicant. The consignment shall, thereafter, be tendered accompanied with one copy of such application and permit for transport, at any place referred to in sub-rule (1)."

He has also challenged the aforesaid Rule 8C which reads as follows:—

"8C. Determination of stage of levy of tax on purchases of declared goods. — (1) The first purchase of goods declared under Section 14 of the Central Sales Tax Act, 1956, shall be leviable to tax in terms of sections 3, 3A and 5A of the Act and no subsequent sales or purchases in respect of the said goods shall be liable to any tax under the Act.

(2) A dealer who claims deduction from his gross turnover on the ground that the goods purchased by him are exempt by virtue of sub-rule (1) shall produce evidence to the satisfaction of the prescribed authority."

On the main issue the question at the bottom is not one of refund of a wrong levy but of competence of the authorities concerned to demand or levy tax on inter-State sales or outside sales.

3. Mr. A. K. Sen, learned Counsel appearing on behalf of the petitioners in all the cases, has contended: (i) the levy of purchase tax on jute by Sections 3A and 5A of the Bihar Act contravenes Section 15 of the Central Sales Tax Act, 1956⁶ (No. 74 of 1956) (hereinafter referred to as 'the Central Act') inasmuch as it involves a multi-point tax on a declared commodity. Hence, he submitted that Sections 3A and 5A of the Bihar Act are void and inoperative. (ii) The purchase tax, even if valid, cannot be levied on outside sale and on purchases made in Bihar in the course of inter-State trade. (iii) The assessment was done in any event without giving opportunity to the petitioner to prove that the transactions were outside sale and inter-State sale and not liable to tax. (iv) In cases where there is no assessment the demand for tax from these persons and directing them for getting themselves registered as dealers was illegal and void. (v) Rules 31B and 8C of the Bihar Rules are ultra vires and void because (a) they are in excess of Section 42 of the Bihar Act, and (b) they constitute unreasonable restriction on the freedom of trade and commerce inter-State.

4. In order to support his above contentions he has submitted that the Bihar Act or the Rules made thereunder does not contain any provision for conveying information to every succeeding purchaser coming within a series of sales and purchases of declared goods, to know whether the purchase tax on the declared goods in question has already been paid or not, or accounted for in the return of a purchaser or not. He has drawn our attention to paragraphs 6 to 14 of the supplementary affidavit dated 25-9-68 sworn on behalf of the petitioners in C. W. J. C. 6 of 1968, by Kesari Chand Surana, an attorney of the petitioners; and has urged that the levy of purchase tax in question under Sections 3A and 5A of the Bihar Act does not ensure that the tax will be levied at only one point and will not be levied at more than one point, inter alia, because of the intervention of non-registered dealers: According to him, this is only possible if the levy was on the last purchase before the consumption or export by way of inter-State trade or commerce. In order to support his contention he has relied on a decision of the Supreme Court in *Bhawani Cotton Mills Ltd. v. State of Punjab*, AIR 1967 SC 1616, at pp. 1620, 1622-23. In that case the question involves was the levy of purchase tax on cotton and their Lordships were dealing with Sections 2 to 12 and 27 of the Punjab General Sales Tax Act (Act 46 of 1948) and Rules 20, 27, 27A and 48 to 55 of the Rules framed thereunder. The sim-

ple question before their Lordships was whether the provisions of the Act, specially those of Section 5(1), second proviso, and Section 5(2)(a)(vi) were invalid as being opposed to Section 15 of the Central Act. Learned Counsel has referred to paragraphs 12, 17, 19, 20 and 21 of the said judgment. He has laid special emphasis on paragraph 20 wherein their Lordships have observed:—

"Counsel, for the respondent, has pointed out that, if a dealer wants to claim exemption, under sub-cl. (vi) of Section 5(2)(a), Rule 27A provides for his getting a declaration from the dealer to whom the goods are resold, in which case, the dealer is absolved from the liability to pay tax. We have gone through the various statements contained in the said Rule, as well as the Forms, to which it refers, but they are not decisive, either way. There will also be cases where a non-registered dealer may have intervened and even if such dealer intervenes, it is clear that under Section 15(a) of the Central Act, the tax cannot be levied at more than one stage. There is no machinery by which a dealer can ascertain whether his vendor, of the declared goods has paid the tax already. Even otherwise it will be seen that if a dealer, A, sells the declared goods, to B, six months after the close of the year (B being a registered dealer), A becomes liable to purchase tax. But, if B sells the identical declared goods, again, after the period mentioned in sub-cl. (vi), he will also be liable to pay purchase tax. That means, in respect of the same item of declared goods, more than one person is made liable to pay tax and the tax is also levied at more than one stage. That is not permissible, under Section 15(a) of the Central Act. If goods are resold to a non-registered dealer within the period, sub-cl. (vi), will not help the original purchaser. We may also point out, at this stage, that sub-cl. (vi) of Section 5(2)(a), negatives the assumption that the normal rule, under the Act, in respect of declared goods, is to levy the tax on the first purchaser."

Learned Counsel, therefore, submitted that in the case before their Lordships of the Supreme Court, the Act clearly provided by express language that the tax was to be levied only at one point, but nevertheless their Lordships struck down the levy on the ground that the Act, and the rules did not provide for making impossible for the levy to be made at more than one point, because of lack of machinery by which a dealer could ascertain whether his vendor of the declared goods had paid the tax already. He has contended that the case of *Niamat Rai Milk Raj Ahuja v. State of Punjab*, (1968) 22 STC

365 at p. 373 (Punj) provides a clear example of single point levy. In that case it was observed that the purchase by the last dealer liable to pay tax under the Punjab General Sales Tax Act, 1948, as amended with retrospective effect from 1st October, 1958, by the Punjab General Sales Tax (Amendment and Validation) Act, 1967, will be the purchase by the dealer who himself consumes it or sells it to a consumer or to a dealer in the course of inter-State trade or commerce so that as long as the goods remain with him in the condition he purchased them, he does not become liable to pay the tax. Every dealer will thus be able to know whether he is liable to pay the tax under the Act or not and the stage having been prescribed, no machinery is required to be prescribed to ascertain that stage. In that case at p. 372 their Lordships have also referred to the decision reported in AIR 1967 SC 1616 (supra) and have observed:—

"The next contention of Mr. Srinivasan was that 'taxable turnover' is defined by Section 5(2) of the Punjab Act after giving certain deductions and one of them being under Section 5(2)(a)(vi). Since Section 5(2)(a)(vi) has not been amended, taxable turnover cannot be ascertained with the consequence that no purchase tax can be levied. Therefore, it is maintained that the infirmity, which was pointed out by the Supreme Court decision in AIR 1967 SC 1616 (supra), still persists. In my opinion, this contention is not sound. The real basis of the Supreme Court decision was that no stage had been fixed for the levy of the tax, and, therefore, it was not possible to determine who was liable for it under the Act"

Their Lordships further at pages 373-74 observed:—

"I may point out that all these infirmities, that were pointed out by their Lordships of the Supreme Court, have been removed by the Amending Act. The Amending Act added sub-section (3) to Section 5 with effect from the 1st of October, 1958. This provision provides that 'in respect of declared goods, tax shall be levied at one stage and that stage shall be in the case of goods liable to purchase tax, the stage of purchase of such goods by the last dealer liable to pay tax under this Act'. Thus it is clear that only one single stage for the levy of purchase tax has been prescribed. It is not difficult for any dealer to ascertain whether he is the last purchaser liable to pay tax. The contention, that the 'last dealer liable to pay tax under this Act' has not been defined, is of no consequence. This expression was not even defined in the Mysore, Madras, Andhra

Pradesh and U. P. Acts, which were noticed by their Lordships of the Supreme Court in Bhawani Cotton Mills' case, AIR 1967 SC 1616 (supra), vis-a-vis the Punjab Act, which was struck down. Their Lordships compared the Punjab Act and these other Acts to show that the provisions of the Punjab Act were defective, the implication being that the provisions of the Madras and other Acts were not defective. In the Madras Act, section 4 read with Second Schedule, 'cotton' was specified as liable to a single point tax 'at the point of last purchase in the State'. In a case that went to the Supreme Court and is reported as State of Madras v. T. Narayanaswami Naidu, 21 STC 1=AIR 1968 SC 194, in assessing the assessee, who was a dealer in cotton and cotton goods, the Commercial Tax Officer did not exempt purchase to the extent of Rs. 2,27,250 on the ground that cotton of that value was in stock on the last day of the assessment year with the assessee and was liable to be taxed as last purchase. The Appellate Assistant Commissioner (Commercial Taxes) upheld the order, but the Sales Tax Appellate Tribunal accepted the appeal and remanded the case to the Appellate Assistant Commissioner for disposal afresh in the light of observations made by it. The department filed a revision in the Madras High Court which was dismissed: Vide 21 STC 1=AIR 1968 SC 194 (supra). The learned Judges observed: The stage of last purchase or last sales in a State will be reached just before the goods are caught up in the stream of export and go outside the State, or just before the goods find their way to a factory when they are manufactured into some other goods." The State of Madras obtained special leave to appeal to the Supreme Court and that appeal was dismissed on April 12, 1967. The judgment is reported in 21 STC 1=AIR 1968 SC 194 (supra). Their Lordships held that under Section 4 of the Act read with Second Schedule thereto 'a dealer is not liable to pay a tax on purchases of cotton until purchases acquire the quality of being the last purchases inside the State. In other words, when he files a return and declares the stock-in-hand, the stock-in-hand cannot be said to have been acquired by last purchase because he may still during the next assessment year sell it or he may consume it himself or the goods may be destroyed, etc. He would be entitled to claim before the assessing authorities that the character of acquisition of the stock-in-hand was undetermined; in the light of subsequent events it may or may not become the last purchase inside the State. In our view, this construction is in consonance with Section 15 of the Central Act'.

apply to revisional jurisdiction of the High Court. There is indication in the Code itself that the purpose of Section 369 is not to prescribe a general rule of finality of all judgments of all Criminal Courts but is only to prescribe finality for the judgment of the trial Court so far as the trial Court is concerned. This is also clear from Section 424 which clearly indicates that S. 369, which is placed in chapter 26 of the Code had reference only to judgment of a Criminal Court of original jurisdiction. Section 439 Criminal Procedure Code, is not in term controlled by Section 369 and in fact the revisional jurisdiction under Section 439 must be read as controlling Section 369 of the Code. It cannot, therefore, be said that the inherent power which High Court possesses to review a judgment made in the exercise of its revisional jurisdiction relates either to a matter covered by a specific provision of the Code or that its exercise would in any way be inconsistent with any express provisions of the same. (Paras 7, 8, 9)

The High Court subject to the extraordinary jurisdiction under Article 134(1) vested in the Supreme Court in criminal matters, practically remains the last court of appeal and revision. The principle that there remains an inherent power in the last court of appeal and revision to rectify an error which may creep in finds express recognition in S. 561A of the Code under which the High Court whenever it is satisfied that for the purposes mentioned in S. 561A it should exercise its inherent powers not only can it do so but it is its duty to exercise it and secure the completion of those purposes. The power to grant a rehearing in an appropriate case, therefore, would obviously fall within the ambit of the inherent powers of the High Court. AIR 1962 Andh Pra 479 (FB) & (1964) 1 Mad LJ 362 & AIR 1966 Mad 163 & AIR 1965 Orissa 7, Dissented from. AIR 1959 All 315 (FB) & AIR 1963 Mys 326 & AIR 1962 Pat 417 & AIR 1955 SC 633, Rel. on. Case law discussed. (Paras 10 & 12)

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Bijay Govind Singh 10

D. N. Aggarwal, for Petitioners; M. S. Dhillon for Advocate General, S. P. Goyal for Lal Singh, for Respondent.

SANDHAWALIA, J.:— The point of law which has necessitated the reference of this Criminal Miscellaneous Application to a Division Bench may be formulated in the following terms:—

"Is this High Court empowered to revoke, review, recall or alter its own earlier decision in a Criminal Revision and rehear the same?"

The facts which deserve notice for the limited purpose of this application may now be surveyed. By his order dated the 22nd October, 1967, the Executive Magistrate 1st Class, Sangrur, in proceedings under Section 145, Criminal Procedure Code, held that Karnail Singh and others were in possession of the land in dispute on the 6th of May, 1967, and directed the delivery of the same to them. Against this order, Lal Singh and others (respondents in the present Criminal Miscellaneous Application) went up in revision to the learned Sessions Judge, Sangrur, who by his order dated 1st April, 1968, made a recommendation to the High Court for the acceptance of the revision on the basis of the reasons given therein. It was recommended that the order of the learned Magistrate dated the 22nd October, 1967, be set aside, and the pos-

session of the land be ordered to be delivered to Lal Singh and others.

2. The learned Sessions Judge had directed that the parties, if they so desire, may appear in the High Court on the 3rd May, 1968. However, it appears that the matter came up before the Registrar on the 13th of May, 1968, and that none of the parties was then present. Notices, on that date, were directed to be issued for the 27th May, 1968, and all the parties were served. Some of the respondents therein, amongst them the present petitioners in this application namely Sher Singh, Kartar Singh, etc., did not put in any appearance and consequently on the 24th July, 1968, actual date notices were issued to them by registered post acknowledgement due intimating thereby that the revision would be heard by this Court on the 31st July, 1968. On the said date the revision came up for hearing before Jindra Lal J. and it was found that actual date notices had not come back duly served. The State was represented through counsel and the recommendation was not opposed on its behalf. The learned Single Judge notices that some remark was made that the respondents, other than the State, were no longer interested in the matter on account of the Civil litigation having been compromised in the High Court and consequently on the 1st August, 1968, when the matter came up before Jindra Lal J. he was pleased to pass the following order:—

"This revision is reported for acceptance and is not opposed.

For the reasons given by the learned Sessions Judge, Sangrur, the revision is accepted, the order of the learned Magistrate dated the 22nd October, 1967, is set aside, and it is ordered that possession of the land, which is the subject-matter of the present proceedings, be delivered to the petitioners-tenants."

3. The present Criminal Miscellaneous Application was then moved on behalf of Sher Singh, Kartar Singh, Charag Singh, Suraj Singh and Kapur Singh, under Section 561-A, Criminal Procedure Code, on the 6th August, 1968. It was averred therein that the actual date notices issued by this Court for appearance to them on the 31st July, 1968, were actually delivered to them on the 4th of August, 1968, and the reports on the registered covers dated the 31st July, 1968, clearly show that none of the present applicants was present in the village on that day. It was further averred that the order dated the 1st August, 1968, which was passed without affording any opportunity of hearing to them is gravely prejudicial to their interests and the same be vacated. Notice of the present application was issued to the respondents and accepted on their behalf by the counsel and meanwhile the

operation of the order dated 1st August, 1968, was stayed. At the hearing of the application, it was contended on behalf of Lal Singh etc. respondents that there is no power in this High Court for a review of its earlier order dated the 1st August, 1968, and the same having become final could not now be interfered with. In view of the importance of the question involved, Jindra Lal J. for the reasons given in the relevant order, referred this case for decision by a larger Bench and this is how the matter is before us.

4. Mr. D. N. Aggarwal, learned counsel for the applicants in this Criminal Miscellaneous Application, has relied mainly upon the ratio and the reasoning of the majority judgment in the Full Bench case reported as AIR 1959 All 315 (FB), and particularly therein on the judgment of Raghubar Dayal J. In that case, the identical point arising in this application was in issue and Raghubar Dayal and M. L. Chaturvedi, JJ. (O. H. Mootham, C. J. dissenting) held that the High Court had the power to recall its earlier decision and rehear a Criminal Revision and the learned Judges also further sought to classify the conditions and the circumstances which would justify the exercise of such an exceptional power. Mr. Aggarwal has also placed reliance on four decisions of the same High Court in support of the proposition canvassed by him. These are, the Division Bench judgment in AIR 1948 All 106 and three Single Bench judgments reported as AIR 1949 All 176, AIR 1952 All 926 and AIR 1951 All 441. Two Division Benches of the Mysore and Patna High Courts have also been relied upon by the learned counsel, namely AIR 1963 Mys 326 and AIR 1962 Pat 417.

5. In reply to the contentions raised and the authorities cited on behalf of the applicants, Mr. S. P. Goyal, learned counsel for the private respondents Lal Singh and others, has relied primarily on the observations in the Full Bench judgment of the Andhra Pradesh High Court reported as AIR 1962 Andh Pra 479 (FB). Reliance was also placed on three Single Bench judgments of the Madras High Court reported in (1964) 1 Mad LJ 362; 1963 (2) Cri. LJ 224 and AIR 1966 Mad 163, and another Single Bench judgment of the Orissa High Court reported as AIR 1965 Orissa 7.

6. To appreciate the rival contentions raised it is necessary to go back to the language of the statute as laid down in the relevant provisions of the Criminal Procedure Code. Reliance has been placed on the language of Section 369, Criminal Procedure Code, which is in the following terms:—

"369. Save as otherwise provided by this Code or by any other law for the

time being in force or, in the case of a High Court by the Letters Patent or other instrument constituting such High Court no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error."

It has been contended by Mr. S. P. Goyal that Section 369, Criminal Procedure Code, applies in terms to the revisional jurisdiction of the High Court and in the alternative it has been argued that if that be not so then in any case the principle and the doctrine of the finality of criminal judgments enshrined in this section is applicable by analogy to the revisional powers also. However, the true meaning and the exact scope of S. 369, Cr. P. C., is evident when this provision is viewed in the context of the general scheme of the Criminal Procedure Code and the place of this provision therein. Chapters 20 to 23 of the Code deal with different kinds of trials, i. e. trial of summons cases; warrant cases; summary trials and trials before High Courts and Courts of Session whilst Chapter 24 contains general provisions regarding such enquiries and trials. Chapter 25 prescribes the mode of taking and recording evidence and it is thereafter that Chapter 26, in which Section 369 finds its place, falls and is headed as 'of the judgment'. Chapter 27 provides for the submission and confirmation of the death sentences to the High Court whilst the rules relating to execution, suspension, remission and commutation of the sentences are to be found in Chapters 28 and 29. From this overall view of the scheme noticed above, there is hardly any doubt that the provisions of the sections contained in Chapter 26 pertain only to the judgments pronounced by the trial Court. This conclusion finds certain assurance from the language of some of these sections. Thus Section 366, Criminal Procedure Code, which is the very first section in this Chapter refers to "the judgments in every trial in any criminal Court of original jurisdiction". Similarly Section 367, Criminal Procedure Code, provides what must be contained in every "such judgment" that is to say a judgment in any original trial.

7. As to what is the true meaning to be attributed to Section 369, Criminal Procedure Code, particularly, in reference to the appellate jurisdiction under Section 430, Criminal Procedure Code, came up for consideration before the Supreme Court in the case of *U. J. S. Chopra v. State of Bombay*, AIR 1955 SC 633. Their Lordships of the Supreme Court were particularly considering the rule of the finality of criminal judgments in the particular context of the provisions of Section 439 sub-section (2) and sub-section (6) of the Code. The whole gamut of

case law had been considered and discussed in this authoritative pronouncement and the following observations appear in the judgment of S. R. Das J. (as he then was):—

"There is indication in the Code itself that the purpose of Section 369 is not to prescribe a general rule of finality of all judgments of all Criminal Courts but is only to prescribe finality for the judgment of the trial Court so far as the trial Court is concerned."

It was further laid down —

"Again, the rule of finality embodied in Section 369 cannot, in terms, apply to the orders made by the High Court in exercise of its revisional jurisdiction, for Section 442 of the Code which requires the result of the revision proceedings to be certified to the Court by which the finding, sentence or order revised was recorded or passed refers to it as its "decision or order" and not "judgment".

Mr. Goyal has, however, drawn our attention to certain observations made in the judgment of Bhagwati J. in the above said case which torn from their context and read in isolation tend to support the contention advanced by him. However, on a closer analysis of the whole case we are of the view that some of the observations made with respect to the competence of the High Court to revise or recall the orders passed are to be taken in their particular context of the point for determination and consideration urged before the Supreme Court. It is noticeable, and we do not consider that these observations relate at all to the inherent power of the High Courts to pass appropriate orders to secure the ends of justice even if those orders amount to the reviewing or recalling of an earlier order.

8. In any case Section 369, Criminal Procedure Code, is subject to the other provisions of the Code and we see no reason why section 439 of the Code and Section 561-A embodying the inherent powers of the High Court should not be regarded as such provisions. In our view Section 439, Criminal Procedure Code, is not in term controlled by Section 369 and in fact the revisional jurisdiction under Section 439 must be read as controlling Section 369 of the Code. Further support for this view arises from the language of Section 424 of the Code of Criminal Procedure which refers to the appellate judgments of the Subordinate Courts. This is in the following terms:—

"The rules contained in Chapter 26 as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court, other than a High Court;

Provided that, unless the Appellate Court otherwise directs, the accused shall

not be brought up, or required to attend, to hear judgment delivered."

This provision clearly indicates that Section 369, Criminal Procedure Code which is placed in Chapter 26 of the Code had reference only to the judgment "of a Criminal Court of original jurisdiction". Again the appellate judgments of the High Court are expressly excluded from the ambit of the provisions of Chapter 25 of the Criminal Procedure Code. Reference may also be made to the provisions of Section 430 which are as follows:—

"Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in Section 417 and Chapter 32."

The provisions of this section, therefore, leave one in no manner of doubt that the revisional jurisdiction embodied in Chapter 32 of the Code is in no way fettered by the rule in Section 430. It logically follows, therefore, that Section 430 does not in terms give finality to the judgments of a High Court passed in the exercise of its revisional jurisdiction.

9. On an overall consideration of the relevant statutory provisions we are unable to find any bar whatsoever express or implied which would rule out the applicability of the inherent powers of the High Courts under S. 561-A qua an order purporting to be passed under Section 439, Criminal Procedure Code. It cannot therefore, be said that the inherent power which this Court possesses to review a judgment made in the exercise of its revisional jurisdiction relates either to a matter covered by a specific provision of the Code or that its exercise would in any way be inconsistent with any express provisions of the same.

10. It is also necessary to consider the matter on principle in its historical background as well. Prior to the coming into force of the Government of India Act, 1935, the High Courts in India were the last and the final Courts of appeal and revision in its criminal jurisdiction subject to the extraordinary powers of the Judicial Committee of the Privy Council to interfere in cases occasioning a grave miscarriage of justice. After the Constitution of the Federal Court under the provisions of the Government of India Act, 1935, a very limited jurisdiction indeed in criminal matters was also vested in it under Sections 205 and 207 of the said Act. Subsequent to the promulgation of the Constitution of India the jurisdiction exercised by the Judicial Committee of the Privy Council and the Federal Court have ceased to exist. Article 134 of the Constitution of India enshrines the special criminal jurisdic-

tion of the Supreme Court in regard to criminal matters. On a consideration of this provision it is patent that subject to the extraordinary jurisdiction under Article 134(1) vested in the Supreme Court in criminal matters, the High Court practically remains the last Court of appeal and revision. That there remains an inherent power in the last Court of appeal and revision to rectify an error which may creep in seems to be well-recognised, and in the Code of Criminal Procedure express recognition of the same principle is also embodied in the provisions of Section 561-A of the Code.

This aspect of the power of a Court of last resort to rehear an issue came up for consideration before the Privy Council in *Rajundernarain Rae v. Bijai Govind Singh*, (1836) Moo PC 117. In the said case an order had been made *ex parte* upon the appearance of the respondents alone, for the dismissal of an appeal and it appeared that the appellants who were infants, under the protection of the Court of Wards in India had an agent in the matter of appeal who had absconded and abandoned the cause. Their Lordships rescinded the order of dismissal and restored the appeal for rehearing upon the terms of the appellant's paying the costs therefor. Their Lordships considered the powers of the Judicial Committee and also of the House of Lords to direct the rehearing of a case and Lord Brougham while delivering judgment observed as follows:—

"Whatever, therefore, has been really determined in these Courts must stand, there being no power of re-hearing for the purpose of changing the judgment pronounced; nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by common law, the same power which the Courts of Record and Statute have of rectifying the mistakes which have crept in. The Courts of Equity may correct the decrees made while they are in minutes; when they are complete they can only vary them by re-hearing; and when they are signed and enrolled they can no longer be re-heard, but they must be altered, if at all, by appeal. The Courts of Law, after the term in which the judgments are given, can only alter them so as to correct misprisions, a power given by the Statutes of Amendment. The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have, however, gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to

be enforced, or have added explanatory matter, or have reconciled inconsistencies."

It was further observed:—

"It is impossible to doubt that the indulgence extended in such cases, is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort whereby some accident without any blame, the party has not been heard, and an order has been inadvertently made as if the party had been heard."

11. In this connection reference may also be made to the case of the Owners of the Vessel Singapore and Owners of the Vessel, Hebe, (1866) 1 PC 378, wherein Sir William Erle delivering the judgment of the Judicial Committee observed at page 388 —

"We do not affirm that there is no competency in this Court to grant a rehearing in any case."

He further said later:—

"This, however, is a Supreme Court of final appeal, and it is inconsistent with the purposes for which such a Tribunal was instituted, that in any case, at the option of the parties who are dissatisfied with the conclusion which the Court has arrived at they should be at liberty to apply for a reconsideration of the judgment upon the point decided thereby. Although it is within the competency of the Court to grant a rehearing, according to the authorities cited above, still it must be a very strong case indeed, and coming within the class of cases there collected, that would induce this Court so to interfere."

12. This power to grant a rehearing in an appropriate case, therefore, would obviously fall within the ambit of the inherent powers of the Court. Inherent power implies by its very nature a power which cannot be expressed in terms but which must reside in a court for achieving the higher and the main purpose of doing justice in a cause before it and for seeing that the act of the Court does no injury to any of the suitors. This was enunciated in the words of Lord Cairns in *Rodger v. Comptoir D'Escompte De Paris*, (1871) 3 PC 465 at p. 475 —

"Now, their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lower Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression to take care that no act of the Court in the

course of the whole of the proceedings does an injury to the suitors of the Court."

It is not necessary to multiply authorities and the proposition seems to be undisputed that the Court of records and the ultimate Courts of appeal and revision have inherent powers to act for the securing of the ends of justice. This very principle as regards criminal matters before the High Court in India is embodied in the provisions of Section 561-A of the Code in the following terms:—

"Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

The true scope of this provision has been authoritatively pronounced upon by the Supreme Court in *Talab Haji Hussain v. Madhukar Purshottam Mondkar*, AIR 1958 SC 376. In the said case, their Lordships of the Supreme Court were considering the inherent powers of the High Court to cancel the bail granted to a person accused of a bailable offence. It was observed in the course of the judgment as follows:—

"In prescribing rules of procedure legislature undoubtedly attempts to provide for all cases that are likely to arise; but it is not possible that any legislative enactment dealing with procedure, however, carefully it may be drafted, would succeed in providing for all cases that may possibly arise in future. Lacunae are sometimes discovered in procedural law and it is to cover such lacunae and to deal with cases where such lacunae are discovered that procedural law invariably recognizes the existence of inherent power in Courts.

* * * * *

There can thus be no dispute about the scope and nature of the inherent power of the High Courts and the extent of its exercise."

From the above enunciation of the law it seems to be very clear that whenever the High Court is satisfied that for the aforesaid purposes it should exercise its inherent powers not only can it do so but it is its duty to exercise it and secure the completion of those purposes.

13. It remains to consider the authorities cited at the bar. A number of decisions of the Allahabad High Court have been relied upon by Mr. D. N. Aggarwal and the first in point of time is a Division Bench judgment of the said Court reported as AIR 1948 All 106. The Bench in the above-said case was constituted by Malik and Raghubar Dayal JJ. One Moti Lal, appellant in that case, had been con-

victed by a Magistrate for a breach of the Hoarding and Profiteering Prevention Ordinance 1948 and sentenced to 18 months' rigorous imprisonment and to pay a fine. An application for revision to the High Court by the said Moti Lal was dismissed. It was, however, subsequently discovered that a mandatory provision of the law had been overlooked in the trial. It was held by the learned Judges that the High Court had power to correct such an error and to review and alter the earlier judgment even though the revision had already been decided; the provisions of Section 369 were held to be no bar to the exercise of such a power. Another Single Bench judgment of the Allahabad High Court cited was AIR 1949 All 176, where an application was made for the rehearing of an appeal which had already been dismissed by the High Court. From the facts it appears that the Court had directed that the appeal be heard on 5th June, 1948, but by mistake it was placed on the list on the 25th of June, 1948, and the learned counsel being unaware of this fact did not appear and the appellant was not also heard. The High Court directed that the order passed on the 25th of June, 1948, be set aside and the appeal be reheard and it was held that the Court had power to make such an order under the provisions of S. 561-A of the Code. In AIR 1951 All 441, Agarwala J. held that under the provisions of Section 561-A, the High Court had the power to review and modify an earlier order passed on an erroneous assumption. In AIR 1952 All 926, the revision petition was dismissed for default, the Court being under the misapprehension that no medical certificate of the applicant or illness slip of counsel was filed, while in fact both were on the record. It was held that under Section 561-A of the Code of Criminal Procedure the High Court had the power to review the earlier order and restore the case for hearing. It was observed as follows:—

"No distinction has been made in Section 561-A or in the decided case between the points of fact and the points of law; where *ex facie* order passed by a Court is factually wrong and it has been passed under a misapprehension of facts I am of opinion that the provisions of Section 561-A, Criminal Procedure Code can be applied and the order can be revised."

The authoritative pronouncement, however, on the identical point which is before us is the majority judgment prepared by Raghubar Dayal and M. L. Chaturvedi JJ. (Mootham C. J. dissenting) in AIR 1959 All 315 (FB). In this authority the learned Judges who have delivered separate judgments have exhaustively considered the whole case law on the point and have then come to the

conclusion that the High Court has an inherent power to revoke, review, recall or alter its earlier decision in a criminal revision and to rehear the same.

14. The Mysore High Court has also affirmed the view of the law enunciated by the Allahabad High Court. AIR 1963 Mys 326, a Division Bench of the said High Court consisting of K. S. Hegde and Ahmad Ali Khan JJ. considered the inherent powers of the High Court to alter or review its appellate judgment. On a consideration of the authorities, the view expressed by the majority in AIR 1959 All 315 (FB) was affirmed and it was observed as follows by K. S. Hegde J.:—

"If the Criminal Courts had no inherent jurisdiction to alter or review their judgments there was no need to prohibit the exercise of that power by enacting section 369 as well as Section 424. The Legislature would not have prohibited the exercise of a non-existing power. The Legislature while wisely, if I may say so with respect, prohibited the subordinate Courts from altering or reviewing their judgments left the field clear to the High Court because any error or mistake committed by the Subordinate Courts can be corrected by the High Court either by exercising its revisional powers or by exercising its power of superintendence under Article 227 of the Constitution but such remedies are not available as against any errors or mistakes that may be committed by the High Court. Therefore, I am of the opinion that the High Court has inherent power to alter or review its appellate judgments".

AIR 1962 Pat 417 is also a Division Bench authority which affirmed the view that the High Court under Section 561-A has power to set aside an appellate judgment and order the rehearing of the same. In the said case the name of the counsel appearing in the criminal appeal was omitted from the daily list through inadvertence of the office of the High Court with the result that the counsel could not know about the appeal having been posted for hearing and the appeal was dismissed without being heard. It was held that the order dismissing the appeal was a judgment rendered without any opportunity being given to the appellant or his advocate within the meaning of Section 421 and was liable to be set aside and the appeal could be ordered to be reheard in exercise of inherent powers under Section 561-A.

15. A contrary view, however, has been taken in AIR 1962 Andh Pra 479 (FB) which is a Full Bench judgment of the said Court and has been relied upon by Mr. S. P. Goyal. This is a case pertaining to the appellate jurisdiction of

the High Court. It is noticeable that the learned Judges were directly considering the distinction between lack of inherent jurisdiction and illegal or irregular exercise of the same. Nevertheless there are clear observations supporting the contrary view and the learned Judges dissented from the majority view of Raj Narain's case, AIR 1959 All 315 (FB). It is noticeable however, that even in this authority an exception was made in regard to cases where there has been default of appearance. It was held that the High Court has no inherent power to alter or review its own judgment except in cases where it was passed without jurisdiction or in default of appearance, that is, without affording an opportunity to the accused to appear. Reliance was also placed on three Single Bench judgments of the Madras High Court. The first is *C. Lakshmana Iyer v. Pubbi Setti Sethamma*, (1964) 1 Mad LJ 362 where P. Kunhamed Kutti J. held that there is no inherent power in the High Court to alter or review its own judgments in a criminal case. In this case a criminal revision had been disposed of by the High Court on merits in the absence of the petitioner and his Advocate. From the short judgment in the case it appears that an opportunity had been fully given to the party and his counsel and the case remained on the list for some days, and when it came up for hearing none of them was present. In the circumstances of the case it was held that there was no justification to set aside the order passed earlier on merits. This case appears to be based primarily on its own facts and the point of law does not seem to have been seriously canvassed. In AIR 1966 Mad 163 *Kailasam J.* held that there was no inherent power to alter or review a judgment signed by it in view of the provisions of Section 369 of the Code of Criminal Procedure and that the said section was also applicable to Section 439 of the Code. This view seems patently to be in conflict with the dictum of their Lordships of the Supreme Court in AIR 1955 SC 633, which does not seem to have been brought to the notice of the Court. We would respectfully differ from this enunciation of the law. Reliance was also placed on a Single Bench judgment of the Orissa High Court in AIR 1965 Orissa 7. This is a Single Bench decision by R. L. Narasimhan C. J. wherein reliance primarily has been placed on U. J. S. Chopra's case, AIR 1955 SC 633. We have already referred to this authority of the Supreme Court and have expressed a view that the pronouncement therein does not in any way debar the exercise of inherent powers under Section 561-A for the purposes of reviewing an order passed in its revisional jurisdiction by the

High Court. In 1963 (2) Cri. LJ 224 (Mad), *Sadasivam J.* held that the High Court has in exercise of its inherent powers, no right to set aside its own judgment on the ground that it is erroneous in law and facts. It is noticeable, however, that even in this authority, a notable exception is recognised, namely, in cases where earlier decision has been passed without jurisdiction or in default of appearance without an adjudication on merits.

16. On a close and considered analysis of the authorities cited at the bar we fully accept and adopt the principle and the enunciation of the law by the majority judgment in Raj Narain's case, AIR 1959 All 315 (FB) and endorsed in AIR 1963 Mys 326. It is noticeable that in the Mysore case the Full Bench of Andhra Pradesh High Court in *Devireddi Nagi Reddi's case*, AIR 1962 Andh Pra 479 (FB) has been fully considered and dissented from. We are also in agreement with the law as laid down in *Ramballabh Jha's case*, AIR 1962 Pat 417 and with respect we are unable to agree with the reasoning or the enunciation of the law as laid in *Devireddi Nagi Reddi's case*, AIR 1962 Andh Pra 479 (FB) and the Single Bench authorities of the Madras and the Orissa High Courts cited before us. We are, therefore, of the view that the High Court in its inherent powers is fully empowered to revoke, review, or recall and alter its own earlier decision in a criminal revision and to rehear the same. It is to be reiterated that the circumstances in which these powers can be exercised necessarily would be exceptional ones which would lead the Court to review that the exercise of the same is necessary to conform to the three conditions mentioned in Section 561-A of the Code.

17. Lastly an argument advanced by Mr. Goyal must also be noticed in passing. It has been strenuously contended that under the provisions of Section 440 of the Criminal Procedure Code in the exercise of the revisional jurisdiction no party has any right to be heard either personally or by pleader and the High Court is empowered if it so desires to decide without giving such a hearing. It is, however, noticeable in the present case that it was not at all a matter in which the High Court had chosen to proceed under the provisions of Section 440. At the time of admission, notice had been issued to both the parties on the 13th of May, 1968. Again actual date notices were issued on the 24th of July, 1968, directing that the case would be listed on the 31st of July 1968. It is the admitted case of the parties that the respondents in the original criminal revision were not in fact served prior to that and that the said

notices were actually delivered to them on the 4th of August, 1968, that is, after the hearing of the petition and the decision thereon. In view of this factual position this argument based on Section 440 obviously is not well conceived.

18. Mr. N. S. Chhachhi, the learned counsel appearing for the respondent State of Punjab has reiterated the submissions advanced on behalf of the applicant by Mr. D. N. Aggarwal. He has submitted that particularly on the facts of the present case the earlier order which has been passed without affording the applicant an opportunity to be heard should be set aside and the matter should be reheard on merits.

19. This criminal miscellaneous application, therefore, succeeds and is allowed. The case should now go back to the learned Single Judge for decision on merits.

20. **SAMSHER BAHADUR J. :-** The ultima ratio of judicial process undoubtedly resides in the highest tribunal of the land and if the finality in a criminal judgment envisaged in Section 369, Code of Criminal Procedure, is to be attached to the High Court as well, its supremacy cannot be preserved. In the authorities as also the relevant statutory provisions, both of which have been fully and elaborately discussed by Sandhawalia J., the power of the High Court to rectify and amend accidental and inadvertent errors is maintained. While the order of judgment of an original Court or even a Court of appeal can be set right if so needed by a superior tribunal, the inherent powers alone can enable a High Court to do likewise. Only the clearest language of a statute can deprive the High Court of this useful and necessary adjunct of judicial power.

21. I agree entirely with the reasoning and conclusion of my learned brother. Application allowed.

AIR 1970 PUNJAB & HARYANA 40
(V 57 C 8)

FULL BENCH

MEHAR SINGH, C. J.; D. K. MAHAJAN
& R. S. NARULA, JJ.

Shiromani Gurdwaras Parbandhak Committee, Amritsar and another, Petitioners v. Lachhman Singh Gill and others, Respondents.

Civil Writ No. 2847 of 1967, D/- 2-4-1968.

(A) Punjab Sikh Gurdwaras Act (8 of 1925), S. 79(iv) — Validity — Power under S. 79(iv) is arbitrary and unguided and hence violative of Art. 14 of Constitution.

DM/GM/B924/69/VGW/D

On the face of it the power in clause (iv) of S. 79 of the Act is arbitrary and unguided. The exercise of the power of removal of a member of the Judicial Commission under S. 79 pursuant to clauses (i) to (iii) is obviously exercise of the power in the wake of the object and policy of the Act as in the preamble and the main body of the Act, but that object or policy is not in anywise effectuated by the whimsical and capricious exercise of the power under clause (iv) of that section.

So, for the exercise of power under clause (iv) of S. 79 of the Act there is no guidance whatsoever. The object and the policy of the Act are, substantially and in almost the total effect, effectuated by the exercise of its power of removal under S. 79 by the State Government in the wake of the first three clauses. If there is a reason outside those clauses which justifies removal of a member of such a judicial body, it should be available in the statute as are the reasons given in the first three clauses.

The power is undoubtedly discretionary, but that is not a complete answer because a discretionary power unrelated to any guiding object or policy is an arbitrary power. No doubt, again it is vested in the State Government, but while that consideration may weigh with regard to matters other than the tenure of a judicial or a quasi-judicial body, it is not a consideration which can be accepted in so far as the tenure of a member of a judicial or a quasi-judicial body is concerned. Protection to such a body is an essential element of the democratic and constitutional base of the country and, therefore, such a discretionary power unguided by any object or policy of the statute cannot even be left in the hands of the highest authority: AIR 1957 SC 397, Disting.

In the objects and reasons of the Amending Punjab Act 11 of 1954, it has been stated that otherwise the life of the Judicial Commission would remain in perpetuity, probably meaning that the tenure of its members would be life tenure. However, a life tenure is not unknown to law. And if the Legislature intended any limit on the tenure of the members of the Judicial Commission then that limit, in the case of such a judicial body, cannot be held to be otherwise than arbitrary and capricious and thus violative of Art. 14 of the Constitution when expressed, as it is, in the form of clause (iv) of S. 79; in fact such an object could be achieved in a more effective manner with a certainty of tenure to the members of such a judicial body by providing a tenure for a term of years terminable, though it might be followed by the re-appointment of the same member or members again, or a tenure terminable at

a certain age of the incumbent. But the power in this clause, as it is, is destructive of the independence of such a judicial body and such a power, therefore, cannot but be held as arbitrary and in contravention of the provisions of Art. 14 of the Constitution. The argument that after the expiry of initial period of two years the tenure of the members of the Judicial Commission is at pleasure, again is untenable, for this brings out a curious contrast with an ordinary Government service, as in the latter case after a short period of probation, during which service is terminable for unsuitability or like reasons, the Government servant concerned, though holding his position in the service at the pleasure of the Governor or the President, as the case may be, has a normal security of tenure in the wake of the rules applicable to his service, but in the case of a member of the Judicial Commission after serving for an initial period of two years he becomes liable to removal immediately or at any moment thereafter. So that the tenure of a member of the Judicial Commission after the expiry of the first two years is entirely at the whim and caprice of the executive Government, who have no guidance given to them in the statute itself in relation to which such power is to be exercised by them. The object and the policy of the Act as stated in the preamble and also appearing in the main body of the Act are no guide to the executive Government in this respect for the same are effectuated by the exercise of power under the first three clauses of S. 79 of the Act. Thus the power under clause (iv) of S. 79 is arbitrary and unguided, without any principle or policy being made available for its exercise, and hence it is violative of Art. 14 of the Constitution and must be struck down as invalid. AIR 1964 SC 600, Rel. on.

(Para 10)

(B) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 79 & 70—State Government — Powers of — Punjab State Government — has no power to remove or appoint member of Judicial Commission under S. 79.

No doubt in S. 79 of the Act the State Government has been given power to remove a member of the Commission, and under S. 70 of it, it can appoint a member to it, but one of the four successor State Governments cannot be accepted to exercise such power in relation to a Judicial Commission which has jurisdiction under the Act not only in that State but also in the remaining three successor States. If this was permitted, the functioning and operation of the Board would be impaired and may come to a stop by this Act of one of the successor State Governments, also in the territory under the remaining successor States, which it has not the power to do under any provision of the Reorganisa-

tion Act. More than that, it has not the power to do any act in the shape of removing a member of the Judicial Commission or appointing a new member to the Commission so as to lead to interference with the functioning and operation of the Board, an inter-State body corporate. The jurisdiction and functioning of the Judicial Commission being so intermixed and intermingled with the functioning and operation of the Board that the same cannot be separated, for (a) there are cases in which, where the Board is obstructed in its functioning, the Judicial Commission, on its application, has jurisdiction and authority to carry out such functions, (b) there are cases in which the Judicial Commission has co-ordinate power of legislative nature, in the shape of framing schemes of administration and management for Gurdwaras, with the Board, in other words, where the Board in such a case is unable to perform its functions, it is the Judicial Commission which does so, and (c) in one case at least the Judicial Commission is an appellate tribunal of a co-ordinate and concurrent jurisdiction with the Board, so that a function which can be performed by the Board in its appellate jurisdiction may come to be performed by the Judicial Commission, depending upon whether the approach is made to one or the other. So the Judicial Commission is a judicial body which directly and substantially controls the functioning and operation of the Board and its jurisdiction and functioning cannot be divorced from the operation and functioning of the Board. Any interference with the constitution and powers of the Judicial Commission immediately spells interference and obstruction to the functioning and operation of the Board, an inter-State body corporate, with the functioning and operation of which one of successor State Governments has no power or authority to interfere. On this consideration it is obvious that the Judicial Commission under the Sikh Gurdwaras Act is not now in consequence of the provisions of the Reorganisation Act within the power and authority of the State Government of Punjab, one of the successor State Govts.

Same conclusion is available and is reached on a somewhat different consideration. It is settled that entries in the Legislative Lists in the Seventh Schedule to the Constitution are to be so liberally and broadly construed that they are to include within their ambit and scope all ancillary and necessary matters, the inclusion of which renders the legislation under a particular entry the more effective, useful and purposeful. The entries are not to be construed strictly so as to limit their ambit and scope. Consequently, Entry 44 in List I — Union List — which obviously covers legislation

in regard to an inter-State body corporate such as the Board, also has within its ambit and scope legislation necessary for the operation and functioning of such an inter-State body corporate, in the present case as to the Judicial Commission, which very largely and substantially not only controls the operation and functioning of the Board but may at any moment have to perform the functions of the Board, where the Board cannot do so. The jurisdiction and functioning of the Judicial Commission is so integral to the functioning and operation of the Board that in the terms of the Act no separation is practical. So in this approach the provisions of the Act relating to the Judicial Commission are as much within the scope of Entry 44 in List I — Union List — as its provisions relating to the Board. On this view not one of the successor States, which of course includes the State of Punjab can interfere with the constitution of the Judicial Commission.

(Paras 18 and 19)

The consequence of the considerations as above is that Punjab State Government has no power or authority to remove a member of the Judicial Commission under S. 79 of the Act, nor has it a power to appoint a new member to it. (Para 20)

Cases Referred: Chronological Paras

- (1967) AIR 1967 Punj 272 (V 54)=
C.W. No. 2115 of 1966, D/- 25-11-1966, Balbir Singh v. Sikh Gurdwaras Judicial Commission, Amritsar 13
- (1964) AIR 1964 SC 600 (V 51)=
(1964) 5 SCR 683, Moti Ram Deka v. General Manager, North-East Frontier Rly. 8, 10
- (1959) AIR 1959 Bom. 363 (V 46)=
ILR (1959) Bom. 1267, W. W. Joshi v. State of Bombay 17, 18.
- (1958) AIR 1958 SC 538 (V 45)=
1959 SCR 279, Ram Krishna Dalmia v. Justice Tendolkar 8
- (1957) AIR 1957 SC 397 (V 44)=
1957 SCR 233, Pannalal Binraj v. Union of India 9, 10
- H. L. Sibal with B. S. Dhillon, G. S. Aulakh, B. S. Shant and R. K. Chhibber, for Petitioners; C. K. Daphtary, Advocate General of India, Gopal Singh, Advocate General, Punjab, G. R. Majithia, Deputy Advocate General, for Respondent No. 2; J. N. Kaushal, for Respondents (Nos. 1 and 2).

MEHAR SINGH, C. J.— This judgment will dispose of two petitions Nos. 2847 and 2899 of 1967 under Articles 226 and 227 of the Constitution. In both the petitions Shiromani Gurdwara Parbandhak Committee, Amritsar, is the petitioner, but in petition No. 2847 of 1967 the second petitioner is Mr. Sajjan Singh Giani. To the two petitions the first three respondents are the same, that is to say, Mr. Lachhman Singh Gill, Chief Minister,

Punjab, the State of Punjab, and Mr. Kartar Singh Giani, who is a member of the Judicial Commission; and in petition No. 2899 of 1967 the fourth respondent is Mr. Sardul Singh, who was appointed a member of the Judicial Commission by Punjab Government Notification No. 462 Gurdwaras, of December 12, 1967.

2. There were three members of the Judicial Commission appointed under Section 70 of the Sikh Gurdwaras Act, 1925 (Punjab Act 8 of 1925) — hereinafter to be referred to as 'the Act' —, namely, Mr. Sajjan Singh Giani petitioner, who was also its president, Mr. Kartar Singh Giani, respondent 3, and Mr. Bakhat Singh. Two of the three members of the Judicial Commission are selected for appointment out of a list of qualified persons prepared and maintained at the instance of the Board (Sections 70(3) and 71 of the Act). Mr. Kartar Singh Giani was appointed by the Punjab State Government and Mr. Sajjan Singh Giani petitioner and Mr. Bakhat Singh were appointed by the same State Government from the list as prepared at the instance of the Board in the terms of Section 71 of the Act. The appointment of Mr. Sajjan Singh Giani petitioner and Mr. Bakhat Singh as members of the Judicial Commission was made on September 1, 1965.

3. It is averred in the petitions that Mr. Lachhman Singh Gill, the Chief Minister of Punjab, had been elected to the Punjab Vidhan Sabha in the last General Elections held in February 1967 on an Akali ticket and he was also elected General Secretary of petitioner 1 in petition No. 2847 of 1967. He defected from the Akali Party and, joining hands with the Congress Party, formed Government in the Punjab State with himself as the Chief Minister on November 25, 1967. On December 2, 1967, the Shiromani Akali Dal expelled him from its membership and asked him to resign from the Legislative Assembly and also from the membership of petitioner 1 and the position of General Secretary to petitioner 1. On September 3, 1967, respondent 1, Mr. Lachhman Singh Gill, is said to have made a statement to the press, which is reproduced in the petitions from the Tribune of December 4, 1967, threatening the expulsion of Sant Fateh Singh from petitioner 1 and welcoming any opposition challenge in the Assembly. It is averred that respondent 1 said that he would forcibly remove Sant Fateh Singh and his followers from petitioner 1. It was in pursuance of such attitude of his that at his instance the Punjab State Government, respondent 2, issued Notification No. 454-Gurdwaras, copy Annexure 'B', on December 6, 1967, removing petitioner 2 in petition No. 2847 of 1967, namely, Mr. Sajjan Singh Giani, from the membership of the Judicial Commis-

sion with effect from the afternoon of that date. It appears that Mr. Bakhat Singh had on August 9, 1967, tendered resignation from the membership of the Judicial Commission, and by this very Notification No. 454-Gurdwaras, of December 6, 1967, the Punjab Government accepted his resignation with effect from the afternoon of that date. On December 13, 1967, the two petitioners in petition No. 2847 of 1967 filed that petition questioning the constitutional validity and legality of the removal of petitioner 2 in that petition from the membership of the Judicial Commission, pointing out that the grounds on which the removal of petitioner 2 in that petition from the membership of the Judicial Commission was challenged also had application to the acceptance of the resignation of the other member Mr. Bakhat Singh, but Mr. Bakhat Singh has not been made a party to either petition, nor has any prayer been made in regard to the acceptance of his resignation by the Punjab State Government. On December 12, 1967, respondent 2, the Punjab State Government, proceeded by Notification No. 462-Gurdwaras, to appoint Mr. Sardul Singh, respondent 4 in petition No. 2899 of 1967, as a member of the Judicial Commission, against one of the existing vacancies, in exercise of the powers conferred by S. 78 of the Act. On December 18, 1967, petitioner 1 filed petition No. 2899 of 1967 questioning the constitutionality and legality of the appointment of respondent 4 in this petition as a member of the Judicial Commission. The two petitions are practically copies, one of the other, and the same grounds are urged against the constitutional validity and legality of both the removal of petitioner 2 from and the appointment of respondent 4 to the membership of the Judicial Commission.

4. The grounds taken in both the petitions are (a) that both the orders have been passed mala fide with the ulterior motives of respondent 1 so as to have a member of the Judicial Commission to get orders from it prejudicial to the interests of the president of petitioner 1, the members of the Executive Committee of the Board and the General Body belonging to the Akali Dal Sant Fateh Singh Group, pursuant to his threat as reported by the Press on December 4, 1967, of forcibly ousting the members of that group from petitioner 1, (b) that the provisions of clause (iv) of Section 79 of the Act to the effect that the State Government may remove any member of the Judicial Commission, if he has served as a member for more than two years, are ultra vires and unconstitutional because (i) the power given admits of discriminatory classification without any guidance by any principle or policy for the exercise of the discretion, (ii) it is delegation of arbitrary

and uncontrolled power, and (iii) the provision is against the principles of natural justice as the members of the Judicial Commission, who are to perform judicial functions, are left to the mercy of the executive Government after they have completed a tenure of two years as such members, (c) that the Judicial Commission has territorial jurisdiction extending over the territories which immediately before November 1, 1966, comprised the State of Punjab and the Punjab State Government after the Punjab Reorganisation Act, 1966 (Act 31 of 1966), has no jurisdiction to remove or to appoint members, including a new member, of the Judicial Commission, and so both the impugned orders are a nullity, and (d) that when on November 2, 1967, Mr. Gurnam Singh, the then Chief Minister as leader of the United Front Party resigned, along with his colleagues, he advised the Governor to dissolve the Punjab Legislative Assembly so that fresh elections could be held to it, but, though the Governor was constitutionally bound to accept such advice, contrary to that he refused to dissolve the Punjab Legislative Assembly, and rather appointed respondent 1, Mr. Lachhman Singh Gill, as Chief Minister, whose appointment is thus illegal and unconstitutional. In so far as the first ground of mala fide is concerned, it is further stated in the petitions that between October 13, 1949 and September 1, 1965, there had been five instances in which the removal of a member of the Judicial Commission was made by the State Government after a period varying from six to ten years, but in the case of petitioner 2 the removal has been made after a period of about two years, thus indicating the whimsical and arbitrary exercise of power under clause (iv) of Section 79 of the Act by the State Government. The details of the instances are given in paragraph 9 (vii) of petition No. 2847 of 1967 and paragraph 11 (x) of petition No. 2899 of 1967.

5. In both the petitions one return had been made by respondent 1 and another by respondent 2, but the tenor of returns in both the petitions by those respondents is the same. In the affidavits of respondent 1 the broad facts are not denied, but it is clearly stated that his speech of December 3, 1967, was not correctly reported by the Press and his position is that what he said was that "I would not permit Sant Fateh Singh to use the sacred Gurdwaras to malign me and my Government." He says clearly that he never threatened to use force against the members of petitioner 1. The charge of mala fide is denied and it is explained that the work of the Judicial Commission under the presidentship of petitioner 2, Mr. Sajjan Singh Giani, was not being done with expedition and cases took in-

ordinately long time for being decided. Efforts made on behalf of the Department concerned to speed up the work of the Judicial Commission unfortunately led to no appreciable progress and petitioner 2 was mainly responsible for the conduct of cases before the Judicial Commission and their early disposal. So it was thought desirable in the public interest to remove him so that the disposal of the cases in the Judicial Commission could be done with expedition in order to avoid bad name which this body was earning because of the inordinate delay which was taken in the disposal of cases. A denial has been entered that the removal of petitioner 2 was with any ulterior motive. In regard to the appointment of respondent 4 in petition No. 2899 of 1967, it has been said that he has been appointed in place of petitioner 2 out of the panel of names suggested by petitioner 1. It is denied that these changes in the personnel of the Judicial Commission have been made with an ulterior motive to have influence with the Judicial Commission. Respondent 1 then takes the position that Section 79(iv) of the Act is constitutionally valid and the Punjab State Government had the jurisdiction and authority to proceed not only to remove petitioner 2 from but to appoint respondent 4 to the membership of the Judicial Commission under Ss. 70 and 79 of the Act. It is not accepted on his side that his Ministry is not constitutional. A denial has been entered regarding the remaining allegations. The return for and on behalf of respondent 2 is by way of an affidavit by the Secretary to Punjab Government in the Election Department. The instances of removal of members of the Judicial Commission pursuant to Section 79(iv) after the period varying from six to ten years as given in the petitions are not denied, but it is said that the illustrations do not warrant a conclusion that Section 79(iv) of the Act is void or unconstitutional. Otherwise, leaving out the allegations as to mala fide against respondent 1 in regard to which reference is invited to the affidavit of respondent 1, it is stated that neither Section 79(iv) of the Act is unconstitutional or void, nor is the exercise of power by the Punjab State Government in removing petitioner 2 from and appointing respondent 4 to the membership of the Judicial Commission without jurisdiction or ultra vires. It is said that the Punjab Ministry under the Chief Ministership of respondent 1 is validly and constitutionally formed. There is a replication, in either petition, on the side of petitioner 1, which broadly reiterates the position of petitioner 1 in the petitions, but on the question of the explanation by respondent 1, forming basis of the removal of petitioner 2 from the membership of the Judicial Commission, it is pointed out

that the allegation that the disposal of work under petitioner 2's presidentship of the Judicial Commission was unduly delayed is false and is denied. Then between the years 1962 and 1967, for each year, the number of sittings of the Judicial Commission are given, and, against those numbers of sittings for each year, the number of cases disposed of are given. This is in paragraph 9(i) of the replication. The object is to show that in the years 1965 to 1967, during the period petitioner 2 was president of the Judicial Commission, the disposal of cases was more than during any other year. However, it is accepted that "the disposal could be further increased by the disposal of certain other cases regarding the disposal of which petitioner 2 could not participate as member of the Commission because he was the counsel in those cases before he was appointed as member of the Judicial Commission. Hence, the said cases had to be decided by Giani Kartar Singh (respondent 3) and Shri Bakhat Singh alone. Shri Bakhat Singh was very rarely attending the meetings of the Commission. Therefore, the said cases could not be disposed of."

6. At the hearing of these petitions the learned counsel for the petitioners has given up the ground that respondent 1's Ministry in the Punjab State has been formed unconstitutionally and illegally. This ground has not been urged on behalf of the petitioners. The counsel appearing on their behalf has confined his arguments to the remaining three grounds (i) that the removal of petitioner 2 from and appointment of respondent 4 to the membership of the Judicial Commission is outside the jurisdiction of the State of Punjab and thus void and illegal, (ii) that Section 79(iv) of the Act is ultra vires and unconstitutional, and (iii) that both the removal of petitioner 2 from and the appointment of respondent 4 to the membership of the Judicial Commission by the Punjab State Government, at the instance of respondent 1, the Chief Minister, is mala fide.

7. These grounds may be taken in the reverse order. Respondent 1 has stated in his affidavit that the press report of his speech on December 3, 1967, is not correct, that he never said that he was going to remove anybody by force, and that all that he said was that he would not permit Sant Fateh Singh to use the sacred Gurdwaras to malign him and his Government. This has been one basis of allegation of mala fide against respondent 1, which allegation, in the circumstances, cannot possibly be accepted. The other matter urged has been that respondent 1 has given a wrong reason for the removal of petitioner 2 from the membership of the Judicial Commission that

the latter was responsible for the delay in the disposal of cases before the Commission. Although the affidavit in the shape of replication by petitioner 1 makes out a case that during the term of office of petitioner 2 for the number of sittings the comparative disposal was more than in the earlier years, but in the same affidavit it is admitted that there were a number of cases which could not be disposed of simply because petitioner 2 had been a counsel in those cases and thus could not sit in the Judicial Commission for the hearing of the same. The other member Mr. Bakhat Singh, it has been admitted, did not attend regularly. So delay there was in the disposal of cases. This matter might well have weighed with respondents 1 and 2 in reaching the conclusion that they did, which conclusion may not appeal to others, that it was the presence of petitioner 2 as president of the Judicial Commission which was the cause of the delay. There is no other material in support of the allegation of mala fide against respondent 1. It is obvious that on this material a clear and unqualified finding is not possible that the order removing petitioner 2 from the membership of the Judicial Commission was made by respondent 2 at the instance of respondent 1, who was actuated by ulterior motives and thus acted mala fide. This ground, therefore, fails.

8. In Section 79 of the Act is the power in the State Government to remove a member of the Judicial Commission and the section reads—

"79. The State Government may remove any member of the Commission—

(i) if he refuses to act or becomes in the opinion of the State Government incapable of acting or unfit to act as a member; or

(ii) if he has absented himself from more than three consecutive meetings of the Commission; or

(iii) if it is satisfied after such enquiry as it may deem necessary that he has flagrantly abused his position as a member; or

(iv) if he has served as a member for more than two years."

The second argument on the side of the petitioners is an attack upon the constitutional validity and legality of clause (iv) of this section. There existed originally this clause in the Act with power to the State Government to remove a member of the Judicial Commission after three years, and this clause was deleted by Section 18 of the Sikh Gurdwaras (Amendment) Act, 1944 (Punjab Act 11 of 1944). It was re-enacted in the present form by the Sikh Gurdwaras (Amendment) Act, 1954 (Punjab Act 11 of 1954), and the objects and reasons indicate that "as fresh cases are instituted in the Court

of the Judicial Commission from time to time, the effect of the existing provision of the Act is that a Commission once constituted is more or less perpetuated. In the interest of the efficient working of the Judicial Commission and in order to remedy a possible awkward situation in which the life of a Tribunal may get very unnecessarily prolonged, it is therefore, desirable that there should be a provision in the Act empowering the State Government to remove any member of the Commission after he has served on it for a specified period, where circumstances may so require." There is nothing either in the Act or in the Amending Punjab Act 11 of 1954 to give any indication as to the circumstances to be kept in view that may require removal of a member of the Judicial Commission. The argument on the side of the petitioners is that in so far as clause (iv) of this section is concerned, the power of removal is arbitrary, capricious, unguided, and uncontrolled. No principle or policy has been provided for the exercise of this power by the executive. This power has no nexus with the object of the Act. The executive can, after the expiry of two years, be as whimsical and capricious in the exercise of the power as it may choose to do so, and that may be for reasons entirely and utterly extraneous to any object of the Act. The discretion thus given to the State Government admits of arbitrary discrimination and reference has already been made to the instances given in the petitions that over the years the removal of members has been after a period varying from six to ten years, on earlier occasions, but in the case of petitioner 2 the power has been exercised just after completion of two years of office as member of the Judicial Commission by him. The learned counsel has pointed out that to effectuate the object and the policy of the Act the first three clauses of this section have relation to the efficient and proper functioning of the Judicial Commission but, obviously, the fourth clause has nothing to do with the same. The preamble of the Act says that it was being enacted 'to provide for the better administration of certain Gurdwaras and for inquiries into matters and settlement of disputes connected therewith', and this object of the Act and the policy underlying it are evidently manifest from the main body of the provisions of the Act, both of which are available to the Court to see whether there is any object or policy of the statute from which guidance for the exercise of such power may be available. The learned counsel for the petitioners has, as stated, stressed that while the object and the policy of the Act are served by the first three clauses of this section, the power in the fourth clause, he points out, is uncanalised, unguided, and without

any indication on what basis it is to be exercised. In this respect the learned counsel has referred to *Moti Ram Deka v. General Manager, North East Frontier Railway*, AIR 1964 SC 600. That was a case in which the constitutional validity of Rules 148(3) and 149(3) in the Indian Railway Establishment Code, Volume I, was the subject of challenge. In brief, the rules provided for the termination of the service of a (non-pensionable) railway servant by notice on either side for periods shown in the same. The constitutional validity of the rules was attacked on the ground that the same violated Article 311(2) and Article 14 of the Constitution. The argument in regard to Article 14 proceeded, in the alternative, on grounds (i) that the rules contravened that Article in that certain classes of railway servants were selected for special prejudicial treatment when no such conditions of service were applicable in any other public employment, and (ii) that, in any event, an arbitrary power had been conferred upon the authority competent in that behalf under the rules to terminate employment without any principle to guide it. Of the seven learned Judges, the majority of four accepted the first aspect of the argument in this respect, refraining from expressing any opinion on the second. Subba Rao J. appears to have agreed with the majority opinion on the first aspect of this argument under Article 14 as appears from paragraph 59 of the report and that is why in the end the learned Judge observed that, apart from Article 311, the rules were violative of the provisions of Article 14. Das Gupta J., did not express himself on the first aspect of the argument, but on the second, which is the aspect relevant in the present case, after referring to this passage from *Ram Krishna Dalmia v. Justice Tendolkar*, AIR 1958 SC 538,—

"A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification." the learned Judge observed—

"Applying the principle laid down in the above case to the present Rule, I find on scrutiny of the Rule that it does not

lay down any principle or policy for guiding the exercise of discretion by the authority who will terminate the service in the matter of selection or classification. Arbitrary and uncontrolled power is left in the authority to select at its will any person against whom action will be taken. The Rule, thus enables the authority concerned to discriminate between two railway servants to both of whom Rule 148(3) equally applied by taking action in one case and not taking it in the other. In the absence of any guiding principle in the exercise of the discretion by the authority the Rule has therefore to be struck down as contravening the requirements of Article 14 of the Constitution."

Shah J. did not accept either aspect of the argument under Article 14 on the ground that the power to terminate employment under the impugned rules in that case could not be regarded as an arbitrary power exercisable at the sweet will of the authority, when having regard to the nature of the employment and the service to be rendered, the importance of the efficient functioning of the rail transport in the scheme of country's public economy, and the status of the authority invested with the exercise of the power, it may reasonably be assumed that the exercise of the power would appropriately be exercised for the protection of public interest or on grounds of administrative convenience. The learned Judge proceeded to observe— "Power to exercise discretion is not necessarily to be assumed to be a power to discriminate unlawfully, and possibility of abuse of power will not invalidate the conferment of power. Conferment of power has necessarily to be coupled with the duty to exercise it bona fide and for effectuating the purpose and policy underlying the rules which provide for the exercise of the power. If in the scheme of the rules, a clear policy relating to the circumstances in which the power is to be exercised is discernible, the conferment of power must be regarded as made in furtherance of the scheme, and is not open to attack as infringing the equality clause." The learned counsel for the petitioners has placed reliance upon the dictum of Das Gupta J., and has further pointed out that the dictum of Shah J. does not run contrary to his argument, because, although the object and policy of the Act as given in the preamble and emerging from its main provisions have a relation to the exercise of power under the first three clauses of Section 79, the same have no nexus or connection with the unguided and uncanalised power given by clause (iv) of that section.

9. The reply of the learned Attorney-General on behalf of the respondents is that under clause (iv) of Section 79 of the Act initial appointment is for a fixed term

of two years, which cannot be cut short and which may be treated as some sort of a probationary period, but thereafter a member of the Judicial Commission holds the post at the pleasure of the State Government, for the exercise of which the guiding policy and the principle are to be found in the preamble and the main body of the Act, which is the better administration of the Gurdwaras and for inquiries into matters and settlement of disputes connected therewith. The learned Attorney-General has contended that the object and policy of the Act provide clear guidance to the State Government for the exercise of its power under clause (iv) of Section 79. The power is discretionary to be exercised by the high authority of the State Government and thus it cannot be described as discriminatory. In this connection reliance is placed on *Pannalal Binjraj v. Union of India*, AIR 1957 SC 397, in which their Lordships observed— "It may also be remembered that this power is vested not in minor officials but in top-ranking authorities like the Commissioner of Income-tax and the Central Board of Revenue who act on the information supplied to them by the Income-tax Officers concerned. This power is discretionary and not necessarily discriminatory and abuse of power cannot be easily assumed where the discretion is vested in such high officials." The approach of the learned Attorney-General that the initial period of two years may be treated as some sort of a probationary period cannot possibly be accepted for, while in ordinary cases of public service after the probationary period the Government servant concerned is confirmed and has security of tenure, in the case of the Judicial Commission after the expiry of the first two years immediately insecurity for the tenure of its members begins and continues at the whim and caprice of the executive until the removal. There is apparently no possible comparison between the two situations.

10. On the face of it the power in clause (iv) of Section 79 of the Act is arbitrary and unguided. The exercise of the power of removal of a member of the Judicial Commission under Section 79 pursuant to clauses (i) to (iii) is obviously exercise of the power in the wake of the object and policy of the Act as in the preamble and the main body of the Act, but that object or policy is not in anywise effectuated by the whimsical and capricious exercise of the power under clause (iv) of that section. In fact it has been pointed out on the side of the petitioners that respondent 4 was some time back removed from the membership of the Judicial Commission and he is now being appointed again in place of petitioner 2, thus providing a glaring instance of the arbitrary exercise of the power under this

clause. So, for the exercise of power under clause (iv) of Section 79 of the Act there is no guidance whatsoever. The object and the policy of the Act are, substantially and in almost the total effect, effectuated by the exercise of its power of removal under Section 79 by the State Government in the wake of the first three clauses. If there is a reason outside those clauses which justifies removal of a member of such a judicial body, it should be available in the statute as are the reasons given in the first three clauses. The illustrations from the past cited by the petitioners show that the exercise of the power has been quite whimsical because in a number of cases the removal has been after a term of six to ten years, and in the case of petitioner 2 it has just been after a period of a little over two years; The power is undoubtedly discretionary, but that is not a complete answer because a discretionary power unrelated to any guiding object or policy is an arbitrary power. No doubt again it is vested in the State Government, but while that consideration may weigh with regard to matters other than the tenure of a judicial or a quasi-judicial body, it is not a consideration which can be accepted in so far as the tenure of a member of a judicial or a quasi-judicial body is concerned. Protection to such a body is an essential element of the democratic and constitutional base of the country and, therefore, such a discretionary power unguided by any object or policy of the statute cannot even be left in the hands of the highest authority. The considerations which prevailed with their Lordships of the Supreme Court in *Pannalal Binjraj's case*, AIR 1957 SC 397, have no possible application to a case like this where the tenure of a member of a judicial body can be kept in suspense and put an end to at any time without any basis whatsoever. In the objects and reasons of the Amending Punjab Act 11 of 1954 it has been stated that otherwise the life of the Judicial Commission would remain in perpetuity, probably meaning that the tenure of its members would be life tenure. However, a life tenure is not unknown to law. And if the Legislature intended any limit on the tenure of the members of the Judicial Commission then that limit, in the case of such a judicial body, cannot be held to be otherwise than arbitrary and capricious and thus violative of Article 14 of the Constitution when expressed, as it is, in the form of clause (iv) of Section 79; in fact such an object could be achieved in a more effective manner with a certainty of tenure to the members of such a judicial body by providing a tenure for a term of years terminable, though it might be followed by the reappointment of the same member or members again,

or a tenure terminable at a certain age of the incumbent. But the power in this clause, as it is, is destructive of the independence of such a judicial body and such a power therefore cannot but be held as arbitrary and in contravention of the provisions of Article 14 of the Constitution. The argument of the learned Attorney-General that after the expiry of initial period of two years the tenure of the members of the Judicial Commission is at pleasure, again is untenable, for this brings out a curious contrast with an ordinary Government service, as in the latter case after a short period of probation, during which service is terminable for unsuitability or like reasons, the Government servant concerned, though holding his position in the service at the pleasure of the Governor or the President, as the case may be, has a normal security of tenure in the wake of the rules applicable to his service, but in the case of a member of the Judicial Commission after serving for an initial period of two years he becomes liable to removal immediately or at any moment thereafter. So that the tenure of a member of the Judicial Commission after the expiry of the first two years is entirely at the whim and caprice of the executive Government, who have no guidance given to them in the statute itself in relation to which such power is to be exercised by them. The object and the policy of the Act as stated in the preamble and also appearing in the main body of the Act are no guide to the executive Government in this respect for the same are effectuated by the exercise of power under the first three clauses of Section 79 of the Act. Thus the power under clause (iv) of Section 79 is arbitrary and unguided, without any principle or policy being made available for its exercise, and hence it is violative of Article 14 of the Constitution, and must be struck down as invalid. To this power under clause (iv) of Section 79 very aptly apply the observations of Das Gupta J., as reproduced above from Moti Ram Deka's case, AIR 1964 SC 600. The power is not protected even on the dictum of Shah J. in that case because there is no guiding principle or policy for its exercise, as what is stated in the preamble and in the main body of the statute have no relation to the exercise of this power in this case. So Section 79(iv) of the Act is violative of Article 14 of the Constitution and is thus invalid and void.

11. There remains then the first ground for consideration. The Act obviously applied to the whole of the territory of Punjab State earlier to November 1, 1966, which is the appointed day for the coming into force of the Punjab Reorganisation Act, 1966 (Act 31 of 1966), hereinafter to be referred as 'the Reorganisa-

tion Act'. Part II, Sections 3 to 8 deal with the division of what is defined in Section 2(f) of this Act as the 'existing State of Punjab' into four parts, which are the State of Punjab, the State of Haryana, the Union Territory of Chandigarh, and the transferred territory to the Union Territory of Himachal Pradesh. Each one of these four parts is defined as 'successor State' according to Sec. 2(m) of this Act to the 'existing State of Punjab'. Section 88 of the Reorganisation Act provides —

"88. Territorial extent of laws. — The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial references in any such law to the State of Punjab shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day."

This section applies to all the laws, and thus obviously applies to the Act which then remains in force throughout the four parts, previous to November 1, 1966, of the 'existing State of Punjab'. In Part VII of the Reorganisation Act, Sections 67 to 71 deal with Corporations which were functioning throughout the 'existing State of Punjab', that is, before November 1, 1966; continuation of such corporations is provided for, and there is a further provision how those corporations are to come to an end and are then to be started separately in the four reorganised parts. Sub-sections (1) to (3) of Section 72 are then relevant for the present purpose. Section 72, sub-sections (1) to (3) provide —

"72. General provisions as to statutory Corporations. —

(1) Save as otherwise expressly provided by the foregoing provisions of this Part, where any body corporate constituted under a Central Act, State Act or Provincial Act for the existing State of Punjab or any part thereof serves the needs of the successor States or has, by virtue of the provisions of Part II, become an inter-State body corporate, then, the body corporate shall, on and from the appointed day, continue to function and operate in those areas in respect of which it was functioning and operating immediately before that day, subject to such directions as may from time to time be issued by the Central Government, until other provision is made by law in respect of the said body corporate.

(2) Any direction issued by the Central Government under sub-section (1) in respect of any such body corporate may include a direction that any law by which the said body corporate is governed shall,

in its application to that body corporate, have effect, subject to such exceptions and modifications as may be specified in the direction.

(3) For the removal of doubt it is hereby declared that the provisions of this section shall apply also to the Punjab University constituted under the Punjab University Act, 1947 (East Punjab Act 7 of 1947), the Punjab Agricultural University constituted under the Punjab Agricultural University Act, 1961 (Punjab Act 32 of 1961), and the Board constituted under the provisions of Part III of the Sikh Gurdwaras Act, 1925 (Punjab Act 8 of 1925)."

It is apparent that the Board under the Act, because of the division of the 'existing State of Punjab' into four parts, under Part II of the Reorganisation Act, has become an inter-State body corporate, as it has been declared clearly, for removal of doubt, in sub-section (3) of Section 72. Unlike the other corporations dealt with in Sections 67 to 71 of the Reorganisation Act, there is no provision in Section 72, or for that matter in any other section of the Reorganisation Act, for dissolution of the Board as an inter-State body corporate, and its reconstitution in the divided four parts of the 'existing State of Punjab'. So the Board under the Act as an inter-State body corporate is intended to continue as such having power, authority and jurisdiction over all the four parts of the 'existing State of Punjab' after the reorganisation. In List I — Union List — in the Seventh Schedule to the Constitution, entry 44 reads —

"44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities;"

and in List II — State List — of the same Schedule, entry 32 is —

"32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies."

So incorporation, regulation and winding up of inter-State corporations is within the legislative power of Parliament. The Board under the Act has been expressly declared to be such a body corporate. Obviously only Parliament have legislative powers with regard to the Board under the Act. After Section 88 in the Reorganisation Act, Section 89 makes provision for adaptation of laws in the four parts of the reorganised 'existing State of Punjab' by the 'appropriate Government' and explanation to this section defines the expression 'appropriate Government' to mean (a) as respects any law relating to a matter enumerated in

the Union List, the Central Government; and (b) as respects any other law, — (i) in its application to a State, the State Government, and (ii) in its application to a Union territory, the Central Government. So the effect of Section 89 of the Reorganisation Act is that adaptation of the Act in the States of Punjab and Haryana can be made by the Governments of those States, and in the Union Territories of Chandigarh and Himachal Pradesh by the Central Government, but in regard to Chapter VI of the Act which deals with 'the Board', declared as an inter-State body corporate by Section 72 of the Reorganisation Act, only the Central Government has the power of adaptation of the Act, because of entry 44 in the Union List relating to inter-State body corporates and in view of clause (a) of the explanation to Section 89 of the same Act. However, the functions and powers of the Board are not only confined to Part IV of the Act but are also spread all over the Act, and as an instance may be cited Chapter X of the Act which specifically deals with the 'power and duties of the Board'. It means that if the Act is to be adapted separately by the Governments, having the power under Section 89 of the Reorganisation Act to adapt it, in the four parts of the 'existing State of Punjab', it cannot be done effectively and with any measure of success without the Central Government joining in the adaptation of it. There is another difficulty even when the Central Government thus comes in, for unless the Reorganisation Act is amended to keep the Board no longer an inter-State body corporate, the Act as a whole cannot be effectively and successfully adapted in any one of the four parts of the reorganised 'existing State of Punjab'. So the Act has to continue to apply, after reorganisation, to the whole of the territory of the 'existing State of Punjab' as it applied before that. How and in what manner the question of adaptation is to be solved in these circumstances is not a matter that comes in for consideration in these petitions, although by virtue of Section 90 of the Reorganisation Act this Court has power, for the purposes of facilitating the application of the Act in relation to any of the four parts of the reorganised 'existing State of Punjab' to construe it in such manner, without affecting the substance, as may be necessary or proper in regard to the matter before this Court. As I have said, the exercise of power under Section 90 of the Reorganisation Act is not necessary for the purposes of decision of these petitions. Reference to these provisions has been made only for the sake of clarity as to the application of the Act, the extent of its application territorially, the position of the Board as an inter-State body

corporate, and the authority of the Government which has legislative power in regard to the Board. There is one other provision to which reference may again be made here, though it has already been reproduced above. The provision is in sub-section (1) of Section 72 of the Reorganisation Act where power had been given to the Central Government to issue directions in regard to the functioning and operation of the Board within the whole of the territory that was the 'existing State of Punjab', and sub-section (2) of the same section lays down that any such direction may include a direction that any law by which a body corporate as the Board is governed shall, in its application to that body corporate, have effect, subject to such exceptions and modifications as may be specified in the direction. So the effect of Sections 72 and 89 of the Reorganisation Act is (a) that in regard to the functioning and operation of the Board the Central Government can give directions, which directions may include modification of the provisions of the Act in their application to it, and (b) the Act may be adapted (i) by the Central Government so far as the Board is concerned, and (ii) by the Governments of each one of the four parts coming into existence after the reorganisation of the 'existing State of Punjab'. No direction has been issued by the Central Government under sub-sections (1) and (2) of Section 72 and no adaptation of the Act has been made either by the Central Government or by the Governments in any of the four parts of the 'existing State of Punjab' after reorganisation. The Act up to the present is left as such and is applicable to the whole of the territory of what was the State of Punjab, or described as the 'existing State of Punjab' in Section 2(f) of the Reorganisation Act, and there is no modification of it whatsoever so far. After this it is necessary to go to the relevant provisions of the Act itself, particularly those concerning and relating to the Judicial Commission. It may be stated at once that the stand of the learned Attorney-General on behalf of the respondents has been that while Section 72 of the Reorganisation Act declares the Board to be an inter-State body corporate and as such both the power of direction in regard to the application of the Act to its functioning and operation has been left with the Central Government as also the power of adaptation of the Act in this respect, no such power has been left with the Central Government in so far as the Judicial Commission is concerned.

12. In the Act, Chapter V in Part III deals with the subject of 'Control of Sikh Gurdwaras'. This Chapter comprises of three sections. The first is Section 39 which bars a suit in any Court for relief

available under the provisions of the Act. Section 40 then provides that "for the purposes of this Act there shall be constituted a Board and for every Notified Sikh Gurdwara a committee of management, and there shall also be constituted from time to time a Judicial Commission in the manner hereinafter provided," and then Section 41 says that "the management of every Notified Sikh Gurdwara shall be administered by the committee constituted thereof, the Board and the Commission in accordance with the provisions of this Part." It is apparent that the management of every Notified Sikh Gurdwara is, in addition to the local committee, the statutory responsibility of the Board and the Judicial Commission. Now, this is not confined to the State of Punjab, but it also continues to apply to the State of Haryana, the Union Territory of Chandigarh, and the transferred territories to the Union Territory of Himachal Pradesh. So that in those four parts not only the Board continues to have authority, power and jurisdiction over the management of Notified Sikh Gurdwaras, but so also the Judicial Commission. Chapter VI, Sections 42 to 69, then deals with the name, composition, and constitution of the Board. Chapter VII in Part III, Sections 70 to 84, concerns the Judicial Commission. There are to be three members of the Judicial Commission who are to be Sikhs and appointed by the State Government (sub-section (1) of Section 70), and the qualifications for appointment as a member of the Judicial Commission are to be found in sub-section (2) of Section 70, and then sub-section (3) of this section says that "two of the members of the Commission shall be selected by the State Government out of a list of qualified persons prepared and maintained as described in Section 71." So, of the three Sikh members of the Judicial Commission, one is appointed by the State Government of its own and the other two are appointed by it out of a list prepared and maintained at the instance of the Board according to Section 71. A list of the names of seven persons nominated by the Board is to be submitted to the State Government for appointment of two members of the Judicial Commission and if the Board fails to do so within ninety days of the constitution of the Board, this power passes to the State Government to complete the list of qualified persons (sub-section (1) of Section 71). Removal of a name from such list is dealt with in sub-section (2) of this section and it is to be upon a report of the Board and any enquiries as the State Government may see fit to make on the ground that a particular member has become incapable of acting as a member of the Judicial Commission. Sub-section (3) of this section concerns the re-

removal of a name from the same list on information given by the Board that any person in the list has died or has applied to the Board for removal of his name from the list. Sub-section (4) of this section is important and runs — "The State Government shall on request being made to it for this purpose by the Board remove from the list the name of any person whose name has been on the list for more than three years, provided that the name of any person shall not be so removed while such person is a member of the Commission." So that for continued membership of the Commission the presence of the name of a member on such a list is a statutory requirement. After removal of a name from the list the nomination to fill the vacancy is in the same manner as in the original list (sub-section (5) of Section 71). And again if the Board fails to nominate a person to fill a vacancy in the list according to sub-section (5), the State Government has the power to do so for it under sub-section (6) of this section. So that it is the primary function of the Board to prepare a list of names of seven persons and to supply the same to the State Government from which two members of the Judicial Commission must be appointed by the State Government. The remuneration or daily allowance and travelling expenses of members of the Judicial Commission are to be fixed by the State Government but with consultation of the Board (Section 73), so that this again is a function of the Board and the State Government cannot fix the remuneration of the members of the Judicial Commission without consulting the Board. The net expenses of the Judicial Commission are to be defrayed by the State Government and the Board, the State Government paying one-third and the Board the remaining two-thirds, though the whole of the payment is made to the members and other staff of the Judicial Commission in the first instance by the State Government, and the State Government recovers the expense share of two-thirds payable by the Board from it after the close of each financial year (sub-section (1) of Section 75), and according to sub-section (2) of this section any sum due to the State Government under the provisions of sub-section (1), shall, if not recovered within three months after a demand has been made, be recoverable as if it were an arrear of land revenue. If a vacancy occurs in the Judicial Commission it has to be filled by the appointment by the State Government of some other qualified person in the same manner as in which a person whose seat is to be filled was appointed (Section 78), which means that if a vacancy occurs of a member of the Commission appointed from the list submitted by the Board, the new appointment has to be made in the

same manner, that is to say from the same list. Then comes Section 79, already reproduced above, giving power to the State Government to remove a member of the Commission on the grounds stated in that section. The State Government has been given power under Section 83 to dissolve the Judicial Commission, at any time, when there is no proceeding pending before it. This is as far as the constitution, appointments to, and removal of members from the Judicial Commission by the State Government is concerned. It is immediately apparent that the Judicial Commission is a statutory body, not wholly appointed at the discretion of the Government, for two members of it must be appointed from persons nominated by the Board in a list of seven given by it, and the expenses of the Judicial Commission are not borne and defrayed wholly by the State Government but only one-third of it and the remaining two-thirds by the Board. It is thus not a usual type of a statutory body appointed and employed by the State Government entirely at its discretion and of which the total expenses are borne by it. It is a Judicial body of which the functions are strictly confined to the provisions of the Act in regard to the management of the Gurdwaras as will presently appear next.

13. Section 45 enumerates the disabilities debarring a person from being elected as a member of the Board, and Sec. 46 speaks of disabilities which debar a person from being co-opted to be a member of the Board. If any person having been elected or co-opted a member of the Board subsequently becomes or is found to be by the Board subject to any of the disabilities stated in Section 45 or Section 46, as the case may be, he shall cease to be a member thereof (sub-section (1) of Section 52), and any person aggrieved by the finding of the Board mentioned in sub-section (1) of Section 52 may, within a month of the date of his knowledge of such finding, appeal to the Judicial Commission for setting aside the said finding and the order of the Commission passed in this respect shall be final (sub-section (2) of Section 52). So sub-sections (1) and (2) of Section 52 make the Judicial Commission an appellate tribunal against the finding of the Board as to any disability suffered by an elected or co-opted member of the Board, which disability brings to an end his membership of the Board. The members of the Board are elected from various constituencies all over the area to which the Act applies (Section 44), in so far as they are to be elected; others have either been named ex-officio members of the Board, or are co-opted by the elected and ex-officio members of the Board (sub-section (1) of Section 43-A). So that the elected mem-

bers come from all over the four parts of the 'existing State of Punjab' to the whole of which the Act applies. The consequence of that is that not only the authority, power and jurisdiction of the Board extends, within of course the scope of the Act, to the whole of that territory, but so also does the authority, power and jurisdiction of the Judicial Commission. In exercise of its appellate power under sub-section (2) of Section 52, the Judicial Commission controls the functioning and operation of the Board inasmuch as it may or may not agree with the Board whether a particular person is under a disability either under Section 45 or under Section 46 and has thus ceased to be a member of the Board. There is a committee of management for every Notified Sikh Gurdwara, and similar disabilities, as in Sections 45 and 46, are to be found in Sections 90 and 91 which debar a person to be a member of such a committee. Under sub-section (1) of Section 95, the Board has been given the power to find whether any person has incurred any of the disabilities in Ss. 90 or 91, and from such a finding of the Board an appeal lies to the Judicial Commission under sub-section (2) of this section. These are one set of provisions as to the ambit and scope of the judicial functioning, on appeal, of the Judicial Commission being as extensive as the functions of the Board itself having original authority to decide the question of disability having been suffered by a member of it or a member of a committee. Sub-section (1) of Section 76 provides that the Judicial Commission "shall have jurisdiction unlimited as regards value throughout Punjab, and shall have no jurisdiction over any proceedings other than is expressly vested in it by this Act". So the jurisdiction of the Judicial Commission extends throughout the territory of what was the State of Punjab before reorganisation, or the 'existing State of Punjab' according to Section 2(f) of the Reorganisation Act. This continues to be so up to today, no change either under Section 72 or under Section 89 of the Reorganisation Act having been made in its provisions. According to sub-section (2) of Section 76 of the Act a decree or order of the Judicial Commission is executable or has to be given effect to by the District Court of the District in which the Gurdwara in connection with which the decree or order was passed is situate, or by the District Court to which the Judicial Commission directs that any decree or order shall be sent for this purpose, as if the decree or order had been a decree or order passed by such Court. So that the matter of executability or the giving effect to the decrees and orders of the Commission is not confined to District Court of a particular District but may be by any District

Court to which direction in that behalf is given by the Judicial Commission. In this manner the Judicial Commission has jurisdiction in relation to District Courts of all the districts in the States of Punjab and Haryana and in the Union Territories of Chandigarh and Himachal Pradesh, in other words, in all the four parts coming into existence out of the 'existing State of Punjab' in consequence of its reorganisation under the Reorganisation Act. If a person is a patit, he is under a disqualification or disability under Sections 45, 46, 90 and 91, and, according to Section 84 of the Act, if it is necessary to decide for the purposes of the constitution of the Board or a Committee, apparently under the provisions of the Act, whether a person has or has not become a patit, the question shall, on an application being made thereto for this purpose, be decided by the Commission. A decision on this matter again affects the operation and the functioning of the Board because a finding by the Commission that a person is or is not a patit will mean whether he is or is not to continue to be a member of the Board. In Part III, Chapter IX deals with the subject of finances so far as Notified Sikh Gurdwaras are concerned. In this Chapter Section 106 deals with the funds of the Gurdwaras and how the same may be spent. Sub-section (1) provides for defraying of expenses of management and personnel of the Gurdwaras and other charitable uses referred to therein, which is made first charge on the funds. After defraying those expenses required under sub-section (1), according to sub-section (2), if there is a surplus, a certain specified number of members of the committee of the Gurdwara concerned, by a resolution, with the sanction of the Board, may allocate part or whole of such surplus to a particular religious, educational or charitable purpose or any purpose which promotes social welfare. Then sub-section (3) of Section 106 says that, leaving out sub-section (2), if there is a surplus after defraying expenses under sub-section (1) and the committee of the Gurdwara is not willing to devote such surplus to other purposes, the Board may apply to the Judicial Commission for an order allowing the Board to devote the whole or part of such surplus to a particular and specified religious, educational or other charitable purpose or any purpose which promotes social welfare. According to sub-section (4) of this section, the Commission, if satisfied that such an application by the Board is reasonable, has the power and jurisdiction to determine what portion of such surplus shall be retained as a reserve fund for the Gurdwara concerned and may direct the remainder of the surplus to be devoted according to the application made by the Board. It has further power subsequently

to rescind or vary any such order. The Board is required to maintain regular accounts (Section 114) and such accounts are to be audited once every year by an auditor appointed by the State Government (section 115). Within thirty days of the audit and examination of the accounts of the Board, the auditor is enjoined to submit a report to the Board upon each account audited and examined and also to forward copies of his reports to the State Government and to the Judicial Commission (sub-section (1) of Sec. 116). The Board has to consider the report according to Section 117 of the Act and then within two months of such consideration, it is required to cause the report and abstract of each account to be published in two newspapers one of which must be published daily (sub-section (3) of Section 116). If the Board fails to cause the report to be published in accordance with that sub-section, the Judicial Commission or the State Government may get it so published, and the expenses incurred in this behalf shall be paid by the Board, and shall be recoverable as if it were an arrear of land revenue. So here the Board is under a statutory duty to publish the auditor's report, failing which it becomes the statutory duty of the Commission or the State Government at the same time, and the expenses for the performance of which duty are to be borne by the Board and are recoverable from it as an arrear of land revenue. This is a function required by the statute to be performed by the Board and when it fails to do so, it is a function which is required to be performed in the same manner either by the Judicial Commission or by the State Government, with liability of the Board to make payment for the expenses thus incurred. Every committee of a Notified Sikh Gurdwara has to submit each year to the Board its budget, and if the Board finds either that the expenditure is not authorised by the Act or that it is not in accordance with the scheme of administration settled for such Gurdwara under the Act, it has power to direct the committee of management to modify and alter the budget accordingly, but if the committee does not comply with the direction of the Board in this respect, the Board has been given the right to apply to the Judicial Commission to pass an order calling upon the committee to make such modification or alteration in the budget, and the Commission has been given power to make or pass any order as may be necessary in its opinion and which it considers just and proper. There is a direct control of the budgets of the managing committees of the Notified Sikh Gurdwaras by the Board and when the latter fails to obtain compliance of its directions so as to bring the budgetary provisions within the scope

of the Act or the scheme of administration of a particular Gurdwara, there is the overriding power with the Judicial Commission to compel, through a judicial process, the committee concerned to obey the directions of the Board as accepted and to the extent accepted in the order of the Judicial Commission. Sub-section (1) of Section 107 of the Act provides that every committee shall pay annually to the Board for the purpose of meeting the lawful expenses of the Board a contribution in money out of the income of the Gurdwara or Gurdwaras under its management, and, if after notice to pay the amount (sub-section (1) of Sec. 124), the committee fails to do so, the Judicial Commission is enjoined, on an application by the Board in that behalf, to call upon the committee to show cause why it should not be ordered to pay the same (sub-section (2) of Section 124). So part of the existence, functioning and operation of the Board depends upon the finances available from the Notified Sikh Gurdwara committees, which funds, if the committees will not pay on their own, they can be compelled to pay through the Judicial Commission. A scheme of administration of a Gurdwara may be settled on an agreement between the Board and the committee of a Notified Sikh Gurdwara (sub-section (1) of Section 130), but if both fail to do so, on an application by the Board, after hearing the parties the Judicial Commission has been given jurisdiction to settle such a scheme, and according to sub-section (4) of this section the scheme may subsequently be set aside or resettled, as considered just and proper by the Judicial Commission. It is important to note that, according to sub-section (5) of Section 130, "schemes framed under this section shall have force of law". Such law is made (a) in the beginning on an agreement between the Board and a committee of a Notified Sikh Gurdwara to settle a scheme for such a Gurdwara, or (b) in the alternative, where those two do not agree, on an application of the Board, by the Commission. So that such legislative power in the Board, extensive as it is to all the Notified Sikh Gurdwaras and the committees of management of the same, may, in the event of disagreement between the Board and the committee of a Gurdwara, come to be exercised by the Judicial Commission. Here is thus an instance of a co-ordinate legislative power in so far as the Board and the Judicial Commission are concerned. A committee of a Notified Sikh Gurdwara may suspend or dismiss any office-holder but is not to dismiss a hereditary office-holder of a Sikh Gurdwara except on any one of the findings as enumerated in clauses (a) to (h) of Section 134 of the Act. Procedure in regard to the dismissal of a hereditary office-holder or

a minister of a Gurdwara is referred to in sub-sections (1) and (2) of Section 135, and then sub-section (3) of this section says:—

“135 (3). Any hereditary office-holder who has been suspended or dismissed may, within three months of the date of the order of suspension or dismissal, as the case may be, appeal either to the Board or to the Commission as he may elect; if he elects to appeal to the Board, the order of the Board shall be final, and if he elects to appeal to the Commission, a further appeal shall lie to the High Court from the order of the Commission, provided that such appeal shall be made within ninety days of the date of the order.”

This sub-section of Section 135 of the Act gives concurrent appellate jurisdiction to either the Board or the Judicial Commission against the order of suspension or dismissal. In other words, both the Board and the Judicial Commission are appellate authority in so far as a committee of a Notified Sikh Gurdwara making an order suspending or dismissing any hereditary office-holder is concerned. The election to appeal either to the Board or to the Commission lies with the hereditary office-holder. There is thus, as stated, concurrent appellate jurisdiction in the Board and the Judicial Commission under sub-section (3) of Section 135. The Board has been given power to move the committee of a Notified Sikh Gurdwara to dismiss a hereditary office-holder or a minister of such a Gurdwara in the terms of the provisions of Section 134 and if the committee does not, within one month of its being so moved, dismiss such an office-holder or minister, the Board has been given power to apply to the Judicial Commission to order removal of such an office-holder or minister, or if it finds that such a person ought to be dismissed, then it has the power to dismiss him. There is then Section 142 of the Act which gives power and jurisdiction to the Judicial Commission to entertain an application against the Board, the executive committee of the Board, or against any member of the Board or against any employee past or present of the Board in respect of any alleged malfeasance, misfeasance, breach of trust, neglect of duty, abuse of power or any alleged expenditure on a purpose not authorised by the Act, and on a finding in that respect it may, consistently with the provisions of the Act or of any other law or enactment in force for the time being, direct any specific act to be done or forbore for the purpose of remedying the same and may award damages or costs against the person responsible for the same, and may order the removal of any office-holder or member of the Board

responsible for the same and may also disqualify any member of the Board, executive committee thus removed from such membership for a period not exceeding five years from the date of such removal. This gives complete judicial control over the functioning of the Board to the Judicial Commission not only in regard to its day-to-day functioning but also in regard to its continuance as a Board because power to disqualify members of the Board has been given to the Judicial Commission. Such powers can be exercised by the Judicial Commission not only in the final decision of the application, but, as held by my learned brother Narula J. in *Balbir Singh v. The Sikh Gurdwaras Judicial Commission, Amritsar*, Civil Writ No. 2115 of 1966, D/- 25-11-1966=(AIR 1967 Punj 272), the Judicial Commission has also authority to pass interim orders in the nature of grant of injunction or appointment of receiver if such power is otherwise conferred on it. Section 142 of the Act does not prohibit the grant of such interim relief. Provisions of Order 39, Rules 1 and 2, and Order 40, Rule 1 of the Code of Civil Procedure are in no manner inconsistent with Section 142 of the Act. On the contrary, those provisions are not only ancillary to Section 142 but are necessary to be invoked in suitable cases for effectively exercising the jurisdiction vested in the Judicial Commission under that section. The Judicial Commission has jurisdiction, in suitable cases, to issue temporary injunctions or to make interim arrangements by appointment of a receiver on principles which are well established under the Code of Civil Procedure. This is the enumeration of the judicial functions of the Judicial Commission which cannot be divorced from the functioning and operation of the Board under the statute.

14. In Part I, Chapter III deals with the constitution of one or more tribunals for the purpose of deciding the claims made in accordance with the provisions of the Act (Section 12(1)). Unlike this provision in Section 12(1), Section 70 of the Act only refers to the appointment of ‘the Judicial Commission’, that is to say, there is only appointment of one Judicial Commission under the Act. So long as the Act stands as it is, it does not admit of the appointment of any other Judicial Commission under its provisions.

15. It has already been shown that removal of a member of the Judicial Commission can result under two provisions of the Act (a) under Section 83 by the dissolution of the Judicial Commission, and (b) under Section 79 by the State Government.

16. The consideration of the provisions of the Act, to which somewhat detailed

reference has been made above, briefly comes to this—

(1) The power and authority to administer the management of a Notified Sikh Gurdwara, whether situate in the State of Punjab or in the State of Haryana or in the Union Territory of Chandigarh or in the transferred territories in the Union Territory of Himachal Pradesh, is statutorily vested in the committee of such a Notified Sikh Gurdwara, the Board, and the Judicial Commission (S. 41).

(2) Appointment of two out of the three members of the Judicial Commission can only be made, and if a vacancy in this respect occurs that can be filled only in the same manner, by the State Government out of a list of seven names nominated by the Board and removal of a name from that list can only be at the instance of the Board, but, if in regard to the bringing of the names on the list, the Board fails to do so within the time given in the statute, the State Government has been given power to complete such a list of qualified persons itself. This is the function of the Board. If it fails to perform it, it can be performed by the State Government. So that this function of an inter-State body corporate is to be performed by the State Government in the Act. How can then the expression 'State Government' in Section 71 of the Act in this context be read to be either the State Government of Punjab or the State Government of Haryana or the Government of any one of the two Union Territories of Chandigarh and Himachal Pradesh?

(3) The expenses of the Judicial Commission are not wholly borne by the State Government, but only to the extent of one-third, while the remaining two-thirds are the liability of the Board, which, if it does not discharge by the time provided in Section 75, can be recovered from it as an arrear of land revenue. This is clearly provided in Section 75 of the Act.

(4) The State Government has the power to remove any member of the Commission under Section 79 on grounds mentioned in clauses (i) to (iii), and clause (iv) has already been held invalid as violative of Article 14 of the Constitution.

(5) There is only one Judicial Commission under the Act unlike the provision with regard to tribunals in Section 12 (1), as there can be more tribunals than one under that provision, and the jurisdiction of the Judicial Commission extended throughout the territory of what was the 'existing State of Punjab' before November 1, 1966, and continues to be so because no change or modification has been made in any provision of the Act either by any direction of the Central Government under Section 72 or by any adapta-

tion under Section 89 of the Reorganisation Act. The Act does not envisage more commissions than one. Its provisions, as the same are at present, do not admit of appointment of four separate Judicial Commissions in the four parts of the 'existing State of Punjab' under the Reorganisation Act.

(6) On the date of the reorganisation and the coming into force of Act 31 of 1966 (the Reorganisation Act) there was only one Judicial Commission in the whole of the territory of the 'existing State of Punjab' and that one Commission has continued under the provisions of the Act after that. It is not denied that its office is located at Amritsar in consequence of notification under Section 77 of the Act.

(7) The Judicial Commission is an appellate tribunal against the findings of the Board that a person has incurred disability under Section 45 or Section 46 or Section 90 or Section 91 and thus ceased to be a member either of the Board or of a committee of a Notified Sikh Gurdwara, as the case may be. Further where it is necessary to decide for the purposes of the constitution of the Board whether a person has or has not become a patit, which is a disability under Sections 45 and 46, the question, on an application being made to it for this purpose, is to be decided by the Judicial Commission. This power of the Judicial Commission directly affects the functioning and operation of the Board as a body corporate inasmuch as it may not accept its finding that a certain member of the Board is under a disability or it may do so and thus affect the membership of the Board.

(8) Where a committee of a Notified Sikh Gurdwara is not willing to devote surplus income for the purposes suggested by the Board, the latter may obtain an order from the Judicial Commission against such committee, which brings in the Judicial Commission as regards the functioning and operation of the Board, as where the Board fails to obtain the willingness of a committee of a Notified Sikh Gurdwara to the utilisation of surplus income it may approach the Judicial Commission to compel compliance by the committee. In the same way, according to Section 116, the Judicial Commission is to receive a copy of the audit report of the audit of accounts of the Board just the same as the State Government, and, if the Board will not publish the same as required by the statute, the Commission has co-extensive power with the State Government to get the same published. The publication of the audit report is the function of the Board and, if it fails to do so, the power is given to the Judicial Commission to perform the same function. It makes no difference that the same power has also been given to the State

Government. Further, the Board has control over the budgets of the committees of the Notified Sikh Gurdwaras and if the budgets provide for expenditure not authorised by the Act or in accordance with a scheme of administration settled under the provisions of the Act, it is the function of the Board to ask the committee concerned to modify its budget by removing such defects, but if the committee does not comply, the function of the Board is then performed by the Judicial Commission, on an application by the Board, in passing an order against the committee directing it to comply with the modification of the budget as the Commission considers just and proper. All these are the powers of the Judicial Commission exercised by it, obviously at the instance and on the application of the Board, where the Board while exercising its functions under the statute fails to obtain compliance with the same. In such a situation the Board approaches the Judicial Commission and obtains compliance with the performance of its duties and functions so that it may continue to operate in the terms of the Statute.

(9) There is co-ordinate legislative power to frame schemes of management having the force of law with the Board and the Judicial Commission according to Section 130 of the Act, so that in this respect where the Board cannot perform the functions because the committee of the Notified Sikh Gurdwara concerned is not prepared to agree with it for a scheme of management, the duty is then performed by the Judicial Commission by framing a scheme of management.

(10) There is concurrent appellate jurisdiction with the Board and the Judicial Commission under Section 135 of the Act, so that in exercise of its appellate power, depending upon who is approached, the same function may be performed either by the Board or by the Judicial Commission.

(11) And lastly, the Judicial Commission has complete judicial control over the day-to-day functioning and the membership of the Board under Section 142 of the Act.

The argument of the learned counsel for the petitioners is that there was and there still continues to be one Judicial Commission under the provisions of the Act even in consequence of the reorganisation of the 'existing State of Punjab' into four parts, and as the Board is an inter-State body corporate with regard to which no legislative power is with either the State of Punjab or the State of Haryana or any one of the two Union Territories of Chandigarh and Himachal Pradesh, so wherever as to the functioning of the Board and the Judicial Commission the expression 'State Govern-

ment' appears in any section of the Act, that expression must be read as having been substituted by the expression 'Central Government', for, the learned counsel presses, it cannot be either the State Government of Punjab or the State Government of Haryana or the Central Government as representing any one of the two Union Territories of Chandigarh and Himachal Pradesh. The learned counsel points out that there can be no interference with the existing Judicial Commission for it is one Commission for the whole territory to which the Act continues to extend. As the Act does not envisage more than one Judicial Commission there cannot be four Judicial Commissions, and, if so, there cannot be three of the four reorganised parts of the 'existing State of Punjab' without the Judicial Commission to attend such of the functions of the Board which the Board itself cannot carry out, and for the carrying out of which it has to approach the Judicial Commission to obtain orders from it. This broadly is the argument urged by the learned counsel on the side of the petitioners.

17. The learned Attorney-General on behalf of the respondents has referred to the provisions of the Reorganisation Act and has contended that it is an Act which deals with all the problems connected with the reorganisation of the 'existing State of Punjab' completely and so solution to every problem or question is to be found within the scope of its provisions. He has referred to *W. W. Joshi v. State of Bombay*, AIR 1959 Bom. 363, in which, with reference to the States Reorganisation Act of 1956, the learned Judges observed that "looking to the aim, scope and the object of the Act, the intention of Parliament clearly appears to be to provide for a solution of all problems arising out of the States Reorganisation. Effect can only be given to this intention of Parliament by liberally construing its provisions so far as the language used should permit". The learned Attorney-General has, therefore, urged that as solution to all problems has to be found within the four corners of the provisions of the Reorganisation Act, at least one thing is clear according to him, that wherever the expression 'State Government' appears in any provision of the Act it cannot be read as 'Central Government'. He has not denied that the Board being an inter-State body corporate, the power to legislate in regard to such a body is with Parliament, but his position is that the Judicial Commission is not such a body. He has pointed out that it has not been the argument on the side of the petitioners that there is an omission or a lacuna in the Reorganisation Act in not having made provision with regard to the Judicial Commission under the Act.

Thus, the Reorganisation Act should be so interpreted that it has dealt with even the problem connected with the Judicial Commission under the Act within the scope of its provisions. Human beings are fallible and even the best draftsman may make an omission and that too quite unwittingly and genuinely. So his contention has been (a) that the provisions of Section 72 of the Reorganisation Act are limited and confined strictly to the Board as an inter-State body corporate having nothing to do with the Judicial Commission, so that the Central Government does not come in, in any respect, so far as the Judicial Commission is concerned, (b) that thus wherever the expression 'State Government' appears in the Act in reference to or in connection with the Judicial Commission, it is not the 'Central Government' but the present Punjab State Government, (c) that all the authorities in the present State of Punjab have remained intact, though the other three reorganised parts (State of Haryana and the two Union Territories of Chandigarh and Himachal Pradesh) can make their own laws in the scheme of the Reorganisation Act (Section 91) to provide for all sorts of authorities and bodies, even including a Judicial Commission, but he has stressed that the scheme of the Reorganisation Act is that the bodies functioning in the present State of Punjab continue as before the date of reorganisation and in this respect, so far as the Judicial Commission is concerned, the learned Attorney-General has pointed out (i) that the Judicial Commission has existed in the State of Punjab at the commencement of the Reorganisation Act, (ii) that since then its members have been drawing pay from the present State of Punjab, and (iii) it has been exercising jurisdiction within the present State of Punjab, (d) that under Section 72 of the Reorganisation Act the power of the Central Government is to give directions with regard to the functioning of the Board and the law applicable to the Board, it cannot issue notifications, it cannot make appointments, and it cannot receive the list of names for appointment to the Judicial Commission from the Board, because if it did, it would thus be exercising functions extra-territorially, of which the result is that in the Act, in no provision, can the expression 'Central Government' be substituted for the expression 'State Government', and further that until the Central Government issues any directions under sub-section (2) of Section 72 of the Reorganisation Act, there is no escape from this, that the expression 'State Government' in the Act has to be limited to the present Punjab State Government, (e) that, in any case, the power with the Central Government is additional to the power with the State Government in the

Act which has reference to the present Punjab State Government, and (f) that in view of the provisions of Section 83 of the Reorganisation Act the members of the Judicial Commission continue to hold posts in the present State of Punjab and continue to function therein because the Judicial Commission has been located, on the date of the coming into force of the Reorganisation Act, at Amritsar in the present Punjab State, and thus normally its functions have been limited and cut down to the reduced area of that State alone.

18. In the Reorganisation Act, Part IX, Sections 81 to 85, concerns the 'Provisions as to Services'. Section 83 appears in this part and reads—

"83. Provisions as to continuance of officers in the same posts. — Every person who immediately before the appointed day is holding or discharging the duties of any post or office in connection with the affairs of the existing State of Punjab in any area which on that day falls within any of the successor States shall continue to hold the same post or office in that successor State and shall be deemed, on and from that day, to have been duly appointed to the post or office by the Government of, or other appropriate authority in, that successor State:

Provided that nothing in this section shall be deemed to prevent a competent authority on or after the appointed day, from passing in relation to such person any order affecting his continuance in such post or office."

It is this section upon which the learned Attorney-General has placed reliance to urge that the members of the Judicial Commission hold and discharge the duties of their posts or offices as members of the Judicial Commission in the successor State of Punjab qua the 'existing State of Punjab', and thus the Commission is within the authority and jurisdiction of the new State of Punjab. However, it has already been clearly shown that the jurisdiction of the Judicial Commission extends not only to the new State of Punjab, but also to the State of Haryana, the Union Territory of Chandigarh, and the transferred territory in the Union Territory of Himachal Pradesh. The whole of the Act applies to those parts and, as there is to be only one Judicial Commission under the Act, its authority, power and jurisdiction extends to all those four parts. Section 83 of the Reorganisation Act envisages a person holding or discharging the duties of any post or office in connection with the affairs of the 'existing State of Punjab' and, on division of the 'existing State of Punjab' into four parts in consequence of reorganisation under the Reorganisation Act, the falling of that post or office in one of

the four successor States. It thus provides that such a person shall continue to hold such a post or office in the successor State. It is in terms confined to offices which on division of the 'existing State of Punjab' fell within any one of the successor States and thus the jurisdiction or power of the holder of the office or post comes to be limited within the territory of the successor State. This section cannot apply to a judicial body like the Judicial Commission under the Act which has jurisdiction over the territory of the four parts of the reorganised 'existing State of Punjab'. Undoubtedly before November 1, 1966, the Judicial Commission was having jurisdiction and discharging its duties in the whole of the 'existing State of Punjab' and, even if it is conceded that it was thus having jurisdiction and discharging its duties as Judicial Commission 'in connection with the affairs of the existing State of Punjab' as it does not cease to have jurisdiction over any one of the successor States but has jurisdiction over the territory of all the four successor States, it cannot be taken to be now having jurisdiction and discharging its duties in connection with the affairs of the successor State of Punjab alone. The fact is that under the provisions of the Act it is having jurisdiction and discharging its duties in connection with the affairs of all the four successor States. If the argument of the learned Attorney-General was to prevail that the Judicial Commission has only jurisdiction and power in the successor State of Punjab, then there is no Judicial Commission in the remaining three successor States and none can be appointed as so far no adaptation or modification of the Act has been made. The result of this is patent that the functioning of the Board, on this view, practically comes to a stop in the other three successor States, and is limited to the successor State of Punjab alone. It is obvious that Section 83 of the Reorganisation Act has no application to the Judicial Commission under the Act and Parliament did not intend such a consequence as immediately flows from the argument of the learned Attorney-General. Section 83, therefore, does not advance the argument on the side of the respondents. The mere fact that the Judicial Commission had its existing office in the area that is now the State of Punjab, that does not restrict its jurisdiction, for its jurisdiction arises from the provisions in the Act, which apply it to the whole area of the successor States. It has already been shown that the expenses of the Commission are defrayed one-third by the State Government and the remaining two-thirds by the Board. If after the reorganisation of the 'existing State of Punjab' factually the members of the Board have been drawing their emolu-

ments from the Government of State of Punjab, respondent 2, that will not affect the status and jurisdiction of the Judicial Commission. Even so, the two-thirds of the expenses are the liability of the Board and with regard to the remaining one-third, the Punjab State Government, respondent 2, can take necessary steps to recover whatever share the other successor States may have to contribute in this respect. Besides, nothing has compelled the Punjab State Government, respondent 2, to make payment to the Commission, and, if it had taken objection to such payment, then the proper authority and legislature having the power to adapt, amend or alter the Act would have proceeded to provide for such a contingency. If there are to be four Judicial Commissions, each in each successor State, with regard to the functioning of one inter-State body corporate, the Board, the impediments to the functioning of the Board can readily be seen. That apart, having regard to the provisions of the Act, as they are at present, the Board cannot be compelled to contribute to two-thirds of the expenses of such four Judicial Commissions. There is nothing in the Reorganisation Act which supports any such consequence. The learned Attorney-General has contended, on reference to W. W. Joshi's case, AIR 1959 Bom. 363, that the Reorganisation Act should be liberally construed, but to narrow down the jurisdiction and authority of the Judicial Commission to the Punjab State, one of the four successor States on reorganisation of the 'existing State of Punjab', would not be giving liberal interpretation to the provisions of the Reorganisation Act but would, instead, be narrowing it down in a somewhat extreme manner. So Section 83 cannot be of assistance to support the argument on the side of the respondents. It is not necessary in these petitions for this Court to say whether in any provisions of the Act, and particularly the provisions relating to the constitution, powers and jurisdiction of the Judicial Commission, 'Central Government' can be read for 'State Government' as the latter expression appears in the Act. So, the argument of the learned Attorney-General in this respect that that cannot be done is to my mind not quite in point. What this Court has to decide is whether the Punjab State Government, one of the four successor States to the 'existing State of Punjab', alone can act to interfere with the constitution of the Judicial Commission and its functioning. So that it is not for this Court to decide whether the substitution as referred to by the learned Attorney-General can or cannot be made, nor is it necessary for this Court to exercise its power to construe the provisions of the Act under Sec. 90

of the Reorganisation Act in this manner. The narrow question, as I have already said, for decision is whether the Punjab State Government, respondent 2, has or has not power and authority to interfere and make a change in the constitution of the Judicial Commission? Another aspect of the argument of the learned Attorney-General, which is another shape to the argument just now considered, has been that under Section 72 of the Reorganisation Act, the Central Government can issue only certain directions with regard to the functioning and operation of the Board and under Section 89 of the same Act it has certain power to make adaptation in the Act, but it cannot issue any notification or make any appointment under the Act. This argument means the same thing as the earlier argument that the expression 'Central Government' cannot be substituted for the expression 'State Government' in the Act in so far as the provisions of the Act concern the Judicial Commission. This, however, is a problem which may be tackled by the Central Government when exercising its powers under Section 72 or under Section 89 of the Reorganisation Act, but, as I have already said, this matter does not arise for the consideration of this Court. So the argument of the learned Attorney-General that respondent 2, the State Government of Punjab, has the power to remove a member of the Judicial Commission under Section 79(iv) of the Act and to appoint a new member under Section 70 of the Act cannot prevail. It may be a case of omission, in which case the omission can either be supplied by some amendment of the Reorganisation Act or perhaps it can be met under the provisions of Section 96 of this Act which says — "If any difficulty arises in giving effect to the provisions, of this Act, the President may, by order, do anything not inconsistent with such provision which appears to him to be necessary or expedient for the purpose of removing the difficulty." It may be that it is not a case of omission and the situation can be effectively dealt with by exercise of the powers by the Central Government under Section 72 and also under Sec. 89 of the Reorganisation Act. The question to be decided here is not how this problem is to be solved, but whether the Punjab State Government has the power and authority to remove a member from and to appoint a new member to the Judicial Commission. No doubt in S. 79 of the Act the State Government has been given power to remove a member of the Commission, and under Section 70 of it, it can appoint a member to it, but one of the four successor State Governments, in this case the Government of the State of Punjab, cannot be accepted to exercise such power in relation to a Judi-

cial Commission which has jurisdiction under the Act not only in that State but also in the remaining three successor States. If this was permitted, the functioning and operation of the Board would be impaired and may come to a stop by this act of respondent 2, the State Government of Punjab, also in the territory under the remaining three successor States, which it has not the power to do under any provision of the Reorganisation Act. More than that, it has not the power to do any act in the shape of removing a member of the Judicial Commission or appointing a new member to the Commission so as to lead to interference with the functioning and operation of the Board, an inter-State body corporate. It has already been shown sufficiently and clearly that the jurisdiction and functioning of the Judicial Commission being so intermixed and intermingled with the functioning and operation of the Board that the same cannot be separated, for (a) there are cases in which, where the Board is obstructed in its functioning, the Judicial Commission, on its application, has jurisdiction and authority to carry out such functions, (b) there are cases in which the Judicial Commission has co-ordinate power of legislative nature, in the shape of framing schemes of administration and management for Gurdwaras, with the Board, in other words, where the Board in such a case is unable to perform its functions, it is the Judicial Commission which does so, and (c) in one case at least the Judicial Commission is an appellate tribunal of a co-ordinate and concurrent jurisdiction with the Board, so that a function which can be performed by the Board in its appellate jurisdiction may come to be performed by the Judicial Commission, depending upon whether the approach is made to one or the other. So the Judicial Commission is a judicial body which directly and substantially controls the functioning and operation of the Board and, as I have already said, its jurisdiction and functioning cannot be divorced from the operation and functioning of the Board. Any interference with the constitution and powers of the Judicial Commission immediately spells interference and obstruction to the functioning and operation of the Board, an inter-State body corporate, with the functioning and operation of which the Punjab State Government, respondent 2, has no power or authority to interfere. On this consideration it is obvious that the Judicial Commission under the Act is not now in consequence of the provisions of the Reorganisation Act within the power and authority of respondent 2, the State Government of Punjab.

19. Same conclusion is available and is reached on a somewhat different consi-

deration. It is settled that entries in the Legislative Lists in the Seventh Schedule to the Constitution are to be so liberally and broadly construed that they are to include within their ambit and scope all ancillary and necessary matters, the inclusion of which renders the legislation under a particular entry the more effective, useful and purposeful. The entries are not to be construed strictly so as to limit their ambit and scope. Consequently entry 44 in List I — Union List —, which obviously covers legislation in regard to an inter-State body corporate such as the Board, also has within its ambit and scope legislation necessary for the operation and functioning of such an inter-State body corporate, in the present case as to the Judicial Commission, which very largely and substantially not only controls the operation and functioning of the Board but may at any moment have to perform the functions of the Board, where the Board cannot do so. It has already been sufficiently clearly shown that the jurisdiction and functioning of the Judicial Commission is so integral to the functioning and operation of the Board that in the terms of the Act no separation is practical. So in this approach the provisions of the Act relating to the Judicial Commission are as much within the scope of entry 44 in List I — Union List — as its provisions relating to the Board. On this view not one of the successor States, which of course includes the State of Punjab, respondent 2, can interfere with the constitution of the Judicial Commission.

20. The consequence of the considerations as above is that Punjab State Government, respondent 2, has no power or authority to remove a member of the Judicial Commission under Section 79 of the Act, nor has it a power to appoint a new member to it. It follows that it has no authority and power to accept the resignation of Mr. Bakhat Singh, one of the members of the Judicial Commission. It is true that in the petitions no prayer is made in regard to Mr. Bakhat Singh, but it has been necessary to state so because the Judicial Commission has to function to enable the Board to operate and function, in the wake of the provisions of the Reorganisation Act, under the provisions of the Act. So the impugned notification in Civil Writ No. 2847 of 1967 removing petitioner 2, Mr. Sajjan Singh Giani, from the membership of the Judicial Commission, and the impugned notification in Civil Writ No. 2899 of 1967, appointing Mr. Sardul Singh, respondent 4, as member of the Judicial Commission, are ultra vires and invalid.

21. In the result, on conclusions as above, Mr. Sajjan Singh Giani, petitioner 2, continues to be the member as also the

president of the Judicial Commission, and Mr. Sardul Singh, respondent 4, has not become a member of the Judicial Commission. As already pointed out, for the proper functioning of the Judicial Commission and it is stated merely as a matter of clarity, that what has been the conclusion in these petitions also has effect on the tenure of Mr. Bakhat Singh, the third member of the Judicial Commission in the same manner as it has on the tenure of Mr. Sajjan Singh Giani, petitioner 2. So the two petitions are accepted and the two impugned notifications are quashed. The State Government of Punjab, respondent 2, shall bear the costs of the two petitioners in Civil Writ No. 2847 of 1967, and of the petitioner in Civil Writ No. 2899 of 1967, in either the counsel's fee being Rs. 250/-.

22. D. K. MAHAJAN J.: I agree.

23. R. S. NARULA J.: I also agree.

Petitions allowed.

AIR 1970 PUNJAB & HARYANA 60 (V 57 C 9)

FULL BENCH

HARBANS SINGH, R. S. SARKARIA
AND H. R. SODHI, JJ.

Bishamber Dutt Roshan Lal and others,
Petitioners v. Gian Chand Charan Das,
Respondent.

Civil Revn. No. 504 of 1965 and Civil Misc. No. 3881 of 1968, D/- 15-4-1969, decided by Full Bench on order of reference made by Gurdev Singh, J., D/- 9-2-1967.

(A) Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 — Evacuee property forming part of compensation pool and exempt from operation of Act — Sub-letting by tenant during such period — Purchaser of property can evict the tenant by an application under S. 13 notwithstanding that the property when sublet was exempt from operation of the Act. Civil Revn. No. 675 of 1963, D/- 13-11-1964 (Punj) & Civil Revn. No. 222 of 1964, D/- 21-5-1965 (Punj) & Civil Revn. No. 295 of 1965, D/- 21-5-1965 (Punj) & Civil Revn. No. 231 of 1965, D/- 17-12-1965 (Punj), Overruled; AIR 1969 S.C. 1291, Rel. on; AIR 1964 Punj. 363 & 1966-68 Punj. L. R. 288 Approved. (Para 14)

(B) Transfer of Property Act (1882), S. 108 (J) — Eviction on ground of sub-letting — Tenant of a house subletting premises without permission of landlord — Rent Control Act prohibiting such sub-letting coming into force later — Tenant can be evicted notwithstanding the fact that the Act prohibiting such sub-letting was not in force when the premises were

sub-let. AIR 1969 S.C. 1291, Rel. on.
(Para 11)

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(1963) 1 Punj 30, Gobind Ram v.
Takhat Mal Kanungo 6, 7, 10

(1958) Civil Revn. No. 178 of 1957,
D/- 1-8-1958 (Punj), Siri Ram
Jolly v. Sub-Divisional Officer
Mahasu, H.P. 5

H. L. Sarin, Senior Advocate with M/s.
A. L. Bahl and H. S. Awasthy, for Peti-
tioners; J. N. Kaushal with M/s. Ashok
Bhan and R. S. Mongia, for Respondent.

HARBANS SINGH, J.:— This Full
Bench has been constituted to consider
the following question formulated by
Mr. Justice Gurdev Singh by his order
dated 9th of February, 1967:—

"Whether eviction of a tenant can be
ordered on the ground that he had sublet
or parted with the possession of the pre-
mises during the period the premises
formed a part of the compensation pool
or vested in the evacuee property and
were exempt from the operation of the
East Punjab Urban Rent Restriction Act
3 of 1949, on the application under Sec-
tion 13 of that Act of a person who pur-
chases the property from the Central
Government after such subletting or
parting with possession had occurred?"

2. The facts as have been taken by
the learned Single Judge for the purpose
of the decision of the above-mentioned
law point may briefly be stated as under:

3. The shop in dispute, which belong-
ed to some Muslims, was on rent with
Messrs. Bishambar Dutt Roshan Lal
(hereinafter referred to as the tenants)
immediately before the partition of the
country in 1947. As Muslims had become

evacuees, the shop vested in the Custo-
dian, to whom the rent was paid by the
tenants. Later, as a result of the notifica-
tion issued under Section 10 of the Dis-
placed Persons (Compensation & Rehabili-
tation) Act, 1954, the shop amongst other
evacuee property was acquired by the
Central Government for the rehabilitation
of displaced persons and thus formed part
of the compensation pool. Later still, it
was put to auction when Gian Chand pur-
chased it and a sale certificate was issued
in his favour on 20th of March, 1958, and
the title to the property vested in him
with effect from 10th of February, 1958.

On 28th of June, 1960, Gian Chand
(hereinafter referred to as the landlord)
filed an application under Section 13 of
the East Punjab Urban Rent Restriction
Act, 1949, (hereinafter referred to as the
Act) seeking ejectment of the tenants on
the ground of subletting of the shop and
non-payment of the rent. Arrears of rent
having been paid, we are no longer con-
cerned with that matter. The subletting
was denied, but the Appellate Authority
came to the conclusion that there was
subletting of the premises. The Appellate
Authority also found that the tender of
the arrears of rent was not in order, but
that finding has been set aside by the
learned Single Judge and the same need
not be considered. The Appellate Autho-
rity ordered the eviction of the tenants
and against that order the revision peti-
tion, out of which the present reference
has arisen, was filed on behalf of the
tenants.

4. Before the learned Single Judge, it
was conceded that the subletting took
place sometime in the year 1955 when the
property vested in the Central Govern-
ment as an acquired property and formed
part of the compensation pool and it was
subsequently that the landlord purchased
the same from the Union of India.

5. I may now refer to some of the
provisions of the Act which require con-
sideration. The Act was first published in
the East Punjab Government Gazette
(Extraordinary) on March 25, 1949, and
by virtue of sub-section (3) of Section 1,
it came into force at once; in other words
with effect from March 25, 1949. Section 3
of the Act provides as follows:—

"The State Government may direct
that all or any of the provisions of this
Act shall not apply to any particular
building or rented land or any class of
buildings or rented lands."
The relevant portion of Section 13 of the
Act is as follows:—

"(1) A tenant in possession of a build-
ing shall not be evicted therefrom
in execution of a decree passed before or
after the commencement of this Act or
otherwise except in accordance
with the provisions of this section.

(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant, is satisfied—

(i) x x x

(ii) that the tenant has after the commencement of this Act without the written consent of the landlord—

(a) transferred his right under the lease or sublet the entire building or rented land or any portion thereof; or

(b) used the building or rented land for a purpose other than that for which it was leased, or

(iii) that the tenant has committed such acts as are likely to impair materially the value or utility of the building or rented land, or

(iv) that the tenant has been guilty of such acts and conduct as are a nuisance to the occupiers of buildings in the neighbourhood, or

(v) that where the building is situated in a place other than a hill-station, the tenant has ceased to occupy the building for a continuous period of four months without reasonable cause, the Controller may make an order directing the tenant to put the landlord in possession"

A Notification No. 4630-C-48/764, dated 5th of January, 1949, was issued by the Punjab Government in exercise of the powers conferred under Section 3 of the East Punjab Urban Rent Restriction Act, 1947, which was in fact repealed and replaced by the Act of 1949, Section 3 of the Act of 1947 being in *pari materia* with Section 3 of the Act of 1949. By the above-mentioned notification, all properties belonging to the Central Government were declared exempt from the provisions of the Act of 1947. It was not disputed that that notification made under the 1947 Act was still in force. See in this respect *Sadhu Singh v. District Board, Gurdaspur*, 1962 Pun LR 1=(AIR 1962 Punj 204) and *Siri Ram Jolly v. Sub-Divisional Officer, Mahasu, Himachal Pradesh*, Civil Revn. No. 178 of 1957, decided on 1st of August, 1958 (Punj), by Bhandari, C.J. The result, therefore, is that in the year 1955 when the subletting took place, the building in question was exempt from the operation of the Act of 1949. The contention of the tenants was that the landlord, who became the owner subsequently on transfer from the Union of India, cannot seek eviction on the basis of the subletting, which took place when the Act was not applicable qua that building.

6. Four decided cases of this Court have accepted this view. These are *Gopi Nath Aggarwal v. Shri Siri Krishan Chopra*, Civil Revn. No. 675 of 1963, decided on 13-11-1964 (Punj), *Smt. Maha-*

devi v. Darshan Singh, Civil Revn. No. 222 of 1964, decided on 21-5-1965 (Punj), and *Badri Das v. Prem Chand Puri*, Civil Revn. No. 295 of 1965, decided on 21-5-1965 (Punj), all by *Falshaw C.J.*, and *Kharaiti Lal v. Charanji Lal*, Civil Revn. No. 231 of 1965, decided on 17th of December, 1965 (Punj), by Mr. Justice Mehar Singh (as he then was). A contrary view, however, had been taken by a Bench of this Court in *Gobind Ram v. Takht Mal Kanungo*, 1962 Punj. L.R. 969. In this case it was found that subletting had taken place sometime in the year 1953 when the property formed part of the compensation pool. This was transferred by the District Rent and Managing Officer to *Jai Singh*, landlord, in April, 1958, who in turn transferred it to *Gobind Ram* in July, 1958. *Gobind Ram* then brought the application for the ejectment of the tenants on the ground of subletting, which had taken place in the year 1953. The Appellate Authority dismissed the application on the ground that as the subletting took place at a time when the East Punjab Urban Rent Restriction Act was not applicable, no ejectment could be claimed by the landlord on the basis of such a subletting. The other point raised was whether in view of the provisions of Section 29 of the Displaced Persons (Compensation & Rehabilitation) Act, 1954 (hereinafter referred to as the Rehabilitation Act), the Rent Controller had no jurisdiction to entertain an application for ejectment within the period of two years prescribed by the above-mentioned section. The matter was ultimately referred to a larger Bench and it came up for consideration before a Division Bench consisting of *Dulat*, Acting C. J. and *Mahajan J.*

7. Broadly speaking, Section 29 of the Rehabilitation Act provides that for two years after the transfer of the property in compensation pool, the tenant, who is in lawful possession of the premises, shall be deemed to be a tenant of the transferee on the same terms and conditions as to the payment of rent etc. and no such person shall be liable to be ejected for a period not exceeding two years as may be prescribed in respect of any class of property except that he can be ejected earlier on various grounds including that of subletting as are mentioned under the proviso to sub-section (1) of Section 29 of the Rehabilitation Act. The Bench came to the conclusion that an application made by the transferee within this period of two years on any one of the grounds mentioned in the proviso would be entertainable by the Rent Controller. As regards the other point, Acting Chief Justice *Dulat*, speaking for the Bench, observed as follows:—

"..... the tenant had transferred his tenancy rights to another person with-

out the written consent of the landlord. This had happened in 1953 while the East Punjab Urban Rent Restriction Act had come into force in 1949, so that the transfer occurred after and not before the Act. It is, in my opinion, immaterial that for some time during the interval the premises in dispute were exempted from the operation of the East Punjab Urban Rent Restriction Act, for such exemption cannot alter the date of the coming into force of the Act and the tenant's liability to eviction arises if he parts with his rights after the coming into force of the Act. The conclusion, therefore, must be that in this particular case the tenant had incurred that liability. I would, therefore, allow the landlord's petition and set aside the order made by the Appellate Authority and restore the order of eviction made by the Rent Controller." (See pages 974 and 975 of the report).

Although the three Revisions, decided by Falshaw C.J., mentioned above, which took the contrary view, were decided after the Bench decision in Gobind Ram's case, 1962-64 Pun LR 969, had been reported in the year 1962, yet it appears that this case was not cited before the learned Judge and was therefore not noticed or distinguished. Similarly, in Kharaiti Lal's case, Civil Revn. No. 231 of 1965, D/- 17-12-1965 (Punj) also, this case was not cited till sometime after the learned Judge had dictated the judgment in the case agreeing with the view expressed by Falshaw C.J. in the earlier three cases. Mr. Justice Mehar Singh added a note, in which this Bench decision was distinguished, by making the following observations:—

"The reference to exemption in that part of the judgment does not show that there was exemption to the premises from that Act at the time when the sub-tenancy was created it is obvious that in this case (Bench case) it is not clear from the record that at the time the sub-tenancy was created at that time the exemption from East Punjab Act 3 of 1949 was operative."

As was mentioned by Mr. Justice Gurddev Singh in the referring order and as noticed above, the printed report of the case leaves no manner of doubt that the subletting was in the year 1953 when the property formed part of the compensation pool and consequently the Bench case cannot be distinguished on this score.

8. Mr. Sarin, learned counsel for the tenants, vehemently urged that the view taken by Falshaw C.J. and Mehar Singh J. was the correct view. He urged that although the Act came into force in the year 1949 and as such generally speaking the Act must be taken to have commenced from that date, yet the words used viz. "after the commencement of the Act" in

sub-clause (ii) of sub-section (1) of Section 13 of the Act must be read in conjunction with Section 3 of the Act. Quia a particular building, which was exempt from the operation of the Act by virtue of a notification published under Sec. 3, the Act should be taken to have commenced only after the expiry of the period of exemption.

9. In respect of the property, which is exempt from the operation of the Act, in view of the fact that the same formed part of the compensation pool and which later on, is transferred by the Union of India to a private person, there are three stages:

- (i) the period during which the property remained exempt;
- (ii) two years after the transfer to a private person; and
- (iii) after the expiry of the aforesaid period of two years.

During the period the property is exempt from the operation of the Act, the Act is altogether inapplicable and the relations between the tenant and the landlord, who in this case is the Union of India, are governed by the terms on which the tenancy is held; the provisions of the Transfer of Property Act or any special law or provision governing the relations between the parties. After the transfer of the property to a third person, these relations would have been governed by the provisions of the Rent Restriction Act because immediately after the transfer the exemption goes. However, in view of Section 29 of the Rehabilitation Act, the landlord cannot eject his tenant notwithstanding any terms of contract between the parties. Proviso to Section 29(1) of the Rehabilitation Act is in the following terms:—

"Provided that notwithstanding anything contained in any such terms and conditions, no such person shall be liable to be ejected from the property during such period not exceeding two years as may be prescribed in respect of that class of property, except on any of the following grounds, namely;

(a) that he has neither paid nor tendered the whole amount of arrears of rent due after the date of the transfer within one month of the date on which a notice of demand has been served on him by the transferee;

(b) that he has, without obtaining the consent of the transferee in writing—

(i) sublet or otherwise parted with the possession of the whole or any part of the property, or

(ii) used the property for a purpose other than the purpose for which he was using it immediately before the transfer,

(c) that he has committed any act which is destructive of, or permanently injurious to, the property."

This section, therefore, provides a complete code covering the relations between the tenant and the transferee during this period of two years. The learned counsel for the petitioners rightly argued that in view of the wordings of clause (b) of the proviso to Section 29(1) of the Rehabilitation Act making it obligatory for the tenant to obtain the consent of the transferee in writing with regard to any subletting, the subletting, which would give a cause of action to the landlord to seek ejectment of the tenant, must necessarily take place after the date of transfer and consequently the landlord cannot take advantage of any subletting, which has taken place prior to the date of transfer. After the expiry of the period of two years, of course, the relations between the parties are governed by the provisions of the Act.

The argument of the learned counsel is that if during the period of two years after the transfer, the landlord could not take advantage of subletting, which took place during the earlier period, it would be most unjust if the landlord can seek the ejectment of the tenant after the expiry of the period of two years on the basis of the same subletting which took place during the period when the property was altogether exempt from the operation of the Act. The main contention was that if subletting was not a ground for ejectment when the same was effected, then the same should not be a ground for ejectment at a subsequent date, because it would be against the rules of jurisprudence that an act which was legal when it was performed should be treated as penal subsequently.

10. It was conceded that under the general law of the land, there is no prohibition against subletting and it is only if it is expressly provided in the terms of the lease that subletting involves forfeiture of the lease and entitles a landlord to seek ejectment of his tenant. In *Kharaiti Lal's case*, Civil Revn. No. 231 of 1965, D/- 17-12-1965 (Punj) (supra) while dealing with the case of *Gobind Ram*, 1962-64 Pun LR 969, Mr. Justice Mehar Singh observed as follows:—

"It seems rather difficult to accept that a property should be exempt from the provisions of East Punjab Act 3 of 1949 and yet during the period that Act has no application, the tenant is still required to obtain written permission of the landlord to sub-let, and it is not clear on what this requirement is based. East Punjab Act 3 of 1949 does not come into the picture. There is no other law under which any such requirement can be imposed upon the tenant. The only other situation in which such requirement can be imposed upon a tenant is a term of the contract of tenancy but no such argu-

ment and basis of the term of tenancy has been urged in the present case nor do I understand was there any such argument in *Gobind Ram's case*, 1962-64 Pun LR 969."

It was apparently assumed by the learned Judge and the learned counsel before us to begin with, also proceed on the basis that the subletting, which took place in 1955, was not prohibited either by the terms of the lease or by any other law. It is, however, not correct that during the period that the property formed part of the compensation pool, there was no prohibition against subletting. Under sub-section (1) of Section 19 of the Rehabilitation Act, subject to any rules made under the Act, the Managing Officer is authorised to cancel any allotment or terminate any lease. The material part of rule 102 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955, is in the following terms:—

"The managing officer may in respect of the property in the compensation pool cancel an allotment or terminate a lease if the allottee —

(a) has sublet or parted with the possession of the whole or any part of the property allotted or leased to him without the permission of a competent authority; or

(b)	xx	xx	xx
(c)	xx	xx	xx
(d)	xx	xx	xx"

The result, therefore, is that so long as the property forms part of the compensation pool, there is a prohibition against subletting without the permission of the competent authority. Thereafter, during two years after the transfer, clause (a) of the proviso to sub-section (1) of S. 29 of the Rehabilitation Act places such a restriction. After the expiry of the period of two years, the provisions of the Rent Restriction Act apply. Thus at no relevant time subletting is permissible. Faced with this situation, the argument of the learned counsel for the petitioner was that although subletting during the time when the property was exempt from the operation of the Act is prohibited, yet action can be taken only by the Managing Officer and the transferee cannot take advantage of any subletting that was made during that period.

11. On the other hand, it was contended for the respondent-landlord that the wordings of Section 13 (1) (ii) of the Act are absolutely clear. According to it, if any subletting takes place "after the commencement of the Act" then irrespective of the fact whether at the time such subletting takes place, the property was temporarily exempt from the operation of the Act, the landlord can subsequently, when the Act becomes applicable, proceed to seek ejectment of the tenant on the

basis of such a subletting unless it is made with the permission of the person who was the landlord at the time of subletting. He urged that this would be the result irrespective of the fact whether at the time of subletting, subletting was prohibited or not. The exemption, apart from being on the grounds that the property belongs to the compensation pool or the State or any local authority, is also granted under the Act in respect of new buildings constructed and this exemption extends over a specified number of years after the completion of the building. During this period, the relations between the landlord and the tenant are governed solely by the terms of the lease and if there is no specific prohibition against subletting, it is obvious that no penal consequences can arise if the premises are sublet during this period when the Act was not applicable.

The question can arise whether the landlord can seek ejectment of his tenant on the basis of such a subletting after the expiry of the specified period? The reply of the learned counsel for the respondent was that in the first place, we are not concerned with such a situation as the question of law referred to the Full Bench relates only to a property which is exempt from the operation of the Act because it formed part of the compensation pool. In the second place, he urged that even in such a case the landlord would be fully entitled to seek ejectment of the tenant because the subletting had taken place "after the commencement of the Act", even though the subletting by the tenant may be perfectly legal at the time when the same was effected.

In support of this contention, reliance was placed by him on a recent judgment of the Supreme Court reported as *Goppulal v. Thakurji Shrijee Shriji Dwarkadheeshji*, 1969 R. C. R. 300=(AIR 1969 SC 1291). This was a case from Rajasthan. The Jaipur Rent Control Order, 1947, came into force in the year 1947 and was subsequently replaced by the Rajasthan Premises (Control of Rent & Eviction) Act, 1950. Under paragraph 8 (1) (b) (ii) of that Order, a tenant was liable to eviction on the ground of subletting and the same ground continued in the Rajasthan Act, 1950, vide Section 13(1). The High Court came to the conclusion that the subletting of the two shops had taken place in the end of 1947 after the Control Order had been enforced and consequently the liability of the tenant to be evicted on the ground of subletting continued under the Act of 1950. The Supreme Court, however, held that the subletting took place some time before the Control Order came into force and, therefore, proceeded on the basis that the subletting took place at a time when no rent legislation was applicable. The question for

decision was whether under Section 13(1) of the Rajasthan Act, the tenant was liable to be evicted on the ground of subletting which took place before the Act came into force? Amongst the grounds set out in sub-section (1) of Section 13, on which the landlord can seek ejectment, was the following ground as given in clause (e):—

"That the tenant has assigned, sublet or otherwise parted with the possession of, the whole or any part of the premises without the permission of the landlord."

The Supreme Court came to the conclusion that the landlord can seek ejectment in view of the wording of sub-clause (e) and observed as follows:—

"The argument that Section 13(1)(e) takes away vested rights and should not be given a retrospective effect is based on fallacious assumptions. Apart from the Rent Act the landlord is entitled to eject the tenant on the expiry of the period mentioned in the notice to quit. S. 13(1) protects the tenant from eviction except in certain specified cases. If one of the grounds of ejectment is made out the tenant does not qualify for protection from eviction. We find no reason for presuming that S. 13(1)(e) is not intended to apply to subletting before the Act came into force. If the "tenant" has sublet the premises without the permission of the landlord either before or after the coming into force of the Act, he is not protected from eviction under S. 13(1)(c) and it matters not that he had the right to sublet the premises under S. 108(j) of the Transfer of Property Act."

Thus according to the observations of the Supreme Court a subletting, which is authorised or in other words which is not prohibited at the time when the same is effected, can be made a ground for eviction. The reason given is that under the ordinary law of the land, a landlord can get rid of his tenant at any time he likes, unless prohibited by the terms of the contract, by giving the requisite notice. By the Act, the tenant is given protection from such an ejectment and the landlord can seek ejectment only on the grounds mentioned in the Act and if once such a ground is established, according to the provisions of the Act, it does not make any difference if the act, which is made the basis for ejectment, was permissible at the time when it was performed. Present case is slightly stronger because as detailed above, subletting was not permissible without the permission of the authorities concerned even at the time when the same was effected in 1955 when the property was otherwise exempt from the operation of the Act.

12. Learned counsel for the petitioner urged that the provisions of S. 13(1)(ii) of the Act are different from clause (e) of sub-section (1) of Section 13 of the

Rajasthan Act, in as much as, according to the Punjab Act, it is only a subletting which takes place after the commencement of the Act, which can afford a ground for ejectment. He contended that the decision of the Supreme Court would have been quite different if the provisions in the Rajasthan Act have been similar to the one in the Punjab Act. The addition of the words "after the commencement of the Act" in the Punjab Act only protects the tenants from being ejected for any subletting effected by them prior to the enforcement of the Act, but in no way protects them from any subletting by them effected "after the commencement of the Act", but during the period when temporarily the building is exempt from the operation of the Act. If, as in the Rajasthan case, due to the absence of the words "after the commencement of the Act" in clause (e) of Section 13(1) of the Act the landlord could seek ejectment of the tenant even qua subletting which took place before the enforcement of the Act when such an act was within the competence of the tenant under S. 108(j) of the Transfer of Property Act, for the same reasoning, the landlord can certainly seek ejectment of his tenant for any subletting done by him after the commencement of the Act as is provided in the Punjab Act. More so, when such a subletting was not justified even at a time when the same was effected, the only result of the exemption would be that the landlord could not seek ejectment by having a recourse to the provisions of the Act, but the landlord concerned, who at that time was the Union Government, could seek ejectment of the tenant on the ground of subletting in view of the rules.

13. In a way, the transferee steps into the shoes of the Union Government and it is now settled law that if a tenant sublets the demised premises without the consent of the landlord then the transferee from that landlord can take advantage of the subletting which took place earlier to the transfer of the property in his favour. See in this respect, *Dhanpat Ram v. Tara Singh*, 1966-68 Pun L.R. 288. Regarding the question as to whose written consent is to be obtained, it has been held that the landlord, for this purpose, would be the landlord at the time of subletting. See in this respect, *Pritam Singh v. Raja Ram*, 1964-66 Pun. L.R. 289=(AIR 1964 Punj 363). These cases no doubt relate to subletting which took place when the Act was applicable to the building concerned, yet if the predecessor-in-interest could seek ejectment on the ground of subletting because of the terms of the contract or any special law or rules that are applicable, it can well be argued that the transferee should be entitled to take advantage of such a subletting if the same is a ground under

the Act. Prima facie, this line of argument seems quite plausible.

14. In view of the above and the clear observations of their Lordships of the Supreme Court in *Goppulal's case*, 1969 R. C. R. 300=(AIR 1969 SC 1291), the question referred to the Full Bench must, therefore, be answered in the affirmative.

15. The case will now go back to the learned Single Judge for disposal in the light of the answer returned above. There is a miscellaneous application also on the record, which will be placed before the learned Single Judge..

16. R. S. SARKARIA, J.: I agree.

17. H. R. SODHI, J.: I agree.

Order accordingly.

AIR 1970 PUNJAB & HARYANA 66 (V 57 C 10)

FULL BENCH

D. K. MAHAJAN, SHAMSHER
BAHADUR AND R. S. NARULA, JJ.

Misri Lal Dalip Singh, Petitioner v.
Printers House Private Ltd. and others,
Respondents.

Supreme Court Appln. No. 177 of 1969,
D/- 29-5-1969.

Constitution of India, Art. 133 — Certificate of fitness for appeal — Issue of — Applicant only a lessee and not owner of the lands sought to be acquired — No indication that value of the lease-hold rights was Rs. 20,000— Applicant although alleging that he had erected building and Saw Mill on land worth rupees one lakh, they were not subject-matter of litigation — No question of either public or private importance also involved — Certificate held could not be issued.

(Paras 4 and 5)

H. L. Sarin, for Applicant; J. N. Kaushal, with Ashok Bhan, for Respondent (No. 1); D. S. Tewatia, Advocate-General, Haryana, for Respondent (No. 2).

D. K. MAHAJAN, J.:— This is an application under Article 133 of the Constitution of India read with Sections 109 and 110 and Order 45 of the Code of Civil Procedure. This application is directed against our judgment passed in Letters Patent Appeals Nos. 20 and 29 of 1966. These appeals were directed against the decision of a learned Single Judge of this Court. That decision was set aside by us in an appeal under Clause 10 of the Letters Patent.

2. The contention of the learned counsel for the applicant is that he is entitled to leave under Article 133 of the Constitution of India as of right because our judgment reversed the judgment of the learned Single Judge and the value

of the subject-matter in dispute is more than Rs. 20,000/- both at the time of the institution of the suit as well as of the application for leave to appeal to the Supreme Court.

3. The learned counsel for the respondent has contested the application on the ground that the test of valuation is not satisfied. He has brought to our notice that the applicant is merely a lessee of the land that has been acquired. The land belongs to Mst. Safidan. There is no indication on the record as to what is the nature of the leasehold rights that vest in the applicant. It is stated in the affidavit that the value of the land is Rs. 29,000/-, at the rate of Rs. 4/- per square yard. This rate has been taken from the award of the Collector while fixing the compensation for the remaining land that was acquired for the respondent.

4. It cannot be that the leasehold rights are more than the sum of Rs. 20,000/-, particularly when nothing is known about the nature of the lease and its duration. Therefore, we are unable to hold that the leasehold rights, regarding which their Lordships of the Supreme Court will have to pronounce upon, are of the value of more than Rs. 20,000/-. As the test of valuation is not satisfied, we are unable to certify this case as a fit one for leave to appeal to the Supreme Court.

5. The next contention of the learned counsel for the applicant is that he has spent a sum of Rs. 1,00,000/- on the building that has been constructed by him on the land and for the saw-mill that he had set up there. There is no claim in the suit either regarding the building or the saw-mill. Therefore, they cannot be taken into consideration for arriving at the value of the subject-matter in dispute. The notification regarding the acquisition of land does not relate either to the building or the saw-mill. Therefore, naturally, it was not the subject-matter of the litigation in which the present application has arisen.

6. The last contention of the learned counsel is that he is entitled to leave under Clause (c) of Article 133(1) of the Constitution. We are unable to agree with this contention. No question of either public or private importance is involved.

7. For the reasons recorded above, we reject this application. As a consequence thereof, the interim order of stay will stand vacated.

8. SHAMSHER BAHADUR, J.: I agree.

9. R. S. NARULA, J.: I also agree.
Application rejected.

AIR 1970 PUNJAB & HARYANA 67
(V 57 C 11)

FULL BENCH

MEHAR SINGH, C. J., D. K. MAHAJAN
AND P. C. PANDIT, JJ.

Hindustan Commercial Bank Ltd.,
Amritsar, Appellant v. Sohanlal Gagu
Mal and another, Respondents.

Letters Patent Appeal No. 217 of 1962,
D/- 9-5-1969, decided by Full Bench on
order of reference made by Mehar Singh,
C. J. and Pandit, J., D/- 23-5-1967.

Hindu Law — Debt — Joint family
property — Surety bond creating personal
liability on father to pay third person's
debt — Debt neither illegal nor immoral
— Joint family estate in hands of sons
held liable for payment of same in view
of pious obligation of sons to pay father's
debt — (Contract Act (1872), S. 128) —
(Transfer of Property Act (1882), S. 96
— Mortgage by deposit of title deeds).

One A had three sons B, C and D and
one daughter E. C was sole proprietor of
a firm which had dealings with a bank.
Bank had given cash credit facilities to
the firm. Guarantee was given by A in
favour of the bank for payment of all
monies due from C. He also deposited
with the bank certain title deeds relating
to immoveable property creating an equi-
table mortgage of his interest in that
property for securing payment of money
due to the bank from the firm. The bank
filed suit for recovery of Rs. 47,208/11/3
against A and the firm on basis of the
equitable mortgage. A preliminary decree
was passed in favour of the bank and the
amount due was made recoverable by
sale of mortgaged properties in terms of
O. 34, R. 4 C. P. C. The decree was made
final and the bank sought to execute the
final decree. B filed suit for a declaration
that the property sought to be sold in
execution of the Bank's decree on the
basis of the equitable mortgage was the
joint Hindu family property of B and his
father A and consequently the mortgage
decree was not binding on him; and the
property was not liable to sale in execu-
tion of that decree. The suit was contest-
ed by the bank raising various pleas in-
cluding that of the pious obligation of B
to pay debts of his father.

Held (1) that the mortgage as such
conferred no right on the mortgagee to
put the mortgaged property to sale. Thus,
no mortgage decree could have been
passed even for the sale of the father's
interest in the mortgaged property. The
only decree, that could be passed, was a
money decree against the father. Of
course, the result of a money decree
against the father would be that it would
lay open the entire joint family estate in
the hands of the sons under the pious
obligation theory. This would only

happen if the decretal debt was neither illegal nor immoral. Case law Disc.

(Paras 14, 15)

(2) that though the mortgage was not binding on the sons' interest and the sons could prove this fact when in execution of the mortgage decree, their interest in the property was sought to be attached, nonetheless the property would be liable to sale in execution of that decree unless the sons could show that the mortgage debt was either illegal or immoral. There would be no doubt that the debt, in fact, did exist because the father had taken the liability to pay the debt of a third person; and on the basis of that liability, a money decree against the father could follow, and so also a mortgage decree. AIR 1967 S.C. 727, Rel. on; AIR 1945 P.C. 91 Expld. (Paras 21, 27, 28)

(3) that the surety bond in question created a personal liability on the father to pay the third person's debt; and that debt being neither illegal nor immoral, the joint family estate in the hands of the sons was liable for the payment of the same in view of the pious obligation of the sons to pay their father's debts.

(Paras 16, 17, 24 and 30)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 727 (V 54)=
1967-1 SCR 68, Faqir Chand v.
Sardarni Harnam Kaur 1, 14, 19, 20,
21, 27, 29
- (1961) AIR 1961 Punj 138 (V 48)=
ILR (1960) 2 Punj 325 (FB), Faqir
Chand v. Sardarni Harnam Kaur II
- (1956) AIR 1956 Ori. 144 (V 43)=
22 Cut LT 153, Dandapani Panda
v. D. F. O., Ghumsur 23
- (1951) AIR 1951 Bom. 1 (V 38)=52
Bom. LR 846, Linghat Tippan-
bhat v. Parappa Mallappa 22
- (1947) S. A. No. 645 of 1945, D/-
3-4-1947 (Bom.), Rudragouda v.
Gudnaya 22
- (1945) AIR 1945 P.C. 91 (V 32)=
72 Ind App 165, Kesar Chand v.
Uttam Chand 10, 17, 19, 22, 28
- (1935) AIR 1935 Mad 144 (V 22)=
ILR 58 Mad 375, K. Lakshmi-
narayana v. Hanumantha Rao II 0
- (1932) AIR 1932 P.C. 182 (V 19)=
ILR 54 All. 564, Benares Bank
Ltd. v. Hari Narain 15
- (1929) AIR 1929 All. 72 (V 16)=
1929-27 All. LJ 199, Chakhan Lal
v. Kanhaiyalal II 6
- (1924) AIR 1924 P.C. 50 (V 11)=
51 Ind. App. 129, Brij Narain v.
Mangla Prasad 14, 20, 27
- (1912) ILR 39 Cal. 843=16 Cal. LJ
107, Rasik Lal Mandal v. Singhe-
swar Roy II 6
- (1904) ILR 26 All. 611=1 All. LJ
330, Maharaja of Benares v. Ram
Kumar Misir 10, 16
- (1900) ILR 23 Bom. 454, Tukaram-
bhat v. Gangaram 10, 22

(1888) ILR 11 Mad 373, Sitaramayya
v. Venkatramanna 10

N. K. Sodhi, and Y. R. Sachdeva, for
Appellant; Roop Chand and D. R. Man-
chanda, for Respondents.

D. K. MAHAJAN, J.— This case has been referred to a larger Bench by my Lord, the Chief Justice and Pandit J., to determine, whether or not a Hindu son is bound to discharge his father's debts not incurred for necessity or to discharge his antecedent debts, the same being not raised for illegal or immoral purposes? The debt in question was incurred by the father by standing surety for one of his sons. It has also been argued that the son is not bound to discharge his father's surety debts by reason of his pious obligation to do so, when the father stands surety for the debts of a stranger. The reference was necessitated because the learned counsel for the appellant as well as the respondents relied on the decision in Faqir Chand v. Sardarni Harnam Kaur, AIR 1967 S.C. 727. This decision reversed the Full Bench decision of this Court in Faqir Chand v. Sardarni Harnam Kaur, AIR 1961 Punj. 138.

2. In order to resolve this controversy and to provide the necessary background, it will be necessary to state the relevant facts. Mohan Lal was the sole proprietor of Messrs. Gagoomal Mohanlal and Company (hereinafter referred to as the Firm). This Firm had dealings with the Hindustan Commercial Bank Limited, Amritsar (hereinafter referred to as the Bank). The Bank had given cash credit facilities to the Firm to the extent of Rs. 85,000/-. On 26th January, 1945, Gagoomal, father of Mohanlal, gave a letter of guarantee to the Bank for "the payment of all moneys which are now or shall, at any time, hereafter, during the continuance of this guarantee, be due from the principal to you on the general balance of the said account with you and of all other Bank's charges and all costs and expenses which you may incur in enforcing or obtaining payment of any such outstandings." The guarantee was a continuing guarantee and the only other clauses, that need be noticed in the same, are clauses 7 and 8, which are reproduced below:—

"7.— And I/we further agree that the amount hereby guaranteed shall be due and payable to you on demand after notice requiring payment of the same shall have been delivered or sent through the post by registered letter addressed to me/us at my/our respective last known places of abode or business or at my/our registered address.

8.— This guarantee shall bind my/our respective heirs, executors and administrators and shall be enforceable by you and your assignees."

On the same day, Gagoomal deposited with the Bank title-deeds relating to certain immoveable properties, thereby creating an equitable mortgage vis-a-vis those properties in favour of the Bank to secure the payment of any money due to the Bank from the Firm under the cash credit account. A sum of Rs. 47,208/11/3 was due to the Bank under this account. A demand for this amount was made both from the principal debtor and the surety. The demand was not met.

3. In May, 1948, the Bank filed a suit to recover the aforesaid amount against Gagoomal and the Firm on the basis of the equitable mortgage. A preliminary decree was passed in favour of the Bank on the 26th of January, 1949. The amount sued for was made recoverable by the sale of the mortgaged properties in terms of Order 34, Rule 4 of the Code of Civil Procedure. It was also provided that if the defendants did not pay the decretal amount by the 25th of April, 1949, the mortgaged property or a sufficient part thereof would be sold by auction. And if the sale proceeds were not sufficient to meet the obligation, it would be open to the Bank to apply for a personal decree against the defendants. The preliminary decree was made final on the 18th of August, 1949. The Bank then made an application for execution of the final decree.

4. This led to the present suit. by another son of Gagoomal namely Sohanlal, for a declaration that the property sought to be sold in execution of the Bank's decree on the basis of the equitable mortgage was the joint Hindu family property of the plaintiff and his father Gagoomal; and consequently the mortgage decree was not binding on him; and the property was not liable to sale in execution of that decree. A permanent injunction was also prayed for restraining the Bank from getting the property in dispute sold. It was alleged that Mohanlal was the sole proprietor of the Firm and the letter of guarantee executed by Gagoomal in favour of the Bank was not for the benefit of the joint Hindu family or for legal necessity.

5. The suit was contested by the Bank which pleaded that the property in dispute was neither ancestral nor formed part of the joint Hindu family property. It was also alleged that the Firm was a joint Hindu family firm and the money received under the cash credit account was utilized to clear the debts of the Firm. It was further averred that the plaintiff was under a pious obligation to pay the debts of his father even if the debts were not incurred by the father for the benefit of the joint Hindu family, particularly when the debts had not been raised for an immoral or an illegal pur-

pose. On the pleadings of the parties, the following issues were framed:—

"(1) Whether the property in dispute is ancestral joint Hindu family property qua the plaintiff?

(2) Whether the plaintiff is not bound by the decree passed against defendant No. 2 dated 26th January, 1949 and made final on 18th August, 1949?

(3) Whether the debt on the basis of which the said decree was passed against defendant No. 2, was immoral or illegal and not binding upon the plaintiff?

(4) Whether the present suit is not maintainable in the present form without getting the decree set aside?"

6. The trial Court held that the property in dispute was joint Hindu family property; that the plaintiff was not bound by the decree passed in favour of the Bank on the basis of the equitable mortgage; that the mortgage debt had not been incurred for illegal or immoral purposes and that the present suit was maintainable in the form in which it had been brought without getting the decree set aside.

7. An appeal was preferred to the Senior Subordinate Judge by the Bank against the trial Court's decision. The learned Judge confirmed the findings of the trial Court; but remanded the case after framing the following additional issue:—

"Whether the mortgage in dispute was effected for legal necessity or for the benefit of the joint family or for payment of an antecedent debt?"

The remand order was challenged in appeal by the Bank; but without success. The trial Court, after remand, held that the mortgage in dispute was not effected for legal necessity or for the benefit of joint Hindu family or for payment of any antecedent debt of the father. It was also held that the plaintiff was not bound by the mortgage decree. The result, therefore, was that the plaintiff's suit was decreed.

8. The Bank preferred an appeal against this decision to the Senior Subordinate Judge, Amritsar. The learned Senior Subordinate Judge found that Gagoomal was the Karta of the joint Hindu family consisting of himself and his sons. (Gagoomal had three sons, namely, Sohanlal, Mohanlal and Madanlal and one daughter, Mst. Vidya Wati). The mortgage decree was against Gagoomal and Mohanlal. Mohanlal was the sole proprietor of the Firm with which Gagoomal had no concern. Gagoomal had stood surety for the payment of the debt due from his son, Mohanlal. The mortgage decree did not create any personal liability so far as Gagoomal was concerned, inasmuch as no personal decree had been obtained by the Bank so far. That the mortgage debt had not been raised for

legal necessity or for the benefit of the joint Hindu family of Gagoomal and his sons or for the payment of any antecedent debts of Gagoomal and was, therefore, of no consequence. In the result, the Bank's appeal was dismissed.

9. The Bank then preferred the present second appeal to this Court. During the pendency of the second appeal, Gagoomal died on 23rd December, 1959. His legal representatives, namely, his sons and the daughter were impleaded. The appeal was then heard by Tek Chand J. The learned Judge held that where the father incurred an obligation as a surety not against the debt incurred by him, but by a third person, such a debt was *avyavaharika* in the sense of "a debt for a cause repugnant to good morals". In this view of the matter, the learned Judge dismissed the appeal.

10. It may be observed that the learned Judge held, after referring to certain texts of Hindu law, that there was no room for doubt as to the liability of the sons for suretyship debts incurred by their father undertaking payment of money lent. This observation was made with reference to the decisions in *Sitaramayya v. Venkatramanna*, (1888) ILR 11 Mad 373; *Tukarambhat v. Gangaram*, (1900) ILR 23 Bom 454; *K. Lakshminarayana v. K. Hanumantha Rao*, ILR 58 Mad 375 = (AIR 1935 Mad 144) and *Maharaja of Benares v. Ram Kumar Misir*, (1904) ILR 26 All 611. However, the learned Judge sought to distinguish the present case from the rule laid down in the above authorities on the basis of the decision of the Privy Council in *Kesar Chand v. Uttamchand*, AIR 1945 PC 91. As the debt for which the father stood surety was not raised by him but by the Firm, it was held that *qua* such a debt, the sons were under no pious obligation to discharge the same. Thus it follows that if the debt had been the debt of the father, the sons would be under a pious obligation to discharge the same.

11. Against the decision of the learned Single Judge, an appeal under Clause 10 of the Letters Patent was preferred to this Court. This appeal came up before my Lord, the Chief Justice and Pandit J., and was referred by them for decision by a larger Bench. That is how, the matter has been placed before us.

12. In order to resolve the controversy, three questions have to be determined, namely:—

(1) Whether a father necessarily incurs a personal obligation when he stands surety to guarantee the payment of a debt?

(2) Whether the son is under a pious obligation to pay his father's surety debt when the debt is not actually due from him?

and (3) Whether a mortgage of the joint Hindu family property by the father to secure such a debt renders the property liable to sale in the hands of the sons in execution of the mortgage decree?

13. Before I proceed to determine these questions, it will be proper to set down the matters which are beyond the pale of controversy and on which there is no dispute in the present appeal. Those matters are:— (1) That the debt for the payment of which the surety bond was executed by the father was not incurred by him. The debt was incurred by the Firm. (2) There was no antecedent debt of the father to secure which the equitable mortgage was executed. (3) There was, in fact, no legal necessity for the father to incur this personal liability. (4) That the debt, which was raised by the Firm, was neither illegal nor immoral. (5) That the property mortgaged was the joint Hindu family property of the father and the sons.

14. I propose, in the first instance, to take the last question. So far as the mortgage debt is concerned, the position is this: The mortgage was by deposit of title-deeds and by reason of Section 96 of the Transfer of Property Act, the provisions applicable to a simple mortgage also apply to the mortgage by deposit of title deeds. It is not disputed and indeed it could not be that when a mortgage is created by deposit of title-deeds, the mortgagor incurs a personal liability to pay the debt in case the mortgage security is insufficient to meet the same. Therefore, the mortgage by the deposit of title-deeds gave the mortgagee the right to pursue the property mortgaged and in addition, to recover the debt personally or from the other property of the mortgagor in case the mortgaged security was insufficient to meet the mortgage debt. In view of the finding of the Courts below, that the mortgage debt was not incurred by the father to discharge an antecedent debt due from him and also that the mortgage debt was not raised for any necessity of the joint Hindu family or for its benefit, the joint Hindu family property would not be liable under the mortgage for the payment of the mortgage debt. In *Brij Narain v. Mangla Prasad*, AIR 1924 P.C. 50 = 51 Ind. App. 129, their Lordships of the Privy Council laid down five propositions. But, for our purposes, the following three are relevant:—

"(1) The managing member of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity; but

(2) If he is the father and the other members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt;

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate."

In the present case, the third proposition will apply. The mortgage being not for an antecedent debt or for legal necessity, the joint estate of the father and the sons will not be bound by it. Their Lordships of the Supreme Court in AIR 1967 SC 727, while dealing with the above three propositions, at page 731, observed that:—

"..... The second and third propositions lay down the special rules applicable when the managing member is the father, and deals specially with his power to mortgage the estate for payment of his antecedent debt. Reading the first and the third propositions together, it will appear that a father who is also the manager of the family has no power to mortgage the estate except for legal necessity or for payment of an antecedent debt."

Therefore, the mortgage as such confers no right on the mortgagee to put the mortgaged property to sale.

15. It may be mentioned that in Punjab, where the same rule, as prevails in Uttar Pradesh, is applicable, namely, that no coparcener can mortgage even his own interest in the coparcenary property without the consent of the other coparceners, with the result that the mortgage does not bind even the mortgagor's share in the property. See in this connection para 269 of Mulla's Hindu Law, Thirteenth Edition and the decision in Benares Bank Ltd. v. Hari Narain, AIR 1932 P.C. 182. Thus, in the present case, no mortgage decree could have been passed even for the sale of the father's interest in the mortgaged property. The only decree, that could be passed, is a money decree against the father. Of course, the result of a money decree against the father would be that it will lay open the entire joint family estate in the hands of the sons under the pious obligation theory. This will only happen if the decretal debt is neither illegal nor immoral.

16. I now propose to deal with the second question. So far as this question is concerned, after consideration of the entire legal position, I am of the considered view that a father incurs a personal liability when he stands surety for the payment of a debt incurred by a third person. The position of a surety and the principal debtor vis-a-vis the creditor is identical. In this connection, reference may be made to Section 128 of the Contract Act which provides that 'the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract'. Thus the final position, that emerges in the present case, is that the father was under

a personal obligation to discharge the suretyship debt which was neither illegal nor immoral. A mortgage decree had been obtained against the father qua this debt. A personal decree had yet to be passed which is nothing but a mere formality; and it would be so in the present case when the mortgage is invalid. The suretyship debt has not been incurred by the father either for an illegal or for an immoral purpose. Therefore, the joint Hindu family property in the hands of the sons will be liable to discharge that debt under the pious obligation theory 'There is no doubt that the Mitakshara treats such an obligation as 'a debt' incurred by the surety on account of his having become a surety'. See the observations of Sulaiman J., as he then was, in Chakhan Lal v. Kanhaiyalal, (1929) 27 All LJ 199=(AIR 1929 All. 72). The argument of Mr. Roop Chand, learned counsel for the respondent, that, in fact, no debt was incurred by the surety inasmuch as he took no money himself under the letter of guarantee is fully answered by the observations of Sulaiman J. quoted below from Chakhan Lal's case, 1929-27 All LJ 199=(AIR 1929 All. 72):—

"..... The last point to consider is the liability of the sons of Balak Ram. The learned advocate for these sons has strongly contended that there was no legal necessity for Balak Ram to charge the family property and that if there was no actual debt due from him he was not entitled to hypothecate joint family property and accordingly there is neither a debt due from Balak Ram and his sons nor is there any valid charge created on the family property. That it is open to a father to undertake liability as a surety for the payment of a debt due by another person cannot be disputed. The contention, however, is that there is no such liability in respect of a debt which is not already due but which is promised to be advanced subsequently. In the Mitakshara there is a separate section in chapter 6 devoted to the obligations of sureties. Suretyship is described as being of three classes, viz., for appearance, for confidence and for payment. It is expressly provided that on failure of a suretyship for payment the sons have to pay the amount. The commentary on the original text of Yajnavalkya is clearer still for it expressly lays down that where a person promises to pay the amount in case the principal debtor does not pay, the sons are liable to pay it. The contention that the text and the commentary refer only to a case where the amount has been previously paid and exists as a debt, was repelled by this High Court in the case of the Maharaja of Benares v. Ram Kumar Missir, (1904) ILR 26 All. 611. That case was followed by the Calcutta High Court in the case of Rasik Lal

Mandal v. Singheswar Rai, (1912) ILR 39 Cal. 843. The same view has been accepted in Madras. There can therefore be no doubt that the undertaking given by Balak Ram to pay the debt due to the plaintiffs in case Chakhan Lal failed to pay the amount was a liability which was binding not only on Balak Ram but also on his sons. x x x"

17. So far as the first question is concerned, the position can be two-fold. The father can offer the joint Hindu family property as security for the debt without incurring a personal liability. See the decision in AIR 1945 PC 91. He can also offer the joint Hindu family property as security and in addition, incur a personal liability. So far as the present case is concerned, apart from the personal liability of the father under the mortgage, the father incurred a personal liability under the letter of guarantee. The terms of the letter of guarantee are very clear and there can be no manner of doubt that the father would be personally liable for the surety debt particularly when the same is neither illegal nor immoral.

18. It is not necessary to refer to various cases cited at the bar because all the propositions, which I have stated above, are clear and the apparent conflict of judicial authorities is the result of the application of the various legal propositions to the facts of a given case.

19. The stage is now set to consider the decision of the Supreme Court in AIR 1967 SC 727, and that of the Privy Council in AIR 1945 PC 91, on which the learned Single Judge has relied to hold that the surety debt in the instant case is *avyavaharika* in the sense of 'a debt for a cause repugnant to good morals'.

20. Their Lordships of the Supreme Court in *Faqr Chand's case*, AIR 1967 SC 727, have laid down the following propositions:—

(1) That the sons have no right to restrain the execution of the decree obtained by the mortgagee against the father, or the sale of the property in execution of that decree, where the mortgage is of the property of the joint family consisting of himself and his sons for payment of his debt when the mortgage is not for legal necessity or payment of an antecedent debt, unless they show that the mortgage debt was incurred for illegal or immoral purpose:

(2) That the liability of the son under the pious obligation extends to the joint family property in his hands;

(3) The second proposition laid down in *Brij Narain's case*, AIR 1924 PC 50, is founded upon the pious obligation of a son to pay the debt contracted by the father for his own benefit and not for any immoral or illegal purpose. By incurring the debt, the father enables the creditors

to sell the property in execution of a decree against him for payment of the debt. The son is under a pious obligation to pay all debts of the father whether secured or unsecured;

(4) That the second proposition in *Brij Narain's case*, AIR 1924 PC 50, applies not only to an antecedent debt but also to a mortgage debt which the father is personally liable to pay;

(5) Even where the mortgage is not for legal necessity or for payment of an antecedent debt, the creditor can, in execution of a mortgage decree for the realization of a debt which the father is personally liable to repay, sell the estate without obtaining a personal decree against him. After the sale has taken place, the son is bound by the sale, unless he shows that the debt was non-existent or tainted with immorality or illegality;

and (6) That the third proposition in *Brij Narain's case*, AIR 1924 PC 50, does apply where the joint family consists of father and sons. A father, who is also the manager of the family, has no power to mortgage his estate except for legal necessity or for payment of an antecedent debt. The decree against the father does not, of its own force, create a mortgage binding on the sons' interest. The security of the creditor is not enlarged by the passing of the decree. In spite of the passing of the preliminary or final decree for sale against the father, the mortgage will not, as before, bind the sons' interest in the property and the sons will be entitled to ask for a declaration that their interest has not been alienated either by the mortgage or by the decree.

21. Applying the above propositions to the facts of the present case, it is clear that though the mortgage is not binding on the sons' interest and the sons can prove this fact when in execution of the mortgage decree, their interest in the property is sought to be attached, nonetheless the property will be liable to sale in execution of that decree unless the sons can show that the mortgage debt was either illegal or immoral. There can be no doubt that the debt, in fact, did exist because the father had taken the liability to pay the debt of a third person; and on the basis of that liability, a money decree against the father could follow; and so also a mortgage decree. In my opinion, the decision of the Supreme Court in *Faqr Chand's case*, AIR 1967 SC 727, concludes the present appeal.

22. The only question left to be determined is, whether the surety debt in the present case can be termed as '*avyavaharika*'? The learned Single Judge has held it to be so on the basis of the decision of the Privy Council in *Kesar Chand's case*, AIR 1945 PC 91. The learned Single Judge has held that a father can contract a suretyship debt and thus

lay open the joint family estate liable for its payment in case the debt is neither illegal nor immoral. But in spite of this finding, the learned Single Judge went further and on the basis of the following observations in Kesar Chand's case, AIR 1945 PC 91, held to the contrary:—

"..... For these reasons, their Lordships hold that as it is not shown that Uttam Chand has made himself personally liable for the amount that remained due to the decree-holder there was no debt due from him, and it follows therefore that the unsecured property in question cannot be validly sold in enforcement of the security bond. The same is the position with regard to the secured property also. To make the ancestral property liable, there must in reality be a debt due by the father. In the present case, the security bond was executed not for the payment of any debt due by Uttam Chand, but for payment of a debt which was due from third parties. Unless there was a debt due by the father for which the security bond was executed, the doctrine of pious obligation of the sons to pay their father's debt cannot make the transaction binding on the ancestral property. x x x"

These observations will only apply where there is no personal liability of the father for the debt contracted by him personally or by standing surety for the debt contracted by a third person. These cannot be read in an isolated fashion and divorced from the facts of the case which were before their Lordships of the Privy Council. The view, I have taken of the matter, finds support from the decision of the Bombay High Court in Lingbhat Tippanbhat v. Parappa Mallappa, AIR 1951 Bom 1, wherein Bhagwati J., (as he then was), observed as follows:—

" x x The whole question, in our opinion turns on the terms of the surety bond. If under the terms of the surety bond the father has rendered himself personally liable, be it an ordinary personal bond or even a mortgage or a pledge importing personal liability for the deficit if any on the realisation of the security, the sons are certainly liable to pay the father's personal debt incurred in this manner to the extent of their right, title and interest in the joint family properties. If it is a pure personal bond, the question can never arise of the nature which has been mooted before us. If it is a mortgage bond or a pledge, as and by way of security, even there the question would have to be considered whether in the event of a deficit arising on the realisation of the mortgage or the pledge by the creditor there would remain over a personal liability of the father to the extent of the deficit if any. If the surety bond was of the nature which obtained

before their Lordships of the Privy Council in 72 Ind. App. 165=AIR 1945 P.C. 91, there would be no question of the sons being liable for any debt due by the father by reason of their pious obligation, because there would be no personal liability of the father and consequently there would be no debt due by the father as such. In such a case there would not arise any question of the sons being liable to pay the father's debt by reason of the pious obligation because there would be no debt due by the father. In those cases, however, where the father has rendered himself personally liable even in the case of a mortgage bond or of hypothecation or pledge of goods to pay the balance over or the deficit, if any, after the realisation of the security, the sons' obligation to pay the father's debt by reason of the pious obligation would arise and the debt to the extent that it has not been satisfied by the realisation of the security would be recoverable by the creditor from the father as well as the sons out of the joint family properties inclusive of the sons' share, right, title and interest therein.

This being the true position in law, the observations of their Lordships of the Privy Council in 72 Ind. App. 165=AIR 1945 P.C. 91 do not make any departure from the true position as it had been enunciated before 1945 and the observations of our appeal Court in Rudragouda's case, S. A. No. 645 of 1945, D/- 3-4-1947 (Bom) also are to the same effect. This position in law was enunciated by our appeal Court as early as 1898 in the decision which is reported in (1900) ILR 23 Bom. 454, where it was held that the ancestral property in the hands of the sons was liable for the father's debt incurred as a surety. No change has been made in this position which has obtained ever since by the observations of their Lordships of the Privy Council in Kesar Chand v. Uttam Chand, 72 Ind. App. 165=AIR 1945 P.C. 91 and the position continues to be as it has been enunciated herebefore and has been understood all along at the Bench as well as at the bar.

x x x x
I am in respectful agreement with the above observations. I cannot reconcile myself with the contention of Mr. Roop Chand, learned counsel for the respondent, that the rule is different where the father has stood surety for the payment of a third person's debt. If that was so, there was no need for their Lordships of the Privy Council to determine the question, whether under the terms of that particular bond, the father was personally liable or not. In fact, the main decision of the Privy Council related to the determination of the question whether the bond in question created a personal obligation, so far as the father was concerned, to pay the third party's debt. The decision

of the High Court of Lahore, from which the appeal went to the Privy Council, had held that the bond did create a personal liability. I am, therefore, not prepared to accept the contention of Mr. Roop Chand, and read the Privy Council's judgment in a manner different from that in which it was read by the Bombay High Court.

23. The other decision relied upon by Mr. Roop Chand in support of his contention is that of the Orissa High Court in *Dandapani Panda v. D. F. O. Ghumsur*, AIR 1956 Ori. 144. This decision has no application because on the facts of that case, it was held that what was guaranteed under the surety bond was the personal honesty of the third person and there could be no manner of doubt that according to the rules laid down in the *Mitakshara*, the liability under such a bond would definitely be 'avyavaharika'.

24. After considering the matter carefully, I am clear in my mind that the surety bond in question created a personal liability on the father to pay the third person's debt; and that debt being neither illegal nor immoral, the joint family estate in the hands of the sons is liable for the payment of the same in view of the pious obligation of the sons to pay their father's debts.

25. I would accordingly allow this appeal, set aside the judgments and the decrees of the learned Judge, the District Judge and that of the trial Court and dismiss the plaintiffs' suit. In the circumstances of the case, the parties will bear their own costs throughout.

26. M. SINGH, C. J.: I agree.

27. P. C. PANDIT, J.:— The five propositions laid down by the Privy Council in 51 Ind. App. 129 = AIR 1924 P.C. 50, have been the subject matter of a number of judicial decisions in this country. Before the judgment of the Supreme Court in AIR 1967 S.C. 727, this Court was of the view that in the second proposition, the word "debt" covered not only a simple money debt, but a mortgage debt as well and that the sons could succeed only if they could show that the debt was contracted for an illegal or immoral purpose. The Allahabad High Court, however, had taken a contrary view and was of the opinion that the word "debt" referred only to a simple "money debt" and further that the mortgage by the father could be upheld only if it was made either for legal necessity or for an antecedent debt. The Supreme Court in *Faqir Chand's case*, AIR 1967 S.C. 727, has now made it quite clear that the second proposition applies not only to an unsecured debt but also to a mortgage debt, which the father is personally liable to pay. If the mortgage created by the father is

neither for legal necessity nor for an antecedent debt, then under the third proposition the mortgage as such would not be binding on his son's interest in the joint family property, but nevertheless he would, under the pious obligation theory, be liable to pay the mortgage debt *qua* debt.

It was said in certain decided cases, that in order to avail of the second proposition, the creditor had to obtain a money decree against the father for the payment of the debt. In *Faqir Chand's case*, AIR 1967 S.C. 727, the Supreme Court has settled this point as well by observing that if a mortgage decree against the father directs the sale of the property for the payment of his debt, the creditor may sell the property in execution of that decree. They further observed that even where the mortgage is not for legal necessity or for payment of an antecedent debt, the creditor can, in execution of a mortgage decree for the realisation of a debt which the father is personally liable to repay, sell the estate without obtaining a personal decree against him. It is also held that if there is a just debt owing by the father, it is open to the creditor to realise the debt by the sale of the property in execution of the mortgage decree. The son has no right to interfere with the execution of the decree or with the sale of the property in execution proceedings, unless he can show that the debt for which the property is sold is either non-existent or is tainted with immorality or illegality.

28. In the instant case, the father stood surety for his son and for that purpose he wrote a letter of guarantee and also created an equitable mortgage by the deposit of title deeds relating to the joint family property. Both under the terms of the letter of guarantee and the conditions of mortgage, he had made himself personally liable for the payment of the loan. Consequently, the debt due to the bank would be considered to be his debt. Such a debt cannot in law be called immoral. Immoral debts are specified in para 298 of Mulla's *Principles of Hindu Law* (13th Edition) and a debt of this kind is not mentioned there.

The learned Single Judge had mainly relied on the Privy Council ruling in AIR 1945 P.C. 91, for holding this debt to be *Avyavaharika* (immoral). That ruling has not been, if I may say so with respect, correctly interpreted by the learned Judge. There it was held that where the security bond was executed by a Hindu father not for the payment of any debt due by him, but for the payment of a debt which was due from third parties, the doctrine of pious obligation of the sons to pay their father's debt could not make the transaction binding on the ancestral property. These observa-

tions were made by their Lordships after interpreting the terms of the security bond in that case and holding that no personal liability for the debt had been undertaken by the father and, consequently, no debt was due by him for which the security bond was executed. In the present case, as I have already said, the father had undertaken personal liability for the debt due from his son, both under the letter of guarantee and the mortgage created by him.

29. It was argued by the learned counsel for the respondent that in Faqir Chand's case, AIR 1967 S.C. 727, the learned Judges had held that in a case where a father mortgaged some property of a joint family consisting of himself and his sons for payment of his debt, but the mortgage was neither for legal necessity nor for payment of his antecedent debt and the mortgagee had obtained a decree against the father for sale of the property, but the sale had not yet taken place, the sons had no right to restrain the execution of the decree for sale of the property in execution proceedings without showing either that there was no debt which the father was personally liable to repay or that the debt had been incurred for an illegal or immoral purpose.

Even after holding that, the learned Judges went into the question of the legal necessity for the mortgage, because, according to them, in the absence of a finding on that question, the appeal could not be completely disposed of. They were of the view that the son was entitled to impeach the mortgage of a joint family property made neither for legal necessity nor for payment of an antecedent debt and that remedy was available to him even after the mortgagee had obtained a decree against the father on the mortgage, since that decree did not of its own force create a mortgage binding on the son's interest. According to them, from the reading of the first and third propositions together, it would appear that a father who was also the manager of the family had no power to mortgage the estate except for legal necessity or for payment of an antecedent debt.

30. Even if this contention is correct, I am of the view that the mortgage effected by the father in the instant case also was for legal necessity. If the father can burden the joint family estate by incurring a debt, not tainted with immorality, for his own benefit, I see no difference in principle as to why he cannot create a mortgage by incurring personal liability for a similar kind of debt due from his son, who is also a coparcener of the joint Hindu family.

31. With these observations, I also agree that the appeal be accepted and the

parties be left to bear their own costs throughout.

Appeal allowed.

AIR 1970 PUNJAB & HARYANA 75 (V 57 C 12)

R. S. NARULA, J.

Dayal Saran Sanan, Petitioner v. Union of India and others, Respondents.

Civil Writ No. 556 of 1967, D/- 23-1-1969.

(A) Constitution of India, Art. 226 — Order refusing to grant pension on extraneous or irrelevant grounds — High Court should normally interfere and set aside order: AIR 1959 All. 769 Dissented from — Pensions Act (1871), S. 4.

The bar to a claim under the Pensions Act is restricted to ordinary civil proceedings, and cannot possibly extend to affect the extraordinary original jurisdiction of a High Court under Art. 226 of the Constitution. If a retired Government servant is found to be entitled, according to his service rules, to payment of pension which has been refused to him on an extraneous or irrelevant ground, the High Court should normally interfere and set aside the order of refusal to grant the pension. AIR 1959 All. 769, Dissent. from. (Para 6)

(B) Constitution of India, Art. 226 — Point not specifically taken in writ petition — Point cannot be raised during arguments in writ petition since adopting such course would seriously prejudice respondents having no opportunity to meet challenge. (Para 7)

(C) Civil Services — Civil Service Regulations, Regns. 189, 420 — Employee not complying with order of joining transferee post and his application for grant of leave refused — Held, no question of granting any pension to him arise as he never resumed duty after break in service. (Para 7)

Cases Referred: Chronological Paras
(1959) AIR 1959 All. 769 (V 46)=
1959 All. L. J. 855, Shaukat
Husain Beg Mirza v. State of
U. P. 6
(1916) AIR 1916 Mad. 492 (V 3)=
1915 Mad. W.N. 323, G. Kothandaramiah v. Secy. of State 6

J. L. Gupta, for Petitioner; J. S. Rekhi, for Respondents.

JUDGMENT:— Dayal Saran Sanan (hereinafter called the petitioner) was appointed as a Sub-Divisional Officer on September 20, 1941, in a temporary capacity. By order, dated March 23, 1950

CM/FM/B426/69/MBR/B

(Annexure 'A' to the return read with item 39 of list 'C' attached thereto), the petitioner was confirmed with effect from August 15, 1947. The result was that with effect from August 15, 1947, the petitioner became a permanent Superintendent Grade II in the Military Engineering Service. Under order, dated September 30, 1950 (Annexure 'B' to the return), the petitioner, who had earlier been promoted to grade I was reverted to grade II. It is stated that he had subsequently been removed from service, but in pursuance of the decree of a competent Civil Court, he was reinstated by order, dated November 17, 1956 (Annexure 'E' to the return), and the earlier notification cancelling his permanent appointment was withdrawn. On October 24, 1962, the petitioner submitted an application (copy Annexure A-2 to his replication) to the Commander Works, Engineer, Chandigarh, for the grant of four months' leave preparatory to retirement from January 1, 1963, to April 30, 1963, as he was completing the age of fifty-five years on May 14 in that year. In Government's reply, dated December 28, 1962 (Annexure 'A-3'), the petitioner was informed that the leave applied for by him could not be granted as the age of compulsory retirement of Central Government servants had been raised from 55 years to 58 years. On December 24, 1964, an order was issued by the Chief Engineer, Western Command, Simla (copy Annexure 'H' to the return) directing the transfer of the petitioner from the establishment of the C.W.E. Chandigarh to that of the Chief Engineer, Delhi and Rajasthan Zone, Delhi Cantt. It was directed that the move should be completed forthwith. The petitioner's request to cancel his transfer was admittedly refused. In the meantime, however, he continued on the pay roll of the Chief Engineer, Chandigarh, and admittedly received all the emoluments due to him for the period ending January 31, 1965.

In confidential letter, dated February 13, 1965 (Annexure H-I to the return), the Chief Engineer, Chandigarh, wrote to the Chief Engineer, Western Command, Simla, that the petitioner had not complied with the order of transfer, that his application for casual leave had not been sanctioned, and though he had been relieved of his duties on February 6, 1965, he had not collected the movement order and left station, i.e., he left Chandigarh on that day (February 6, 1965). In paragraph 6 of the said communication, it was stated that the petitioner was expected to return on February 13, 1965, but he was being struck off the strength. In the last paragraph of the letter, dated February 13, 1965, the Chief Engineer, Chandigarh, stated that the action of the petitioner showed indiscipline and this would be

reflected in his report. The petitioner submitted an application, dated February 19, 1965 (Annexure 'P' to the return which corresponds to Annexure 'A-1' to the replication), to the Engineer Incharge Army Headquarters, New Delhi, wherein he complained that his transfer had been wrangled by some interested person as he had demanded an open Court of enquiry against a particular contractor on certain allegations. He then added in the application that he was to retire in May, 1966, after availing of his leave preparatory to retirement with effect from January, 1966, and he should not be disturbed from Chandigarh as one of his daughters was studying in M.A. English, and the second one in Higher Secondary at this place. He also requested for an investigation into the alleged loss which the State had suffered on account of the alleged conduct of the contractor. The petitioner followed up the abovesaid communication with his letter, dated February 23, 1965 (Annexure 'N' to the return) wherein he again stated that he intended to avail of his leave preparatory to retirement with effect from January, 1966, and he prayed that the decision to transfer him be reconsidered and he may be allowed to continue at Chandigarh, failing which he might be granted leave preparatory to retirement due to him as his family circumstances did not permit him to leave his family alone at Chandigarh. The petitioner then wrote letter, dated June 10, 1965, to the Chief Engineer, Delhi Cantt. that he had not so far received any movement order nor was he prepared to accept one as his transfer from Chandigarh had been made mala fide. It was added that the question of the petitioner's resuming duties at Delhi did not arise as he had referred the case to the Engineer in Chief, New Delhi, and to the Ministry of Defence, and as the direction for his transfer was contrary to the order of the Government of India because the petitioner was about 57 years old.

In reply to the petitioner's complaint against the contractor, he was informed by the Chief Engineer, Western Command, Simla, in the latter's memorandum, dated September 16, 1965 (Annexure 'Q' to the return) that a departmental Court of enquiry had been ordered to investigate into the allegations made by the petitioner, but that the Court of enquiry had found that there was no substance in the petitioner's complaint. It was mentioned in the memorandum that it had been reported that the petitioner had been insolent and insubordinate to his superiors, and had not cared to study the provisions of the contract in question. In paragraph 3 of this communication, it was mentioned that the petitioner had been struck off the strength of Garrison Engineer, Lalru, on February 12, 1965,

on permanent posting to the Chief Engineer, Delhi and Rajasthan Zone, but that the petitioner had not reported for duty at his new formation till then. At that stage the petitioner filed Civil Writ 2896 of 1965, in this Court on November 22, 1965. In that writ petition, the history of the case upto the reinstatement of the petitioner consequent upon the decision of the litigation in the Civil Court was mentioned, and it was then stated that though he had been reinstated, no order had been passed regarding the payment of the salary or other allowances for the period during which he had remained under order of dismissal. He then stated that in reply to petitioner's notice under Section 80 of the Code of Civil Procedure, he had been informed that he would get his arrears of pay and allowances which were within time, but that the salary etc. for the period commencing from November 1, 1950 to October 31, 1953, had become barred by time. He complained that a sum of Rs. 9,120/- due to him for the abovesaid period had been withheld from the petitioner. The petitioner complained that under Rule 193 (2)(b) (1-a) of Chapter 10 of the Indian Civil Services and Military Officers Rules, the petitioner was entitled to get arrears for the entire period beginning from the date of the order of his dismissal up to the date of reinstatement. It was prayed by the petitioner that the Union of India and the Chief Engineer, Western Command, Simla, be directed to decide his case of arrears of emoluments under the abovesaid rules; and to pay him the sum of Rs. 9,120/- as detailed above. No other complaint was made in the writ petition, and no other specific relief was claimed therein. The writ petition was dismissed in limine by the order of the Motion Bench (Falshaw, C. J., and Khanna, J.), dated November 23, 1965.

2. Resuming the narrative of the facts leading to the filing of the present petition, it may be stated that on January 29, 1966, the Chief Engineer, Delhi Cantt., sent a memorandum to the petitioner (copy Annexure 'J' to the return) wherein it was stated that he was informed (SOS) by Garrison Engineer, Lalru, on the afternoon of February 12, 1965, that he was permanently posted to the office of the Chief Engineer, Delhi and Rajasthan Zone, Delhi Cantt., but he had not reported for duty till then. It was added in the communication that for the aforesaid reason, the petitioner had no lien on his appointment under Article 189 of the Civil Service Regulations. He was advised in the last paragraph of the letter to resume duty by the 15th of February, 1966, at the latest in his own interest. The petitioner ultimately sent his reply, dated March 1, 1966 (Annexure 'K' to the return corresponding to Annexure

'A-4' to the replication) wherein he again referred to his letter, dated February 23, 1965, to the Chief Engineer, Western Command, Simla, and his letter, dated June 10, 1965, addressed to the Chief Engineer, Delhi Cantt. The petitioner reiterated in his letter Annexure 'K' that the question of his resuming duty at that stage did not arise at all, as he was over 55 years of age and was going to complete the age of 58 years on May 14, 1966. He claimed that in accordance with certain instructions of the Government of India, he stood retired on October 9, 1965, as he had given a notice with effect from June 11, 1965, in his letter, dated June 10, 1965. The petitioner prayed in the said communication that his pension papers may be completed and said that he would attend the office for signing the same as and when intimated to him by the Chief Engineer, Western Command. In confidential letter, dated March 15, 1966, from the Chief Engineer, Western Command, to the Engineer-in-Chief, Army Headquarters, New Delhi, information regarding various communications sent by the petitioner to the office of the Engineer-in-Chief was furnished. In the last paragraph of the communication, it was stated that the insolence and insubordination of the petitioner had been taken notice of prior to October, 1964, for which he had been warned verbally. The entire communication related to the petitioner's complaint against the contractor. On May 30, 1966, the Chief Engineer, Western Command, wrote to the Chief Engineer, Delhi Cantt. (copy Annexure 'M' to the return), in connection with the posting/transfer of the petitioner, *inter alia* as follows:—

"Adverting to your letter No. 11549/DRZ/BR/DS/63/EIO, dated 12th April, 1966, it is pointed out that Shri Dayal Saran had stated in his application dated 10th June, 1965 that he had applied to our office (Chief Engineer, Western Command) for leave preparatory to retirement and that the question of his resuming duty at Delhi did not arise. His statement that he had served the department with a notice of retirement in terms of paragraph 6 of Government of India, Ministry of Defence, letter No. 14(8)63/D (Appts), dated 4th December, 1962, is, therefore, not correct. The disciplinary proceedings should have been finalised by you *ex parte* in view of the fact that he refused to submit his Defence Statement and returned the charge-sheet to you.

Since Shri Dayal Saran attained the age of superannuation on 14th May, 1966, it is no use to pursue the disciplinary aspect of the case any more. He should, however, be informed that since he ceased to hold any lien on his permanent appointment in terms of Article 189 Civil

Service Regulations, he is not entitled to any pension under the Rules. The formation concerned should be directed to publish the event of his having lost the lien on the permanent appointment in his Part II Orders."

On the other hand, the petitioner sent his application, dated June 29, 1966 (Annexure 'O' to the return corresponding to Annexure 'A-5' to the replication) praying for the completion of his pension papers as he had retired from service with effect from October 9, 1966. This was followed up by petitioner's letter, dated October 5, 1966 (Annexure 'A-6' to the replication corresponding to Annexure 'A' to the writ petition), wherein the petitioner's request for completion of his pension papers was repeated. The correspondence relating to the petitioner which has been placed on the record of this writ petition ended with letter, dated November 22, 1966, from the Chief Engineer, Western Command, Simla, to the Engineer in Chief, Army Headquarters, New Delhi. After referring to the previous history of the case, it was stated in the letter that the petitioner did not retire from service after giving due notice to the Department, but on the other hand he had failed to join his new appointment within the joining time in spite of reminders. On that basis, it was mentioned in the letter that the petitioner had "ceased to have a lien on any appointment in terms of Article 189 CSR." In the next paragraph of the letter, it was stated that the Chief Engineer, Delhi and Rajasthan Zone, was being directed to apprise the petitioner of the abovementioned position with reference to his application, dated October 5, 1966, addressed to the Chief Engineer, Western Command, Simla. The claim of the petitioner for the grant of pension and gratuity etc. having thus been finally refused by the Government, he came to this Court on March 29, 1967, under Articles 226 and 227 of the Constitution for the issuance of an appropriate writ, order or direction to the respondents to finalise the case of the petitioner regarding the pension and gratuity due to him, and to pay the arrears of salary and other payments which were due to him. At the hearing of the writ petition, however, the prayer of the petitioner has been confined to the grant of a direction for finalising his pension and gratuity case, and for paying the same to him.

3. In the written statement filed in this case by Shri K. L. Bawa, Superintending Engineer, Commander Works Engineer (Projects), Chandigarh, on behalf of the respondents (the Union of India, the Chief Engineer, Western Command, Simla, the Chief Engineer, Chandigarh, and the Commander of Works,

Chandigarh), reference has been made to the various communications of which I have already given the details, and the impugned order refusing to grant pension and gratuity to the petitioner has been justified in the following words:—

"On his (petitioner's) failure to comply with orders for resuming duty, he was treated as absent without leave by Chief Engineer, Delhi and Rajasthan Zone, and he was informed that he had ceased to have any lien on his appointment in terms of Article 189 of Civil Service Regulations."

After repeatedly stating that the petitioner had ceased to hold any lien on his appointment in terms of Article 189 of the Civil Service Regulations, it has been stated in the return:—

"In view of the fact that the petitioner ceased to have lien on his substantive appointment, he has no claim for gratuity and pension under the rules."

4. Besides the abovesaid reply on merits, the respondents have also taken up two objections of a preliminary nature in their return. The first is to the effect that the grant of pension and gratuity is not founded on any legal right as it is a matter of grace and bounty. In that connection it has been added that the Union of India having sole jurisdiction to proceed under Article 189 of the Civil Service Regulations, the Government was competent to issue necessary orders under the said provision of law which cannot be challenged in writ proceedings. The second objection is that the petitioner is estopped from filing this writ petition on account of his acts of omission and commission. By this the learned counsel for the respondents states was intended to be conveyed that the petition is barred on principles of constructive res judicata on account of the dismissal in limine of the petitioner's earlier application under Article 226 of the Constitution, i.e., Civil Writ 2896 of 1965. In his replication, dated May 4, 1968, the petitioner has reiterated his previous stand, on the merits of the controversy. In reply to the first preliminary objection he has stated that the grant of pension and gratuity is not a matter of grace or bounty and the petitioner has got a legal right to get the same paid in accordance with the relevant service rules. In reply to the other objection it has been stated that the same is absolutely vague as no acts of omission or commission have been specified in the return.

5. Mr. Jawahar Lal Gupta, learned counsel for the petitioner, has pressed only two points in support of the claim of his client. He has firstly stated that

under the relevant rules raising the age of superannuation from 55 to 58 years, the petitioner was entitled as of right to retire from service on giving three months' notice at any time after attaining the age of 55 years, and inasmuch as he had given the requisite notice (Annexure 'A-2' to his replication), the petitioner was deemed to have retired after the expiry of three months from the date of the said notice. I am unable to find any force whatever in this submission of Mr. Gupta for more than one reason. Firstly, the communication, dated October 24, 1962 (Annexure 'A-2') does not even purport to be a notice of retirement, but is a plain application for leave preparatory to retirement, submitted on the assumption that the age of compulsory retirement was 55 years. Secondly, the question of serving a three months' notice for retiring between the age of 55 and 58 years could not arise in October, 1962, as the first communication by which the age of retirement of Central Government servants was raised from 55 to 58 years was the circular letter of the Government of India, dated November 30, 1962, referred to in Annexure 'A-3'. On October 24, 1962, when submitting application Annexure 'A-2' the petitioner could not possibly have dreamt of the change of the rule enforced on November 30, 1962, with effect from December 1 in that year, and of the permissive clause under that rule which entitled the Government as well as the employee to terminate the services of an incumbent at any time after his attaining the age of 55 years and before attaining the age of 58 on giving three months' notice on either side. Thirdly it is significant that the period referred to in the application Annexure 'A-2' was to expire before the petitioner was to attain the age of 55 years. Fourthly, the stand now taken by the petitioner about his application, dated October 24, 1962, being a three months' notice is inconsistent with what was explicitly stated by him in his subsequent communications. In his letter dated June 10, 1965 (Annexure 'L'), the petitioner stated that he was about 57 years old and had applied to the Chief Engineer, Western Command, for leave preparatory to retirement. In his application, dated March 1, 1966 (Annexure 'K'), the petitioner stated that he stood retired on October 9, 1965, as his notice started from June 11 in that year, vide his letter of June 10, 1965 (Annexure 'L'). The abovesaid four factors and other circumstances of the case taken together conclusively show that the communication, dated October 24, 1962 (Annexure 'A-2') neither intended to be nor can the same be construed to be a three months' notice claiming retirement between the age of 55 and 58 years. At the hearing of this petition it has not been claimed on behalf

of the petitioner that he ever gave any other notice for that purpose though an insinuation has, as already stated, been made in some of his communications that he gave such a notice on June 10, 1965. Even the period referred to in letter, dated June 10, 1965 (Annexure 'L'), read with his letter dated March 1, 1966 (Annexure 'K') is of four months and not of three months. I, therefore, hold that the petitioner never gave any three months' notice or any other notice of his intention to retire before attaining the age of superannuation.

6. The only other ground pressed by Mr. Gupta is that the order of the Government (Annexure 'G' to the return), dated November 22, 1966, amounts to the petitioner's removal from permanent Government service, and inasmuch as the said order has been passed and the petitioner's services deemed to have been terminated with effect from February 19, 1965, without complying with the mandatory requirements of Clause (2) of Art. 311 of the Constitution, the petitioner is entitled to have the impugned order of termination of his service quashed on that short ground. Before dealing with the merits of this submission of Mr. Gupta, it appears to be appropriate to dispose of the two preliminary objections raised in the return of the respondents, and pressed by Mr. Rekhi, who appears for them. The question of this petition being barred on principles of constructive *res judicata* does not appear to raise in the circumstances of this case. The petitioner is confining himself in the present case to the prayer for the payment of pension and gratuity. His claim in this respect was finally settled only on November 22, 1966, by the order of the Chief Engineer, Western Command (Annexure 'G' to the return). It could not possibly have been called in question while filing the earlier writ petition. Moreover, the question of the purported termination of the petitioner's services consequent upon his not reporting to the transferee office did not even impliedly arise in the previous case. I have, therefore, no hesitation in repelling this objection of the respondents. Nor is there any force in the second preliminary objection. Mr. Rekhi has relied on the judgment of a learned Single Judge of the Allahabad High Court in *Shaukat Husain Beg Mirza v. State of Uttar Pradesh*, AIR 1959 All. 769, wherein a writ petition was dismissed on the ground that pension cannot be claimed as of right; and a claim for pension is barred under the Pensions Act. The bar to a claim under the Pensions Act is, in my opinion, restricted to ordinary civil proceedings, and cannot possibly extend to affect the extraordinary original jurisdiction of a High Court under Article 226 of the Constitution. With the greatest respect to the learned

Single Judge of the Allahabad High Court, I am of the opinion that if a retired Government servant is found to be entitled, according to his service rules, to payment of pension which has been refused to him on an extraneous or irrelevant ground, the High Court should normally interfere and set aside the order of refusal to grant the pension.

Learned counsel for the respondents also referred to the judgment of a Division Bench of the Madras High Court in *G. Kothandaramiah v. Secretary of State*, AIR 1916 Mad. 492. In that case it was held that under Articles 458 and 464 of the Civil Service Regulations, it is essential that an officer to be entitled to pension must be in the service on the date of his retirement, and therefore, an officer removed by Government from service before that date, can have no claim for any pension. There is no doubt that if it is ultimately found that the petitioner has been removed from service, the order of the Government refusing to grant him pension cannot possibly be assailed. But this submission of the counsel appears to be wrought with graver consequences than the learned counsel for respondents appears to envisage. If it is found that the petitioner has been removed from service and if the order of removal is called in question on the ground that the same has been passed without compliance with Clause (2) of Article 311 of the Constitution, the order of removal itself may have to be quashed, and in that event, the impugned decision refusing the grant of pension will vanish. Article 458 states *inter alia* that a superannuation pension is granted to an officer in superior service entitled or compelled, by rule, to retire at a particular age. The argument of the learned counsel is that inasmuch as the petitioner was never compelled to retire at a particular age, he is not entitled to any pension. This submission of the learned counsel appears to be misconceived as superannuation pension has to be granted under Article 458 in two contingencies, viz. (i) that an officer in superior service is entitled by rule to retire at a particular age; or (ii) that such an officer is compelled to retire at a particular age. No doubt the petitioner was not compelled to retire at a particular age, but he was certainly entitled to retire at the age of 58 years. It cannot, therefore, be said that his case could not possibly fall under Article 458. In the case before the Madras High Court, it was the admitted case of both sides that the Government servant concerned had been removed from the State service long before attaining the age of superannuation. The crucial question that, therefore, calls for decision is whether the petitioner continued in Government service when and till he attained the age of 58 years.

7. Coming back to the merits of the second submission of Mr. Gupta, it is significant that no such point has been specifically taken in the writ petition. It has not even been urged in the petition that the petitioner has been removed from service or that his services were terminated contrary to the requirements of clause (2) of Article 311 of the Constitution. In this view of the matter, I cannot allow counsel to raise this new point during arguments in this writ petition. Adopting such a course would seriously prejudice the respondents as they have had no opportunity to meet such a challenge. Mr. Gupta states that from the record produced by the respondents themselves this point emerges for consideration, and should, therefore, be allowed to be urged. The record produced by the respondents comprises of correspondence between the petitioner and the various Government departments, and it is a matter of regret that the petitioner withheld the same from the Court while filing the writ petition, and did not even state specifically in the writ petition that he had refused to comply with the order of transfer and had been told that his lien had been terminated on that account. Be that as it may, the situation appears to me to be this. The petitioner admittedly did not comply with the order of joining the transferee post to which he was lawfully posted. His application for the grant of leave or casual leave as the case may be, had been refused. He did not resume duty, and has to face the consequences which ensued under regulation 189. This clearly caused a break in his service within the meaning of regulation 420 of the Civil Service Regulations. This amounted to an interruption in the service of the petitioner and by operation of regulation 420 which states that an interruption in the service of an officer entails forfeiture of his past service, he forfeited all his past service. His case does not fall under any of the exceptions (a) to (g) of the rule contained in the purview of regulation 420. He never resumed duty after the interruption or break in service and no question of granting any pension to him can, therefore, arise.

8. In this view of the matter I am unable to interfere in this case. The writ petition, therefore, fails and is dismissed with costs.

Petition dismissed.

That application has also therefore to be dismissed with costs.

21. This leaves application No. 18 for consideration. It relates to five properties and it is admitted that four of these properties are the same for which a claim or objection was filed by the four sons of Vastulal Pareek under Order 21, Rule 58 and resulted in the order of rejection dated December 17, 1960. As that order has also become conclusive in the absence of a suit under Order 21, Rule 63, it would bar the present application, so far as the aforesaid four properties are concerned, on the general principles of *res judicata*, and to that extent the claim is not maintainable and has to be rejected. The claim will however survive so far as the fifth property is concerned and I shall proceed to try it after settling the procedure by a separate order.

22. In the result, applications Nos. 16, 17 and 19 of 1967 are dismissed with costs on the ground that they are not maintainable. Application No. 18 of 1967 is dismissed so far as it relates to the four properties mentioned above, while the claim regarding the fifth property shall be investigated and tried by this Court. In respect of this application the parties will be entitled to proportionate costs.

Order accordingly.

AIR 1970 RAJASTHAN 17 (V 57 C 3)

P. N. SHINGHAL, J.

Sukanraj, Plaintiff v. Nekarchand, Defendant.

Second Appeals Nos. 41 of 1966 and 512 of 1965, D/-12-10-1968, from judgment and decree of Civil and Addl. S. J. Jalore, D/-7-10-1965.

(A) Registration Act (1908), S. 49 — Admissibility in evidence of a duly registered 'kabuliyat' — Held though document was not one creating a valid lease it was at any rate relevant for purpose of showing nature of defendant's possession, that it was permissive. (Para 10)

(B) T. P. Act, (1882), S. 106 — Duration of tenancy — Fact that defendant was in permissible possession of residential premises and that he paid rent admitted — Presumption can be drawn that it was tenancy from month to month. AIR 1952 SC 23 and AIR 1959 Raj 240, Rel. on. (Para 13)

(C) Easements Act (1882), S. 52 — Lease or licence — It is to be decided on basis of real intention of the parties — (T. P. Act (1882), S. 105). (Para 21)

(D) Civil P. C. (1908), Ss. 100-101 — Question whether defendant held premises as a licensee — Question not tried or raised in Courts below — Held question being

essentially one of fact could not be allowed for first time in second appeal — (Easements Act (1882), S. 52). (Para 21)

(E) T. P. Act (1882), S. 106 — Tenancy at will — Permissive possession under invalid or void lease — Tenancy at will arises but it comes to end when rent is paid and accepted — It then becomes monthly or yearly lease according to purpose for which it was taken. AIR 1961 Pat 350 and AIR 1957 Cal 625, Rel. on; AIR 1936 Oudh 102 and AIR 1946 Oudh 144, Dissent. from. (Para 22)

(F) T. P. Act (1882), S. 105 — Lease for certain period — Lease deed entitling lessor to have house vacated and rent realised on failure of tenant to pay rent in time — Held provision related to term or the period of lease and had effect of reducing it, and being an integral part of the term, or the period, it could not be separated from it — It was not a clause regarding period of notice or mode of termination of lease. (Para 24)

(G) T. P. Act (1882), S. 114 — Provision in lease as to forfeiture, has to be strictly construed. (Para 24)

Cases Referred:	Chronological	Paras
(1961) AIR 1961 Pat 350 (V 48), Jhalku Singh v. Chandrika Singh		22
(1959) AIR 1959 Raj 24 (V 46) = ILR (1959) 9 Raj 31, Chauth Mal v. Sardar Mal		19
(1959) AIR 1959 Raj 240 (V 46) = ILR (1958) 8 Raj 466, Lal Chand v. Radha Ballabh	14, 19, 24	
(1957) AIR 1957 Cal 625 (V 44) = 60 Cal WN 903, Sudhir Kumar v. Dharendra Nath		22
(1955) 1955 RLW 117, Kajodmal v. Baluram		18, 19
(1952) AIR 1952 SC 23 (V 39) = 1952 SCR 269, Ram Kumar Das v. Jagdish Chandra Deo	13, 14	
(1952) AIR 1952 All 344 (V 39), Dau Dayal v. Brij Mohan		20
(1949) AIR 1949 All 455 (V 36), Magbool Ahmad v. Debi	16, 17, 18, 19	
(1946) AIR 1946 Oudh 144 (V 33) = ILR 21 Luck 292, Gur Prasad v. Hansraj		22
(1944) AIR 1944 All 221 (V 31) = ILR (1944) All 346, Pyare Lal v. Ram Swarup	16, 17	
(1942) AIR 1942 All 330 (V 29) = 1942 All LJ 386, Ganga Sahai v. Badrul Islam	16, 17	
(1938) AIR 1938 All 32 (V 25) = 1937 All LJ 1297, Mirza Moham- mad Hasam v. Buddhu	16, 17	
(1936) AIR 1936 Oudh 102 (V 23) = 1935 Oudh WN 1238, Janki v. Kanhaiyalal		22
S. C. Bhandari, for Plaintiff; L. R. Mehta, for Defendant.		

JUDGMENT: The plaintiff and the defendant have filed appeals against the appellate judgment and decree of the Civil

Judge of Jalore dated October 7, 1965. The plaintiff's appeal is No. 41 of 1966, while appeal No. 512 of 1965 has been filed by the defendant. I shall dispose them of by this judgment.

2. Mr. L. R. Mehta, learned counsel for the defendant, has not pressed the defendant's appeal. Only the plaintiff's appeal therefore remains for consideration. In that appeal also, the controversy in this Court has been confined to the question whether the tenancy of the defendant was terminated by a valid notice. This was the subject-matter of issue No. 8 and it will be enough to state those facts which have a bearing on it.

3. The plaintiff is the owner of the suit house which is situated in Jalore. He stated in the plaint that he let it out to the defendant on Kartik Bad 10, S. 2006 (October 17, 1949) on an annual rent of Rs. 210 calculated at the rate of Rs. 17/8/- per month, for a period of 10 years. He also stated that the defendant executed a rent-note (Ex. 1) in his favour the same day and got it registered. The plaintiff received the rent up to January 18, 1955 and the payments were endorsed at the back of the rent-note. He felt aggrieved because the defendant did not pay the rent after January 18, 1955, in spite of reminders. After the expiry of the period of the tenancy, the plaintiff gave a notice to the defendant to redeliver the possession of the house to him, but without success. The claim for arrears of rent became barred by time for some period and the plaintiff instituted the present suit on March 26, 1962 for the recovery of Rs. 630 as arrears of rent and damages. He also prayed for the eviction of the defendant on the ground that he had committed more than three defaults in the payment of the rent.

4. The defendant denied that the plaintiff was his landlord, or that he was his tenant, and pleaded that he was in possession of the suit house as it was his ancestral property. Further, he pleaded that the rent-note was not duly registered and was not admissible in evidence, and that the notice given by the plaintiff was invalid so that there was no termination of his tenancy according to the law. In the replication, the plaintiff made it clear that the suit house had been mortgaged by the plaintiff in his favour, with possession, for Rs. 3,500 and that the deed of mortgage as well as the rent-note were duly registered. The plaintiff also clarified that it was after delivering the possession of the suit house to him as mortgagee that the defendant took it on rent. It was specifically pleaded that the relationship of landlord and tenant existed between the parties. As regards the defence regarding the invalidity of the notice, the plaintiff pleaded that it was devoid of any force.

5. The trial Court held that as the period of the tenancy was 10 years, the defendant continued in possession of the suit premises

without the express consent of the plaintiff after the expiry of that period and that he was not entitled to a notice under Sec. 106 of the Transfer of Property Act. That Court therefore decreed the suit. The defendant preferred an appeal which was decided by the impugned judgment of the Civil Judge of Jalore. He went to the extent of holding that the defendant continued to be the tenant by holding-over after the expiry of the period of 10 years, but that his tenancy, after that period, was a tenancy from month to month which could only be determined by a notice in accordance with Section 106 of the Transfer of Property Act. As such a notice was not given, the learned Judge allowed the appeal and set aside that part of the decree of the trial Court which related to the defendant's eviction. It is in these circumstances that the present second appeals have been filed by the parties.

6. Section 107 of the Transfer of Property Act deals with the creation of leases of immoveable properties and provides as follows:

"107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immoveable property is made by a registered instrument such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:

Provided that the State Government may, from time to time, by notification in the Official Gazette direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession."

The section thus divides leases into two categories. Leases from year to year, or for a term exceeding a year, or reserving a yearly rent, or permanent leases fall in first category and can only be made by a registered instrument. The other leases, that is leases for a term not exceeding one year, or from month to month, fall in the second category and may be made by a registered instrument or by an oral agreement accompanied by delivery of possession.

7. The present lease falls in the first category because it was for a term exceeding one year and reserved a yearly rent. It could therefore be made only by a registered instrument. This has been done, but the third paragraph of Section 107 of the Transfer of Property Act requires that where a lease of immoveable property is made by a registered instrument such instrument or,

where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee. There is a proviso to this paragraph, but it is admitted that it has no application to the present case. The fact remains that for the purpose of creating a valid lease under S. 107 of the Transfer of Property Act it was necessary that the instrument or instruments of the lease should have been executed by both the parties. This is however not so because a perusal of document Ex. I shows that it was executed only by the defendant, and not by the plaintiff. It could not therefore create a valid lease for a period of 10 years, or reserve an annual rent, even though that might have been the intention of the parties. The learned counsel for the parties are therefore in agreement that Ex. I was merely a "Kabuliyat" and fell within the definition of "lease" in Section 2(7) of the Registration Act for purposes of that Act.

8. The "kabuliyat" was however duly registered, as has now been admitted by the learned counsel for the defendant. The question is what relationship was created between the parties? To appreciate this aspect of the matter, it will be necessary to mention the other admitted facts.

9. It is admitted by the learned counsel for the plaintiff that the suit house belonged to the defendant and was mortgaged by him in favour of the plaintiff by a valid deed of mortgage and that the defendant took it on rent by executing rent-note Ex. 1 in favour of the plaintiff on October 17, 1949. As has been stated, the period of the tenancy was 10 years, and the annual rent of Rs. 210 was reserved for it with the stipulation that if the rent was not paid annually, in time, the plaintiff would be entitled to re-enter and realise the arrears of rent. The period of 10 years expired on October 16, 1959. The defendant paid the rent up to January 18, 1955, but not thereafter. The plaintiff gave him a notice on March 4, 1962 demanding the payment of the arrears of rent by way of damages and to deliver possession of the house within a period of 15 days. It is admitted that this 15 days' notice did not expire with the end of the month of the tenancy and was not therefore in accordance with Section 106 of the Transfer of Property Act.

10. It has been argued by Mr. Bhandari that as Ex. 1 is admissible in evidence as a duly registered "kabuliyat" even though it did not create a valid lease, those parts of it which are not of the essence of a lease within the meaning of Section 105 of the Transfer of Property Act can be read in evidence. There is force in this argument. At any rate the document is relevant for the purpose of showing the nature of the defendant's possession — that it was permissive. It is therefore satisfactory evidence of the fact that the plaintiff gave permission to the defendant to live in the suit house. In his replication the plaintiff has also clearly stated that he took

possession of the suit house under the mortgage, and then re-delivered the possession to the defendant as his tenant. The fact that the defendant was in permissive possession has therefore been proved beyond any doubt.

11. Another important fact which has been established equally well, is that the defendant paid the rent to the plaintiff. The plaintiff has admitted in paragraph 3 of the plaint that the defendant paid him "rent" up to January 18, 1955 on various dates, and that this payment of the "rent" had been endorsed at the back of the rent-note (Ex. 1) from time to time.

12. The two facts which have therefore been fully established are that: (i) the defendant was in permissive possession of the suit premises, and (ii) he paid the rent therefor and the plaintiff accepted that payment as "rent". It is therefore fair and reasonable to conclude that the parties intended to create and did actually create a tenancy in respect of the suit house.

13. But there is still the question as to the duration of the tenancy. It is admitted that possession to the defendant was not given for use of the premises for agricultural or manufacturing purposes for it was a residential house. It can therefore be safely inferred by reference to the provisions of Section 106 of the Transfer of Property Act, which lay down a rule of construction, that, in the absence of a valid agreement to the contrary, the duration of the lease was from month to month. I am fortified in this view by the decision in Ram Kumar Das v. Jagdish Chandra Deo, AIR 1952 SC 23. In that case also there was a registered "kabuliyat" by which the land was settled for a period of 10 years, on an annual rent. The defendant remained in possession of the land and paid rent. Their Lordships took into consideration the admitted facts that the defendant remained in possession of the land with permission, and paid the rent. From these facts they held that a tenancy could fairly be presumed and decided the question of its duration by invoking the rule of construction contained in Section 106 of the Transfer of Property Act as follows:—

"The section lays down a rule of construction which is to be applied when there is no period agreed upon between the parties. In such cases the duration has to be determined by reference to the object or purpose for which the tenancy is created. The rule of construction embodied in this section applies not only to express leases of uncertain duration but also to leases implied by law which may be inferred from possession and acceptance of rent and other circumstances. It is conceded that in the case before us the tenancy was not for manufacturing or agricultural purposes. The object was to enable the lessee to build structures upon the land. In these circumstances, it could be regarded as a tenancy from month to month, unless there was a contract to the contrary."

14. A similar view has been taken by a Division Bench of this court in *Lal Chand v. Radha Ballabh*, ILR (1958) 8 Raj 466 = (AIR 1959 Raj 240) on the basis of the abovementioned decision of their Lordships of the Supreme Court in *Ram Kumar Das's case*, AIR 1952 SC 23. In that case also, a "kabuliyat" was executed by the defendant in favour of the plaintiff creating a lease for 3 years, with the condition that it would be terminable on one month's notice. It was not registered and was not signed by the landlord. There was however no requirement in the Jaipur State, at the relevant time, for the registration of such a document. While, therefore, the "Kabuliyat" was held to be admissible in evidence, it was decided that it could not create a lease under Section 107 of the Transfer of Property Act. At the same time it was held that there could be no doubt that a tenancy was certainly created and the nature of such a tenancy, after the "Kabuliyat" had fallen on account of its invalidity as a lease, was a monthly tenancy. This decision also therefore supports the view which I have taken.

15. And once it is held that the defendant's was a tenancy from month to month, in respect of which there was no contract or local law or usage to the contrary, Section 106 of the Transfer of Property Act would at once be attracted. Such a tenancy would therefore be terminable by 15 days' notice expiring with the end of a month of the tenancy. Since as has been stated, it has been conceded by Mr. Bhandari that the notice in the present case did not fulfil this requirement of Section 106 of the Transfer of Property Act, it was not a valid notice and could not terminate the tenancy. The plaintiff is not therefore entitled to succeed in his claim for eviction.

16. It has however been argued by Mr. Bhandari that Ex. 1 was at least a contract by which the defendant agreed to allow the plaintiff to re-enter the premises on default in the payment of the rent. It has therefore been contended that there could be no reason why the defendant should not be held bound by the terms of that contract and dispossessed from the suit premises because of his failure to pay the rent after Jan. 18, 1955. The learned counsel has cited *Mirza Mohammad Hasan v. Buddhu*, AIR 1938 All 32, *Ganga Sahai v. Badrul Islam*, AIR 1942 All 330, *Pyare Lal v. Ram Swaroop*, AIR 1944 All 221, *Maqbool Ahmad v. Debi*, AIR 1949 All 455 to support this argument.

17. In *Mirza Mohammad Hasan's case*, AIR 1938 All 32, the father of the plaintiff got the premises on lease (after executing a "kabuliyat") on a rent of Re. 1 per annum and thereafter his son, the defendant, succeeded his father. He withheld the payment of the rent and a suit was brought for his ejectment. It was held that the registered "kabuliyat" could not create a valid lease for the reason that the landlord was not a party to it, but the document was not entirely in-

admissible against the executant himself and as the defendant occupied the premises with the permission of the landlord on the understanding that he would vacate whenever the Zamindar so desired and gave 15 days' notice, he (defendant) was bound to vacate the land when required to do so by the plaintiff. A reading of the entire judgment shows that the question of a monthly tenancy was not raised for consideration and it cannot therefore be said that the view which I have taken in the present case did not find favour in that case. The decision in *Ganga Sahai's case*, AIR 1942 All 330 was based on *Mirza Mohammad Hasan's case*, AIR 1938 All 32 and I need not refer to it separately. The decision in *Pyare Lal's case*, AIR 1944 All 221 was based on facts which were somewhat different and the question of duration of the lease did not arise for consideration. In the remaining case of *Maqbool Ahmad*, AIR 1949 All 455, the decision was based on the abovementioned cases of *Mirza Mohammad Hasan*, AIR 1938 All 32, *Pyare Lal*, AIR 1944 All 221 and *Ganga Sahai*, AIR 1942 All 330 and I need not therefore refer to this case also separately. It will thus appear that the judgments of their Lordships of the Allahabad High Court cited by Mr. Bhandari cannot be said to lay down a view contrary to that taken by me in the present case.

18. The learned counsel has however cited two judgments of this Court in which the abovementioned view of the Allahabad High Court has been accepted and followed. The first of these is *Kajodmal v. Baluram*, 1955 Raj LW 117. In that case there was a lease for 3 years under a registered rent-note executed by the defendant. As there was no requirement in the former Jaipur State at the relevant time for the registration of such a rent-note, it was held to be admissible in evidence. The learned Judge took the document into consideration and held that as the executant had agreed to remain in possession only for 3 years, he was bound to surrender the possession after the expiry of that period, and relied on the decision in *Maqbool Ahmad's case*, AIR 1949 All 455. He did not however consider the matter with reference to Section 107 of the Transfer of Property Act and did not examine the question whether the stipulation regarding the period of the tenancy could at all be read in evidence. So also, the learned Judge did not consider the question whether a monthly tenancy could not be said to be created in the circumstances of that case because of the fact that the defendant was in permissive possession and had paid, and the plaintiff had accepted, the payment of the rent.

19. The other case on which reliance has been placed by Mr. Bhandari is *Chathu Lal v. Sardar Mal*, ILR (1959) 9 Raj 31 = (AIR 1959 Raj 24). In that case a registered "kabuliyat" was executed by the defendant in favour of the plaintiffs in which the term of the lease was stated to be 5 years. It was

however further agreed that if the lessors wanted to make constructions on the land or to sell it, the defendant would vacate it before the expiry of the term of 5 years. The plaintiff gave a notice of 3 days for vacation of the premises on the ground that he wanted to sell the land to some one else. It was held that the terms of the contract contained in the "kabuliyat" were binding on the lessee, and reliance was placed on the decisions in *Maqbool Ahmad's* and *Kajodmal's* cases, AIR 1949 All 455 and 1955 Raj LW 117. It appears however that it was not argued in that case that the "kabuliyat" could not create a valid lease in view of the provisions of Section 107 of the Transfer of Property Act, and this judgment cannot also be of any real assistance to the appellant. In fact it appears that the decision of the Division Bench in *Lal Chand's* case, ILR (1958) 8 Raj 466 = (AIR 1959 Raj 240) was not brought to the notice of the learned Judge even though it was given some months earlier. It cannot therefore be said that the view which I have taken in the present case was considered and disapproved in that case.

20. It has next been argued by Mr. Bhandari that as document Ex. 1 could not create a lease of the suit premises because of the non-compliance of the provisions of Section 107 of the Transfer of Property Act, it should be held that there was only a licence in favour of the defendant and that it was not therefore necessary to give a notice for its termination. The learned counsel has based his argument on the decision in *Dau Dayal v. Brij Mohan*, AIR 1952 All 344. In that case the defendant usufructually mortgaged a house to the plaintiffs and executed a "kabuliyat" whereby he promised to pay the sum of Rs. 13 per month as rent for a period of 5 years. No lease, as provided in Section 107 of the Transfer of Property Act, was executed or signed both by the lessors and the lessee, but the "kabuliyat" was registered. The period of 5 years came to an end and the plaintiff served a notice on the defendant to vacate the house. As the defendant did not comply with the notice, a suit for ejectment was filed, but no claim for arrears of rent was included in that suit. While the ejectment suit was pending, the suit which gave rise to the appeal before their Lordship was filed for recovery of rent. It was held that the "kabuliyat" failed to create a lease whether for a term exceeding one year or for a lesser term, because it was executed only by the lessee. Their Lordships observed that as it had not been alleged that there was an oral agreement accompanied by delivery of possession and that a lease was created thereby, there was no lease at all. They took the view that since the "kabuliyat" "certainly exhibited a contract between the parties to pay a certain amount every month in lieu of the occupation of the house," it was a licence as it was not a lease. It was held that such

a contract was perfectly permissible and could not be said to be illegal or void on the ground that it defeated the provisions of any law. In particular, their Lordships observed that "under Section 23 of the Contract Act, such a contract does not defeat the provisions of Section 107 of the T. P. Act, because by its execution the executant does not obtain the rights of a lessee." They therefore concluded that no interest in immoveable property was created in his favour and he could be ejected at any time in spite of the "kabuliyat". A perusal of the judgment shows that their Lordships did not consider the effect of the facts that the possession of the defendant was permissive, and he had paid, and the plaintiff had accepted, the payment of the rent. In other words, their Lordships did not consider the question of the creation of a lease by an oral agreement accompanied by delivery of possession and excluded that eventuality by the observation that it was not alleged in the case that there was an oral agreement accompanied by delivery of possession and that a lease was created thereby. When their Lordships did not consider that question, it cannot be said that they have taken a contrary view. Moreover, if I may say so with respect, it was hardly necessary to give the finding that a licence was created in respect of the suit premises when no such plea had been taken. In the present case, however, it has clearly been pleaded in the plaint as well as in the replication that a lease was created between the parties and there is no reason why, in the absence of any legal impediment, effect should not be given to that intention.

21. Section 52 of the Easements Act defines a licence. It is settled law that the question whether a lease or a licence is created by an agreement between the parties, has to be decided on the basis of the real intention of the parties whether they intended to create a lease or licence. In the present case, as has been stated, the real intention of the parties was to create a lease and not licence. Besides, the legal possession of the property did not vest in the plaintiff after October 17, 1949 and it is admitted that as from that date it passed to the defendant and is still with him, to the exclusion of the plaintiff. *Prima facie*, therefore, it cannot be held that a licence was created so as to justify the defendant's eviction without a notice under Section 106 of the Transfer of Property Act. Moreover, the question whether the defendant held the premises as a licensee was essentially a question of fact and as no such plea was taken by him and as the point was not tried or raised for the consideration of the Courts below, it is not possible to allow its consideration for the first time in second appeal.

22. Faced with such a situation, Mr. Bhandari has argued that a tenant who

holds the premises under a "kabuliyat", which is inadmissible in evidence for any reason, is a tenant at will and no notice is necessary to determine his tenancy. For this argument he has placed reliance on *Janki v. Kanhaiyalal*, AIR 1936 Oudh 102 and *Gur Prasad v. Hansraj*, AIR 1946 Oudh 144. A tenancy at will no doubt arises by implication of law in case of permissive occupation when a person is in possession of the premises with the consent of the owner e.g., where there has been possession under an invalid or void lease. But that relationship comes to an end as soon as the rent is paid and accepted as such. So where rent is paid, a tenancy at will becomes, by virtue of Section 106 of the Transfer of Property Act, a yearly or monthly lease according to the purpose for which it is taken. I am fortified in this view by the decision in *Jhalku Singh v. Chandrika Singh*, AIR 1961 Pat 350. Besides, it has not even been pleaded in the present case that there was an agreement that the defendant would vacate the suit house on demand, and it cannot at all be said that there was a tenancy at will. The importance of the payment of rent and its acceptance as such does not appear to have been considered in the two Oudh cases cited by Mr. Bhandari. As has been held in *Sudhir Kumar v. Dharendra Nath*, AIR 1957 Cal 625, the relationship of landlord and tenant is created by acceptance of the rent and such a lease is presumed to be a lease from month to month even though the possession was initially delivered under an invalid lease. There is therefore no force in this argument also.

23. Lastly, it has been argued that there was a clause in document Ex. 1 to the effect that if the defendant did not pay the rent in time, the plaintiff would be entitled to have the house vacated and realise the rent according to law, and that this amounted to a contract to the contrary within the meaning of Section 106 of the Transfer of Property Act so that no notice was necessary for the termination of the lease. This argument has been based on the further submission that the aforesaid clause could be read in evidence as it was not a part of the lease and could be separated from the other invalid clauses.

24. In order to appreciate this argument I may again make a reference to *Seth Lal Chand's case*, ILR (1958) 8 Raj 466 = (AIR 1959 Raj 240), in which the question of such separation of the valid clauses was taken into consideration in respect of a "kabuliyat" which was not admissible as a lease under Section 107 of the Transfer of Property Act. In that case, their Lordships took the view that there could be no difficulty in separating those portions of the instrument which were not of the essence of the lease as defined in Section 105 of the Transfer of Property Act, and to consider them as a separate contract altogether from

the contract of lease which was invalid. They reached the conclusion that term as to notice was not of the essence of the definition of a lease, and that it amounted to a contract between the parties. But their Lordships held that the time or the term of the lease was an essential part thereof within the meaning of S. 105 of the Transfer of Property Act, so that any agreement regarding the term or the period was evidence of the lease under that section. It could not therefore be read in evidence when the document containing it was invalid or void under Section 107. In the present case it was stated in agreement Ex. 1 that the term or the period of the lease would be 10 years, but this was qualified by the further agreement that if the rent was not paid annually in time, the plaintiff would be entitled to get the house vacated and realise the rent according to the law. The provision regarding re-entry of the landlord therefore related to the term or the period of the lease and had the effect of reducing it. It was therefore an integral part of the term or the period of the lease, and could not be separated from it. It was not a clause merely regarding the period of the notice or the mode of termination of the lease. Besides, a clause regarding forfeiture has to be strictly construed, and even if it is presumed that there was an agreement providing for the re-entry of the landlord on the failure to pay the rent, that clause related to the payment of the annual rent in terms of Ex. 1 and could not govern the monthly tenancy which has been held to exist.

25. There is thus no force in any of the arguments advanced by Mr. Bhandari. The plaintiff's appeal (No. 41 of 1945) therefore fails and is dismissed. The defendant's appeal (No. 512 of 1963) has not been pressed and it is also dismissed. In the circumstances of the case, the parties are left to bear their own costs. Leave to appeal is prayed for, but is refused.

Appeal dismissed.

AIR 1970 RAJASTHAN 22 (V 57 C 4)

JAGAT NARAYAN, J.

Smt. Hoorā and others, Petitioners v. Abdul Karim, Respondent.

Civil Revn. No. 150 of 1967, D/-12-12-1968, against order of Dist. J., Merta, D/-3-1-1967.

(A) Arbitration Act (1940), Sch. I, Para 2 — Number of arbitrators found odd — There is no implied power in arbitrators to appoint umpire. (Para 4)

(B) Arbitration Act (1940), S. 14 (2) — S. 14 (2) contemplates filing of award either by party or by agent of arbitrators with authority of all arbitrators when there

CM/EM/B272/69/AKJ/D

are more than one arbitrator — Unless award is so filed, Court cannot act upon it—AIR 1949 Nag 349, Dissent. from; AIR 1958 All 720, Foll.

(Paras 6, 9 and 10)

(C) Arbitration Act (1940), S. 14 (2) — Limitation Act (1908), Art. 178 — Art. 178 is only applicable where award is filed on application by party under S. 14 (2) on instructions of court — It does not apply where it is filed by party under authority of arbitrators or arbitrators themselves cause it to be filed at request of party.

(Paras 11 and 12)

Cases Referred: Chronological Paras

(1963) AIR 1963 All 602 (V 50) =
ILR (1962) 2 All 463, Rahmatulla
v. Vidya Bhusan 10

(1958) AIR 1958 All 720 (V 45),
Amod Kumar v. Hari Prasad 10

(1953) AIR 1953 SC 313 (V 40) =
1953 SCR 878, Kumbha Mawji v.
Dominion of India 10

(1949) AIR 1949 Nag 349 (V 36) =
ILR (1949) Nag 272, R. K. Misra
v. Kundanlal Shahni 7

(1945) AIR 1945 Nag 117 (V 32) =
ILR (1945) Nag 323, Narayan
Bhawu v. Dewaji Bhawu 8

(1945) AIR 1945 Pat 140 (V 32) =
ILR 23 Pat 719, Raghubir Pandey
v. Kaulesar Pandey 8

(1927) AIR 1927 Rang 197 (V 14) =
ILR 5 Rang 171, Khatiza Bee Bee
v. I. E. Abowath 8

(1914) AIR 1914 Sind 90 (V 1) =
8 Sind LR 302, Shamdas Teumal
v. Khimanmal 8

S. N. Bhargava, for Petitioners; C. L.
Agarwal, for Respondent.

ORDER: This is a revision application by the legal representatives of one Allarakha against an order of the District Judge, Merta, holding that the application filed by Allarakha under Section 17 of the Arbitration Act was not in accordance with law as the award which he filed had not been filed in accordance with Section 14 (2) of the Arbitration Act. Allarakha filed the original registered award in Court and alleged in Paras. 6 and 7 of his application under Section 17 that the arbitrators had given the award to him for taking legal proceedings.

2. It is common ground between the parties that the dispute between Allarakha and Abdul Karim with regard to a piece of land situated at Merta was referred to five arbitrators under an agreement which is on record. The five arbitrators, appointed under it were Haji Mulla Usman, Abdulla, Farid Baksh, Noor Mohammad and Ashraf Ali. Four of these arbitrators filed an affidavit in support of the application of Allarakha in which it was alleged that the award was handed over by Noor Mohammad to Allarakha on behalf of Noor Mohammad and the remaining arbitrators for taking legal proceedings on the basis of

it. These 4 arbitrators were cross-examined. Noor Mohammad stated in cross-examination—

“मैंने पंच फैसला अलाराख को हमारी तरफ से हमने फैसला दिया उसको अमल में लाने के लिए कानूनी कार्यवाही हमारी तरफ से करने को कहा था दावा दरखास्त धराय करने के वास्ते तपसील नहीं खोली थी।”

In the first part of the above statement he has used the word “हमारी तरफ से.” In the second part he has however stated that

“मैंने इनको अमल में लाने के वास्ते कार्यवाही करने को कहा था।”

3. From the above statement it cannot be inferred that Noor Mohammad had been authorised by the other arbitrators to hand over the award to Allarakha for taking legal proceedings. At any rate the remaining 3 arbitrators who filed affidavits in support of Noor Mohammad made conflicting statements in cross-examination. Haji Mulla Usman's cross-examination goes to show that he was under the impression that the award was still with Noor Mohammad. In re-examination the affidavit was read out to him. Then he stated that what he had alleged in the affidavit was true and that he had made a wrong statement in cross-examination.

Abdulla stated in cross-examination that the award was written on two stamp papers one of which was given to Allarakha. Abdul Karim was called to take the duplicate but he refused to take it. The arbitrators then told Allarakha that as Abdul Karim was not willing to abide by the award he should take legal steps to enforce it. The award which was filed in Court is a registered one. He did not know who brought the registered document from the Registration Department. Farid Baksh is the son-in-law of Allarakha and he supported what he had alleged in his affidavit. The fifth arbitrator Ashraf was examined by Abdul Karim as his witness. He stated that he did not authorise any one to hand over the award to Allarakha. From the evidence on record it is clear that it is not proved at any rate that Haji Mulla Usman authorised the handing over of the award to Allarakha. The fact that in re-examination he admitted what he had stated in the affidavit was correct and that his statement in cross-examination was wrong goes to show that this witness was not hostile to Allarakha. I have therefore no reason to doubt that the statement made by him in cross-examination is true and that he at any rate did not authorise Noor Mohammad to deliver the award to Allarakha.

4. On behalf of the applicants it was contended that Noor Mohammad had been appointed as umpire and therefore he could have authorised Allarakha to file the award in Court. The arbitration agreement does

not provide for the appointment of an umpire. The number of arbitrators appointed was odd and therefore under Para. 2 of the First Schedule of the Arbitration Act there was no implied power in the arbitrators to appoint an umpire. The arbitrators in their statements in Court referred to Noor Mohammad as the Sarpanch. These included Ashraf who appeared as a witness for Abdul Karim. The fact that the arbitrators treated Noor Mohammad as an umpire would not clothe him with authority under Section 14 (2) to deliver the award to Allarakha for filing it in Court without the authority of the remaining arbitrators.

5. Section 14 (2) runs as follows:

"The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award."

6. From the language used in the above sub-section it is clear that the award should be filed under the authority of all the arbitrators or under the authority of the umpire. Where there is no umpire, as in the present case, the award can only be filed by the authority of all the arbitrators who give the award.

7. On behalf of the applicants it was contended on the authority of the decision of a learned single Judge of the Nagpur High Court in *R. K. Mishra v. Kundanlal Shahni*, AIR 1949 Nag 349, that the award can be filed by the authority of a single arbitrator even where there are more than one arbitrator. With all respect the reasoning given by the learned Judge in support of the view is not correct. Where there is only one arbitrator the word "arbitrators" will naturally mean the single arbitrator appointed in the case. But where the number of arbitrators is more than one then the words "the arbitrators shall at the request of any party... or if so directed by the Court... cause the award... to be filed in Court" can only mean that all the arbitrators who have been appointed should authorise the filing of the award in Court. The learned Judge has relied on Rule 7 of the Rules framed under Section 44 of the Arbitration Act by the Nagpur High Court. The Rule framed under Section 44 cannot override the express provisions of the section of the Act. Another reason which is given is that the filing of the award in Court is merely a ministerial act. The filing of the award is no doubt a ministerial act which can be performed by any agent of the arbitrators. But the person filing it should have the autho-

rity of all the arbitrators. Whether the award has been filed with the authority of all the arbitrators or not is a matter of substance under Section 14 (2). For unless the award is filed under the authority of all the arbitrators the Court is precluded from acting on it.

8. The learned single Judge has purported to rely on four decisions none of which can be interpreted to lend support to the view taken by him. In *Narayan Bhawu v. Dewaji Bhawu*, AIR 1945 Nag 117, the only question which arose for decision was whether the award was filed at the request of any of the parties. In *Raghubir Pandey v. Kaulesar Pandey*, AIR 1945 Pat 140, the award was given unanimously by 5 arbitrators but only 4 had signed it and it was held that it was valid. In *Shamdas Teumal v. Khimanmal*, AIR 1914 Sind 90, the question whether one arbitrator had filed the award with the authority of others was not raised at all. In *Khatiza Bee Bee v. I. E. Abowath*, AIR 1927 Rang 197, it was expressly held that one arbitrator can send the award to Court on behalf of himself and others. It presupposes the authority on behalf of all the arbitrators.

9. I accordingly hold that Section 14 (2) contemplates the filing of the award either by a party or by an agent of the arbitrators with the authority of all the arbitrators. Unless the award is so filed the Court cannot act on it.

10. On behalf of the applicants my attention was drawn to the decision of a Division Bench of the Allahabad High Court in *Rahmetulla v. Vidya Bhusan*, AIR 1963 All 602. In that case the party in whose favour the award was given filed it in Court and made a prayer that a decree be passed on it. It was not alleged by the plaintiff that he was filing the award under the authority of the arbitrators. When notice was issued to the opposite party no objection was raised that the award was filed without the authority of the arbitrators. From this absence of objection the learned Judges concluded that the award was filed with the authority of the arbitrators. With all respect no such inference can be drawn from the failure on the part of the defendant to raise an objection. It was held in *Kumbha Mawji v. Dominion of India*, AIR 1953 SC 313, by their Lordships of the Supreme Court that Section 14 (2) implies that where the award is in fact filed into Court by a party he should have the authority of the arbitrators or umpire for doing so and that authority has to be specifically alleged and proved.

In *Rahmetulla's* case, AIR 1963 All 602, *Rahmetulla* did not allege in his application that he had been authorised by the arbitrators to file the award in Court. As such the Court had no jurisdiction to pass a decree on the basis of the award. In this

connection I may refer to the decision of another Division Bench of the same High Court in *Amod Kumar v. Hari Prasad*, AIR 1958 All 720 in which it was held that Section 14 (2) contemplates that the award is filed in Court under the authority of the arbitrator. The question as to whether it can only be filed under the authority of all the arbitrators or only some of them was not considered in that case. The only question which was considered was whether the Court could act on an award filed by a party without the authority of the arbitrator. It was observed—

“Section 14 (2) contemplates the filing of the award in the Court by the arbitrator; it is not essential that he should himself take it to the Court and it is enough if he causes it to be filed. It is true that no formality in the act of filing the award is required; the arbitrator need not make an application for permission or leave to file the award. He can just file the award in the Court without any application but the act of filing must be his or on his behalf; if somebody else files it without his authority or not on his behalf, so that he cannot be said to have caused it to be filed, it is not an act to be taken notice of by the Court.

The effect of Section 14 (2) is that the Court is bound to receive the award and to proceed as laid down in it and the subsequent sections, but cannot be expected to do so whenever an award is produced before it by any person; therefore, the Legislature has laid down that it must be filed or caused to be filed by the arbitrator himself. An arbitrator cannot be said to have caused the award to be filed unless he delivers it to another person with a direction to file it or directs the person, who has custody of it, to file it.

He must intend to file it and must do an act which results in its being filed; otherwise he cannot be said to have caused it to be filed. If an arbitrator simply hands over the award to a party, even if he knows or has reason to believe that the party will file it in the Court and it files it, so long as he has not expressly authorised it to file it, he cannot be said to have caused it to be filed.

If some other person files it he must do so as the arbitrator's agent or as observed by the Supreme Court in AIR 1953 SC 818, he should have his authority. In that case the arbitrators handed over the award to a party and the party filed it in the Court; yet the Supreme Court held that the arbitrators did not cause it to be filed because the party had no authority from them to file it.

Sri Jagdish Swarup vehemently argued that an award can be filed in the Court by a party also. He referred to the provisions of Section 38 which allow a party to apply

to the Court for an order that the arbitrator shall deliver the award to it on payment of his fees and argued that the only object behind the party's being given the right to obtain the award from the arbitrator must be that it can file it in the Court and obtain a decree on it.

The Act does not provide for the award coming before the Court if the arbitrator dies or refuses to file it in the Court or has filed it in another proceeding or has delivered it to a party who refused to file it in the Court. An award is useless unless it is followed up by a decree; prior to the passing of the Arbitration Act of 1940 an award could be sued upon, but now a suit to enforce an award is barred.

It was contended that if the award can be filed in the Court by the arbitrator and not by any of the parties, the making of the award would in some cases be rendered futile. There is undoubtedly much force in the contention that if the law is that the award can be filed in the Court only by the arbitrator, the making of it would be rendered futile in some cases; but our jurisdiction consists in interpreting the law and not enacting a law.

The arguments that have been advanced are for legislating that a party should be given the right to file the award in the Court but would not justify a Court's interpreting Sec. 14 to mean that the award can be filed by a party also. The only right that has been given to a party is to apply to the arbitrator to file the award in the Court; there are no words which are capable of being interpreted to mean that it also has the right to file it in the Court.

I have pointed out earlier that if a person, who has the actual custody of the award is directed by the arbitrator to file it in the Court and complies with it, the arbitrator has caused it to be filed in the Court. It must be conceded that in some rare cases the arbitrator will not be in a position to file the award or cause it to be filed; but it would be for the legislature to provide for a decree being passed on the basis of the award in such cases.”

I am respectfully in agreement with the above observations and hold that the Court cannot act on an award which has not been filed under the authority of the arbitrators either by a party or by some other agent of the arbitrators. It was held in some unreported decisions of this Court that a party can file the award in Court without the authority of the arbitrator and ask for a decree. Those cases were not correctly decided in my opinion.

11. Where an award is filed in Court by a party under the authority of the arbitrators or the arbitrators themselves cause it to be filed in Court at the request of a party Article 178 of the old Limitation Act

is not applicable to it. That article run as follows :

"178. Under the Arbitration Act of 1940 for filing in Court of an award. Ninety days. The date of service of the notice of the making of the award."

12. The above article is only applicable where an award is filed on an application by a party under Section 14 (2) on the instructions of the Court. Under Article 119 of the new Limitation Act this period has been reduced to 30 days.

13. In view of what I have held above the revision application is dismissed. In the circumstances of the case, I leave the parties to bear their own costs of this revision application.

Revision dismissed.

AIR 1970 RAJASTHAN 26 (V 57 C 5)

L. S. MEHTA AND C. M. LODHA, JJ.

Namamal and others, Appellants v. Radhey Shyam, Respondent.

Civil Special Appeal No. 33 of 1966, D/-7-1-1969, against judgment of Jagat Narayan, J., in Civil Misc. Appln. No. 61 of 1965, D/-18-3-1966.

Houses and Rents — Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950, as amended by Act 12 of 1965), Section 13A — "Appeal" — Meaning — Tenants filing appeal or revision against eviction decree — Other conditions under S. 13A (d) fulfilled — Clause (d) covers even such tenants — Application for leave to appeal is not "appeal" within the meaning of Cl. (d) — Tenants applying for leave to appeal to Division Bench and also for special leave to appeal to Supreme Court under Art. 136, Constitution — Tenants yet entitled to apply under S. 13A (d) — (Words and Phrases — "Appeal") — (Constitution of India, Art. 136).

Even a tenant, who has filed an appeal or revision against an eviction decree, the other conditions under Sec. 13A (d) of the Rajasthan Premises (Control of Rent and Eviction) Act (as amended by Act 12 of 1965) being fulfilled, is covered by that Cl. (d). An application for leave to appeal is not "appeal" within the meaning of Cl. (d) and therefore a tenant who had applied for leave to appeal to Division Bench and also for special leave to appeal to the Supreme Court under Art. 136 of the Constitution against the eviction decree is entitled to apply under S. 13A (d).

(Paras 10, 12 and 21)

It is clear from the various clauses of Sec. 13A that by adding S. 13A an opportunity is intended to be afforded to tenants liable to be ejected on the ground of non-payment of rent to pay the entire arrears of rent along with interest and costs of the proceeding and thereby save themselves from ejectment. The words "any proceeding pending" in S. 13A (a) relate to all matters, be they suits, appeals or revisions, pending on the date of commencement of the Rajasthan Premises (Control of Rent and Eviction) Amendment Act. (Para 9)

The purpose in enacting S. 13A (d) is to give retrospective effect to the section. Under S. 13A (d) protection has been extended to all those tenants against whom decrees for eviction had been passed on the ground only of non-payment of rent before the date of commencement of the Amending Act but on or after 21-3-1955. The clause makes specific reference to those tenants who may not have filed appeals or revisions presumably because the statute did not allow further right of an appeal or revision against such a decree or who did not find force in any further appeal or revision in view of the state of law as it then existed, and who could not prefer appeal or revision after the commencement of the Amending Act because of the expiration of the limitation period. The correct interpretation of this clause which will be consistent with the intention of the statute and which will at the same time avoid any absurdity, repugnance or inconsistency and will suppress mischief, will be that it covers not only tenants who have not preferred any appeal or revision against such an eviction decree but also those who have preferred an appeal or revision but which has been rejected and the eviction decree confirmed. This clause does not envisage that if a tenant, after such an eviction decree is finally passed, has made an application for leave to appeal, he shall not be entitled to the benefit of this clause. In this view of Section 13A (d), it will not make any difference even if such an application is treated as an "appeal."

(Paras 10 and 12)

Even if the dictionary meaning of "appeal" viz. "the removal of a cause or the suit from an inferior to superior Judge or Court for re-examination or review" is adopted, it cannot be said that merely by filing an application for leave to appeal, the cause or suit is so removed. It cannot also be considered as an irregular or incompetent appeal. Thus, it cannot be said that such an application must be regarded as an "appeal" within the meaning of S. 13A (d). (1853) 8 Ex 352, Rel. on; (1881) 6 AC 114 and (1883) 8 AC 354 and Maxwell on Interpretation of Statutes, 11th Edn. page 226, Foll.; AIR 1932 PC 165 and AIR 1933 Bom 255 and (1899) ILR 22 Mad 68 (FB) and (1911) 13 Cal LJ 90 and AIR 1964 Ori 205 and AIR 1950 SC 6, Dist.

(Paras 17, 20 and 21)

Cases Referred:	Chronological	Paras
(1964) AIR 1964 Ori 205 (V 51) = ILR (1963) Cut 723, Ghanashyam Mohapatra v. Suryamani Swain		19
(1950) AIR 1950 SC 6 (V 37) = 1950 SCR 25, Bhawanipore Bank- ing Corporation Ltd. v. Gouri Shankar		19
(1933) AIR 1933 Bom 255 (V 20) = ILR 57, Bom 388, Nagappa Band- appa v. Guru Shantappa Shankr- appa		13, 16
(1932) AIR 1932 PC 165 (V 19) = ILR 60 Cal 1, Nagendra Nath Dey v. Suresh Chandra Dey	13, 14, 16	
(1911) 9 Ind Cas 183 = 13 Cal LJ 90, Secy. of State v. British India Steam Navigation Co.		18
(1899) ILR 22 Mad 68 = 8 Mad LJ 231 (FB), Chappan v. Moidin Kutti	13, 17	
(1883) 8 AC 354 = 52 LJ QB 505, Bradlaugh v. Clarke	10	
(1881) 6 AC 114 = 29 WR 685, Caledonian Ry. v. North British Rly.	10	
(1853) 8 Ex 352 = 22 LJ Ex 109, Waugh v. Middleton	10	

R. K. Rastogi and H. C. Rastogi, for Appellants; P. C. Bhandari and A. K. Bhandari, for Respondent.

C. M. LODHA, J.: This appeal has been brought by certificate granted under Section 18 (2) of the Rajasthan High Court Ordinance from the judgment of the learned Single Judge dated 18th March, 1966 in S. B. Civil Misc. Application No. 61 of 1965 (in S. B. Civil Regular Second Appeal No. 452 of 1960).

2. The relevant facts giving rise to this appeal may be stated within a short compass.

3. The plaintiff-respondent Radheyshyam (landlord) filed a suit for arrears of rent and ejectment from a shop situated in Ramganj Bazar, Jaipur, against the defendants-appellants Namamal and others (tenants) on two grounds viz., that the defendants have not paid rent of the premises for more than twelve months and that the premises are required reasonably and bona fide by the landlord for his own occupation. The landlord's plea for personal necessity was rejected by the trial Court. However the suit for arrears of rent and ejectment was decreed on the ground that the defendant-tenants had committed default in payment of rent and had thereby incurred the liability to be ejected. On appeal by the defendants the learned Senior Civil Judge, Jaipur set aside the judgment and decree of the trial court and dismissed the suit on 8-2-1960, by giving the defendants benefit of Section 13 (4) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (which for the sake of brevity will be referred to hereinafter as "the Act").

4. Aggrieved by the judgment and decree of the Senior Civil Judge, Jaipur the plaintiff landlord filed appeal before this Court which was allowed on 8-4-1965 and the suit for ejectment was decreed only on the ground of default in payment of rent. On 30-4-1965 the defendants applied before the learned single Judge for grant of leave to appeal to the Division Bench from the judgment of the learned single Judge under Section 18 (2) of the Rajasthan High Court Ordinance, 1949 but this application was rejected the same day. Thereafter on 3-5-1965 the defendants filed a petition under Article 136(1) of the Constitution of India to the Supreme Court for grant of Special Leave to Appeal from the judgment dated 8-4-1965. While the application for grant of Special Leave to Appeal was pending before the Supreme Court, the plaintiff-landlord took out execution of the decree passed by this Court on 8-4-1965 and obtained possession of the shop in question on 8-5-1965. The defendants' application for grant of Special Leave to Appeal to the Supreme Court under Article 136(1) of the Constitution was also rejected on 18-5-1965.

5. Soon after the rejection of the petition for grant of Special Leave to Appeal to Supreme Court, Section 13-A was inserted in the Act by Section 3 of the Rajasthan Premises (Control of Rent and Eviction) Amendment Act No. 12 of 1965 which received the assent of the President on 2-6-1965 and was published in the Rajasthan Gazette, Part IV-A (Extraordinary) dated 9-6-1965. The amending Act came into force on 9th June, 1965 by virtue of Section 5 of the Rajasthan General Clauses Act, 1955. Since the question of applicability of Section 13-A to the present case is the only point we are called upon to determine, it would be proper to reproduce this section in extenso:—

"Section 13-A. Special provisions relating to pending and other matters: Notwithstanding anything in Section 13, sub-section (1)(a), or sub-section (4) and the proviso thereto or sub-section (5) as they existed before the commencement of the amending Act:—

(a) no court shall, in any proceeding pending on the date of commencement of the amending Act, pass any decree in favour of a landlord for eviction of a tenant on the ground of non-payment of rent, if the tenant applies under clause (b) and pays to the landlord, or deposits in court, within such time such aggregate of the amount or rent in arrears, interest thereon and full costs of the suit as may be directed by the court under and in accordance with that clause:

(b) in every such proceeding, the court shall, on the application of the tenant made within thirty days from the date of commencement of the amending Act, notwithstanding any order to the contrary, determine the amount of rent in arrears upto the date of the order as also the amount of interest thereon at six per cent per annum and costs of the suit allowable to the landlord; and direct the

tenant to pay the amount so determined within such time not exceeding ninety days, as may be fixed by the court; and on such payment being made within the time fixed as aforesaid, the proceeding shall be disposed of as if tenant had not committed any default;

(c) the provisions of clauses (a) and (b) shall mutatis mutandis apply to all appeals, or applications for revisions, preferred or made after the commencement of the amending Act, against decrees for eviction passed before such commencement with the variation that in clause (b), for the expression "from the date of commencement of the Amending Act", the expression "from the date of the presentation of the memorandum of appeal or application for revision" shall be substituted;

(d) if in any proceeding, any decree for eviction on the ground only of non-payment of rent has been passed on or after the 21st March, 1955, but before the date of commencement of the Amending Act, and in which no appeal or application for revision has been preferred or made the court may, on the application of the tenant made within thirty days from the date of commencement of the Amending Act, reopen the proceeding if the tenant deposits all arrears of rent upto the date of such application as also the amount of interest thereon at six per cent per annum and costs of the suit; and thereafter such proceeding, shall be disposed of as if such deposit of rent constituted a valid payment to landlord in time."

6. On 1-7-1965 the defendants made an application under clause (d) of Section 13-A of the Act stating that they had deposited the arrears of rent upto the date of the application as also the amount of interest thereon at 6 per cent per annum and costs of the proceedings, for payment to the plaintiff decree-holder. It was prayed that the decree passed on 8-4-1965 by this Court for ejectment of the defendants from the shop in question may be re-opened and the proceedings in the second appeal may be disposed of as if such deposit of rent constituted a valid payment and the suit for ejectment be dismissed.

This application was opposed by the plaintiff-landlord who pleaded that the application filed by the defendants for leave to appeal to the Division Bench under the Rajasthan High Court Ordinance, as well as the petition for special leave to appeal to the Supreme Court against the judgment and decree of this Court dated 8-4-1965 had both been rejected on 30-4-1965 and 18-5-1965 respectively and that the possession of the shop in question had been handed over to the plaintiff-landlord in the course of execution on 8-5-1965. It was contended that the application filed by the defendants for leave to appeal amounted to filing an appeal "within the meaning of cl. (d) of Section 13-A and therefore the defendants could not ask

for reopening of the proceedings of the second appeal and dismissal of the suit.

7. The learned single Judge accepted the contentions raised on behalf of the plaintiff landlord and held that the application filed by the defendants for grant of leave to appeal from the judgment of a single Judge must be regarded as an "appeal" within the meaning of clause (d) of Section 13-A of the Act, and, therefore, they cannot take advantage of clause (d) of that section. In this view of the matter the learned single Judge by his judgment dated 18-3-1966 dismissed the defendants' application under Section 13-A of the Act. But at the same time he declared the case fit one for appeal to the Division Bench. It is in pursuance of the leave granted by the learned single Judge that this Special Appeal has been filed.

8. We have heard Mr. R. K. Rastogi on behalf of the defendants-appellants and Shri P. C. Bhandari learned counsel for the respondent-plaintiff at some length. Mr. Rastogi has argued that neither the application dated 30-4-1965 for grant of leave to appeal to Division Bench nor the petition dated 18-5-1965 for grant of Special Leave to Appeal to the Supreme Court under Article 136 of the Constitution can be treated as an "appeal". It is contended that the learned single Judge was in error in holding that the defendants-appellants cannot take advantage of Section 13-A, cl. (d) of the Act, on the ground that they had preferred an appeal from the judgment and decree dated 8-4-1965. He has submitted that the authorities relied upon by the learned single Judge have no application to the facts and circumstances of the present case. The learned counsel for the respondent, on the other hand, strongly supported the view taken by the learned single Judge by reference to a few more authorities besides those referred to in the judgment under appeal.

9. Before we embark upon the consideration of the various authorities relied upon by the learned Single Judge and cited at the Bar we consider it proper to examine the provisions of Section 13-A. It is crystal clear from the various clauses of this section that by inserting Section 13-A, the Legislature wanted that an opportunity be afforded to the tenants who are liable to be ejected on the ground of non-payment of rent, to pay the entire arrears of rent along with interest and costs of the proceeding and thereby save themselves from ejectment.

Sub-clause (a) prohibits a Court from passing any decree in favour of a landlord for eviction of a tenant on the ground of non-payment of rent in a pending proceeding, if the tenant expresses his willingness to pay the whole of the arrears of rent together with interest thereon and the costs within 30 days from the date of the commencement of the Amending Act, as provided under cl. (b) of that sub-section. The words "any proceeding pending" used in sub-clause (a) relate to all pending matters, be they suits, appeals or revisions, pending on the date of commence-

ment of the amending Act. Sub-clause (c) makes provision with respect to appeals or applications for revision which though not pending on the date of the commencement of the amending Act may be preferred thereafter and it has been provided in this clause that the provisions of clauses (a) and (b) shall *mutatis mutandis* apply to all such appeals or applications for revision as may be preferred after the commencement of the Amending Act, with this modification that the application for depositing the arrears of rent, interest and costs must be made by the tenant within 30 days from the date of the presentation of the memorandum of appeal or application for revision. Thus clauses (a), (b) and (c) of this section have made provision in respect to suits as well as appeals and applications for revision pending on the date of the commencement of the Amending Act and also appeals or applications for revision which may be preferred after the commencement of the Amending Act against decrees for eviction passed before such commencement.

10. Then we come to clause (d) which lays down that if a decree for eviction on the ground only of non-payment of rent has been passed on or after the 21st March 1955, but before the date of commencement of the Amending Act, and in which no appeal or application for revision has been preferred or made, the tenant may apply within the prescribed time for reopening the proceeding by depositing arrears of rent, interest thereon and costs. The purpose of the Legislature in enacting this clause is to give retrospective effect to Section 13-A to all those matters decided on or after the 21st March, 1955. But with respect to the application of this clause a distinction is being drawn by the learned counsel for the respondent between those tenants who did not file appeals or applications for revision from the decrees of eviction passed against them and those who did file appeals or applications for revision.

It is argued that those who had filed appeals or applications for revision cannot press into service clause (d) which can be availed of only by those who had not filed any appeal or revision. We, however, find ourselves unable to accept this interpretation, as in our opinion, acceptance of such an interpretation would involve absurdity and inconsistency. We fail to understand how the legislature could have intended to penalise those tenants who had preferred appeals or applications for revision and benefit those tenants only who had not filed appeals or revisions on account of their own inaction?

To us it appears that under this clause the legislature extended protection to all those tenants against whom decrees for eviction had been passed on the ground only of non-payment of rent before the date of commencement of the Amending Act but on or after the 21st March, 1955 whether in suit or in appeal or in revision. The clause makes spe-

cific reference to those tenants, who may not have filed appeals or revisions presumably because the statute did not allow further right of an appeal or revision against such a decree or who did not find force in any further appeal or revision in view of the state of law as it then existed, and who could not prefer appeal or revision after the commencement of the Amending Act because of the expiration of the period of limitation. Thus the correct interpretation of this clause which would be consistent with the intention or purpose of the statute and which would at the same time avoid any absurdity, repugnance or inconsistency and would suppress the mischief, would be, that if in any proceeding any decree on the ground only of non-payment of rent has been passed on or after the 21st March, 1955 but before the date of the commencement of the Amending Act, and in which either no appeal or application for revision has been preferred or made or even if an appeal or application for revision has been preferred but the same has been rejected and the decree for eviction confirmed, the Court may on the application of the tenant made within 30 days from the date of the commencement of the Amending Act, reopen the proceedings if the tenant deposits all arrears of rent upto the date of such application as also the amount of interest thereon at 6 per cent per annum and costs of the suit.

This clause cannot be so interpreted as to mean that if any tenant has preferred an appeal or application for revision from the decree for eviction, then he will be deprived of the protection given by Section 13-A. As already observed above the intention of the Legislature in enacting Section 13-A was to protect the tenants against eviction. While interpreting this clause, we cannot ignore this apparent intention of the legislature. It was observed by Pollock C. B. in *Waugh v. Middleton*, 1853-8 Ex 352 (356):—

"It must, however, be conceded that where the grammatical construction is clear and manifest and without doubt, that construction ought to prevail, unless there be some strong and obvious reason to the contrary. But the rule adverted to is subject to this condition, that however plain the apparent grammatical construction of a sentence may be, if it be properly clear from the contents of the same document that the apparent grammatical construction cannot be the true one, then that which, upon the whole, is the true meaning shall prevail, in spite of the grammatical construction of a particular part of it."

And substantially the same opinion is expressed by Lord Selborne in *Caledonian Ry. v. North British Ry.* (1881) 6 AC 114 (222):—

"The mere literal construction of a statute ought not to prevail if it is opposed to the intentions of the legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other con-

struction by which that intention can be better effectuated."

Again Lord Fitzgerald in *Bradlaugh v. Clarke*, (1883) 8 AC 354 at p. 384 observed as follows:—

"I apprehend it is a rule in the construction of statutes that in the first instance the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention or declared purpose of the statutes, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such an inconvenience, but no further."

11. Maxwell in his book on Interpretation of Statutes (11th Edition) at page 226 observes thus:—

"The rule of strict construction, however, whenever invoked, comes attended with qualifications and other rules no less important, and it is by the light which each contributes that the meaning must be determined. Among them is the rule that that sense of the words is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the legislature. The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are indeed frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Sir Edward Cole's words, to suppress the mischief and advance the remedy."

12. In view of the principles set out above we are inclined to hold that the legislature intended to give benefit of clause (d) not only to those tenants who did not file appeals or applications for revision from the decrees of eviction passed against them but also to those against whom decrees for eviction had been passed finally on or after the 21st March, 1955 but before the date of commencement of the Amending Act. This clause does not envisage that if after the decree for eviction finally passed on or after the 21st March, 1955 but before the date of commencement of the Amending Act, a tenant has made an application for leave to appeal, he shall not be entitled to the benefit of this clause. According to the interpretation which we have put on this clause it would not make any difference even if the application for leave to appeal is treated as an "appeal". The defendants-appellants were therefore entitled to make an application under clause (d) of Section 13-A and their application should not have been thrown out on the ground that they had made an application for leave to appeal from the decree for eviction passed by this Court on 8-4-1965. In this view of the

matter, we regret, we cannot subscribe to the view of the learned single Judge, that:

"It is only in those cases in which a decree for ejectment has been passed before 9-6-1965 and an appeal against the decree for ejectment is pending that relief has been granted under clause (c) and that if an appeal is preferred but is rejected then the tenant is not entitled to any relief."

In our humble view the benefit of Section 13-A would be available to those tenants also against whom a decree for eviction had been passed on the ground of non-payment of rent on or after 21-3-55 but before the date of commencement of the Amending Act even though an appeal was preferred by them and rejected before the commencement of the Act. It may thus be not necessary for us to determine the question whether the application for grant of leave to appeal must be regarded as an "appeal". However since the judgment of the learned single Judge has mainly proceeded on this point and the case has also been argued before us at a considerable length on that basis, we consider it proper to decide this question also.

13. We may state at once that no authority in point has been placed before us whether an application for leave to appeal can be regarded as an "appeal". The learned single Judge relied upon the following authorities in support of his view: *Nagendra Nath Dey v. Suresh Chandra Dey*, AIR 1932 PC 165; *Nagappa Bandappa v. Gurushantappa Shankrappa*, AIR 1933 Bom 255; *Chapman v. Moidin Kutti*, (1899) ILR 22 Mad 68 (FB).

14. We shall, therefore, consider each of these authorities. In AIR 1932 PC 165 their Lordships of the Privy Council were dealing with the provisions of Article 182(2) of the Limitation Act, 1908. In a suit to enforce a mortgage the Subordinate Judge disallowed Madan Mohan's claim on 24-6-1920 and passed a final decree for sale of the mortgaged property. The decree was, however, drawn up on 2-8-1920 but properly dated as of 24th June. On 27th August 1920 Madan Mohan presented an application to the High Court purporting to be an appeal from the order of the Subordinate Judge dated 24-6-1920. The appeal was admitted and heard in due course though irregular in form as not being an appeal against the decree of the Subordinate Judge and being insufficiently stamped for this purpose. An objection was taken to the form of the appeal, and in the result, the appeal was dismissed both on the ground of irregularity and upon the merits and the dismissal was embodied in the decree of the High Court dated 24-8-1922. It was argued that Madan Mohan's application of 27-8-1920 (referred to as the 1920 appeal) was by reason of this irregularity not an appeal at all but an abortive attempt to appeal. While rejecting this contention their Lordships of the Privy Council were pleased to observe:

"There is no definition of appeal in the Civil Procedure Code, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptance of the term, and that it is no less an appeal because it is irregular or incompetent."

15. From the facts narrated above, it would be clear that the application presented to the High Court by Madan Mohan purported to be an appeal from the order of the Subordinate Judge dated 24-6-1920. To all intents and purposes it was an appeal, though irregular and insufficiently stamped. Thus, the facts of this case were altogether different and the case is no authority on the point whether an application for leave to appeal is an appeal.

16. In AIR 1933 Bom 255 there again arose a question as to the interpretation of Article 182(2) of the Limitation Act, 1908, and the learned Judges of the Bombay High Court held, after referring to the Privy Council case cited above, AIR 1932 PC 165 that an appeal against an order granting review even though it is incompetent would be included in the definition of "appeal" within the ordinary acceptance of the term. Thus, in this case also, an appeal from an order granting the review had been filed, even though it was incompetent and it was held that it was nevertheless an appeal as contemplated by the Civil Procedure Code.

17. In (1899) ILR 22 Mad 68 the question which arose for decision was whether the power of revision exercised by the High Court under Section 622 of the old Civil Procedure Code was a part of the Court's appellate jurisdiction and in this connection Subramania Ayyar J., referred to the dictionary meaning of the word "appeal" as contained in the Webster's dictionary. The following passage from the judgment of Subramania Ayyar J., was strongly relied upon by the learned counsel for the respondent in support of his argument:

"Now according to Webster's Dictionary the first meaning, in law, of the noun 'appeal' is the 'removal of the cause or a suit from 'an inferior to a superior Judge or court for re-examination 'or review'. The explanation of the term in Wharton's Law Lexicon, which is only different in words, is 'the removal of a 'cause from an inferior to a superior Court for the purpose of 'testing the soundness of the decision of the inferior Court'."

And in consonance with this broad meaning of the word appellate jurisdiction means, the power of a superior Court to review "the decision of an inferior Court". Here the two things, which are required to constitute appellate jurisdiction, are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. This has been well put by Story:

The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial tribunals an appellate jurisdiction, therefore, necessarily implies that the subject matter has been already instituted and acted upon by some other Court, whose judgment or proceedings are to be revised, (Section 1761: Commentaries on the Constitution of the United States)" (P 80).

Suffice it to say that even if we adopt the dictionary meaning of the word "appeal" as "the removal of a cause or the suit from an inferior to a superior Judge or court for re-examination or review," it cannot be said that merely by filing an application for leave to appeal, the cause or suit is removed from an inferior court to a superior court for re-examination or a review. An application for grant of leave to appeal is only an application for grant of necessary permission to file an appeal. If the permission is granted then only the applicant can file appeal. Thus, making of an application for leave to appeal cannot be regarded as "appeal" itself. The facts of the Madras case are altogether different and the observations made by Subramania Ayyar J. have no application to the facts and circumstances of the present case.

18. Learned counsel for the respondent also relied upon Secretary of State v. British India Steam Navigation Co., (1911) 9 Ind Cas 183 (Cal). In this case, the question canvassed before the learned Judges of the Calcutta High Court was whether the revisional jurisdiction is essentially distinct from the appellate jurisdiction, or whether it was intended by the Letters Patent to be included in the appellate jurisdiction? In this connection, the learned Judges observed,

"Now the term 'Appeal' is defined in the Oxford Dictionary, Volume 1, page 398, as the transference of a case from an inferior to a higher Court or tribunal in the hope of reversing or modifying the decision of the former."

Reference was also made to the definition of the term "appeal" contained in the Law Dictionary by Sweet where it was defined "as a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court, or Court of appeal." This case also cannot be of any assistance to us in deciding the point argued before us.

19. Learned counsel for the appellants on the other hand referred us to Ghanashyam Mohapatra v. Suryamani Swain, AIR 1964 Ori 205. It was observed in this case that the word "appeal" as appearing in Article 182(2) is one confined only to such appeals as are directly taken against a decree, but it does not include all appeals from decrees passed in collateral proceedings such as the one under Order 9, Rule 13, Civil P. C. In support of this observation the learned Judges of the Orissa High Court placed reliance on Bhawanipore Banking Corporation

Ltd. v. Gouri Shankar, AIR 1950 SC 6. We may state here that these authorities have also no bearing on the point at issue before us and we, therefore, do not feel inclined to make a detailed reference to them.

20. In absence of there being any direct case law on the point, we are inclined to hold that an application for leave to appeal cannot be considered as an appeal within the ordinary acceptance of the term. The prayer contained in an application for leave to appeal is grant of permission to file an appeal. Such an application cannot be considered as an irregular or incompetent appeal. We have perused the original application for leave to appeal before Division Bench as well as the certified copy of the petition for grant of special leave to appeal to the Supreme Court made under Article 136 of the Constitution. None of these two documents even purports to be an appeal nor do they contain any prayer for setting aside or revising the decision of the learned Single Judge dated 8-4-1965. The only prayer contained in these applications is that leave to appeal may be granted.

21. After bestowing our careful consideration on the question, we are of the view that an application for leave to appeal cannot be regarded as an "appeal" and, therefore, merely because the defendants-appellants filed an application for leave to appeal to Division Bench and also a petition for Special Leave to Appeal to the Supreme Court under Article 136 of the Constitution, it cannot be said that they had preferred an "appeal" either to the Division Bench or to the Supreme Court. We are, therefore, unable to subscribe to the view taken by the learned Single Judge that an application for grant of leave to appeal must be regarded as an "appeal" within the meaning of clause (d).

22. This appeal is, therefore, allowed, the order of the learned single Judge dated 18-8-66 is set aside and the case is sent back to him for disposal of the defendant-appellants' application under Section 13-A of the Act according to law. In the circumstances of the case, the parties are left to bear their own costs of this appeal.

Appeal allowed.

AIR 1970 RAJASTHAN 32 (V 57 C 6)

B. P. BERI, J.

Manglaram, Petitioner v. State of Rajasthan, Opposite Party.

Criminal Revn. No. 23 of 1968, D/- 10-2-1969, against order of City Magistrate, Jodhpur, D/- 11-12-1967.

Rajasthan Armed Constabulary Act (12 of 1950), Ss. 6 (e), 4 and Schedule — Scope — S. 4 is mandatory — Statement under S. 4 signed by constable of Rajasthan Armed Constabulary — Constable not knowing English — Statement neither explained to him nor at-

tested by person of requisite rank — Constable committed to trial on charge under S. 6 (e) — Commitment illegal — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Mandatory provision — Determination).

Section 4 of the Rajasthan Armed Constabulary Act is mandatory. Where a constable, not knowing English, signs a statement under S. 4, but that statement is neither explained to him nor it is attested by a person of the requisite rank, and he is committed to trial on a charge under S. 6(e), the commitment is illegal. (Paras 15 and 16)

In determining the effect of such failure to explain and attest that statement on his commitment, first the legislative intent is to be ascertained. (Para 9)

Under S. 4, it is not open to a member to be enrolled in the constabulary to sign a declaration in any words that he likes. Even the form is prescribed as a part of the statute. The condition in that statement that the member will not be entitled to obtain discharge at his own request is evidently a condition different from the ordinary contracts of master and servant. To ensure that the executant understood its legal implications, the Legislature has prescribed that the executant shall sign it in acknowledgment of that statement having been read over to him and if necessary it shall be explained to him. In addition, the making of an endorsement to the effect that the declaration had been signed in the presence of an officer of a requisite rank evidencing the fact that he had ascertained that the executant had understood the purport of what he had signed, has also been prescribed. This important function of attestation has not been entrusted to any English-knowing person, capable of translating the purport of the statement but the official ranks qualified to attest have also been laid down. Trust for this duty has thus been reposed only on officers of specified status. Perhaps the legislature wanted to impart solemnity to the transaction. In this view, an attestation by an Inspector is clearly contrary to the law. (Para 10)

Where a heavy penalty by way of liability is imposed, the requirements of the law cannot be construed as merely directory. For certain acts and omissions under S. 6, a member of the constabulary is liable to heavy punishment. The severe penalty under S. 6 is the liability of a person fulfilling certain requirements of law and it can be inflicted only if he is an officer of the constabulary duly appointed under the Act. Under S. 4, the appointment of a person to the constabulary is dependent on his signing and attestation of the declaration as given in the schedule. Thus, on the plain language of the statute as well as on the principles guiding the courts in determining what is directory or mandatory, it is not correct to call a lack of proper attestation a mere technicality. Section 4 is thus mandatory. There

is no reason why the steps intended to be taken before a person is subjected to liabilities should not be rigorously observed. Sutherland on "Statutory Construction", Third Edition, Vol. 3 p. 77, Craies on "Statute Law", Sixth Edition, p. 63 and Maxwell on "Interpretation of Statutes", Eleventh Edition, p. 364, Rel. on. AIR 1961 SC 1494, Ref. (Paras 12, 13, 14, 15 and 16)

Cases Referred: Chronological Paras

(1964) AIR 1964 Raj 17 (V 51) =

ILR (1963) 13 Raj 1063, Jain Bros. and Co., Bundi v. State of Rajasthan 4

(1961) AIR 1961 SC 1494 (V 48) =

1961 (2) Cri LJ 696, M. V. Joshi v. M. U. Shimpi 3, 15

(1957) AIR 1957 SC 912 (V 44) =

1958 SCJ 150, State of U. P. v. Manbodhanlal Srivastava 5

S. D. Rajpurohit, for Petitioner; M. L. Shrimai; Dy. G. A., for the State.

ORDER: This criminal revision application is directed against the order dated the 11th December, 1967, passed by the City Magistrate, Jodhpur. The petitioner prays for the quashing of the order of his commitment to face a trial under S. 6(e) of the Rajasthan Armed Constabulary Act, 1950, hereinafter called 'the Act'.

2. The circumstances which have led up to this application, briefly stated, are these. Manglaram applicant was appointed as a constable in the Rajasthan Armed Constabulary (R.A.C.) on the 20th of June, 1963. On the 10th of October, 1964, he was attached to the 5th Battalion stationed at Jodhpur, when he absented from duty. His case is that he had orally taken permission to leave the service from the Platoon Commander, whereas the case of the prosecution is that he absented without leave. It is not in dispute that on the 11th of October, 1964, he joined as a soldier in the Indian Army. On the 13th of October, 1964, a first information report was lodged at the Police Station, Udaimandir, Jodhpur, against Manglaram for his having deserted the R. A. C. He came to be arrested on the 15th of May, 1966, while he was still in service in Jammu and Kashmir where he was stationed as a member of the Indian Army, and on that very day he was discharged from that service.

Enquiry was made against him by the City Magistrate, Jodhpur, and it was urged on his behalf that he was not an officer of the R. A. C. as defined in S. 2(3) of the Act as he did not sign any statement as required by S. 4 of the Act because there was no attestation by the appropriate authority as envisaged by the said provisions, and therefore, he was not an officer liable to be prosecuted for an offence under S. 6 (e) of the Act. The learned Magistrate framed a charge under S. 6(e) of the Act, and committed Manglaram to face his trial before the Sessions Judge, Jodhpur, holding that the plea of the applicant was merely a technical

one. Against that order he has come up in revision before me.

3. Mr. S. D. Rajpurohit appearing on behalf of the applicant has submitted that for the sake of argument let it be assumed that Manglaram had signed his statement as required by Section 4 of the Act, but the said statement was not explained to him and duly attested by anyone of the authorities mentioned in Section 4 of the Act. Assuming again, the learned counsel submitted that Shri Amarsingh explained and attested the said statement signed by Manglaram, Shri Amarsingh being only of the rank of an Inspector, was not competent to attest it, as required by the provisions of Section 4 of the Act, and therefore, Manglaram did not come to acquire the status of a member of the Rajasthan Armed Constabulary and could not incur the liability laid down by Section 6 of the Act. His further submission is that Section 6 of the Act is a penal provision which must be strictly construed. He relied on M. V. Joshi v. M. U. Shimpi, AIR 1961 SC 1494.

4. Mr. Rajpurohit also submitted that the expression "Officer of the Rajasthan Armed Constabulary" is an expression which should be given the same meaning as envisaged by the definition clause, and in support of this argument, he relied on Jain Bros. and Co. Bundi v. State of Rajasthan, ILR (1963) 13 Raj 1063 =(AIR 1964 Raj 17).

5. Mr. Mohanlal Shrimai, Deputy Government Advocate argued that the provisions of Section 4 are merely directory and not mandatory notwithstanding the fact that the word "shall" has been employed therein. He relied on State of U. P. v. Manbodhanlal Srivastava, AIR 1957 SC 912. He further submitted that the fact that Manglaram did not run away from the service out of cowardice may influence the eventual punishment that may be awarded to him because he joined the Army and remained in an area which was critical in view of the Indo Pakistan conflict in 1965 but merely because the statement was attested by a person inferior in rank to those mentioned in Section 4, he could not escape the liability as envisaged by Section 6 of the Act. He submitted that attestation was merely intended to facilitate the recall to the mind of the witness for the purposes of evidencing the fact that Manglaram had signed a statement as required by Section 4 of the Act. In this view of the matter, Manglaram should face his trial and this is not a fit case for quashing the commitment order.

6. Let me examine the provisions of law which require consideration.

7. Section 2(3) of the Act defines an "Officer of the Rajasthan Armed Constabulary" as follows:

"'Officer of the Rajasthan Armed Constabulary' means a person appointed to the Rajasthan Armed Constabulary under this Act, who has, in accordance with the provi-

sions of this Act, signed a statement, in the form given in the Schedule."

8. Section 4 of the Act reads as follows:

"Enrolment and discharge of officers of the Rajasthan Armed Constabulary. Before any person whether already enrolled in the Rajasthan Police Force or not so enrolled, is appointed to be an officer of the Rajasthan Armed Constabulary, the statement in the schedule shall be read, and if necessary, explained to him by a Magistrate, Inspector-General, Deputy Inspector General, Commandant, or Assistant Commandant, shall be signed by him in acknowledgment of its having been so read and explained to him and shall be attested by the Magistrate, Inspector-General, Deputy Inspector General, Commandant, or Assistant Commandant, as the case may be."

The statement mentioned in Section 4 reads as follows:

"STATEMENT

(See Section 4)

At no time during the period of your service in the Rajasthan Armed Constabulary, you will be entitled to obtain your discharge at your own request. On the liquidation of the force or of the battalion in which you may for the time being be posted, you will be discharged from the Rajasthan Armed Constabulary and, unless you were already a confirmed member of the Rajasthan Police Force before joining the Rajasthan Armed Constabulary, from the Rajasthan Police also (*you will, however, be eligible for re-enlistment in the Rajasthan Police Force). In the event of your continuing in the Rajasthan Police Force or your re-enlistment therein, your services in the Rajasthan Armed Constabulary will count for promotion and pension in the Rajasthan Police Force.

Signature of Police Officer in acknowledgment of the above having been read over to him.

Signed in my presence, after I had ascertained that understood the purport of what he signed.

Magistrate, Inspector General, Deputy Inspector General, Commandant or Assistant Commandant.

*This portion in brackets will be deleted in the case of officers who are already members of the Rajasthan Police Force on joining the Rajasthan Armed Constabulary."

It is common ground that the petitioner did sign a statement as required by Section 4. Mere reading over to him of the declaration would have served no purpose because the petitioner did not know English. It had to be explained to him and attested by a person of the requisite rank. This was not done. What is the effect of this failure on his prosecution for desertion is the point which falls for consideration?

9. In determining the aforesaid question, as indeed all questions of statutory constructions, the first object is to ascertain the Legislative intent. What Section 4 lays down

is that before any person is appointed to be an Officer of the R. A. C., the statement in the Schedule shall be read and if necessary explained to him by a Magistrate, Inspector-General, Deputy Inspector-General etc. and shall be signed by him in acknowledgment of its having been so read and explained to him and it shall further be attested by the Magistrate, Inspector-General, Deputy Inspector-General, Commandant or Assistant Commandant as the case may be.

10. It is not open to a member to be enrolled in the Rajasthan Armed Constabulary to sign a declaration in any words that he likes. The Legislature has prescribed even the form as a part of the statute. The language of the declaration, inter alia, provides that at no time during the period of service of the executant in the force, he will be entitled to obtain his discharge at his own request. It is evidently a condition different from the ordinary contracts of master and servant. In order to ensure that the executant has understood its legal implications, the Legislature prescribes that the executant shall sign it in acknowledgment of the above having been read over to him and if necessary explained to him.

Not content with this, the Legislature probably having regard to the large percentage of illiteracy in our country has prescribed an endorsement to the effect that the aforesaid declaration has been signed in the presence of an officer of a requisite rank evidencing the fact that he has ascertained that the executant had understood the purport of what he had signed. This important function of attestation again has not been entrusted to any English-knowing person, capable of translating the purport of the statement; but the Legislature has further laid down the official ranks of the persons who alone are qualified to attest. In doing so, the Legislature reposed trust for this duty only on officers of specified status and has apparently declined to trust the linguistic attainments of an ordinary person. Perhaps the Legislature intended to impart an element of solemnity to the transaction. In this view of the matter, an attestation by an Inspector is clearly contrary to the law.

11. The learned Deputy Government Advocate urged that it should be treated as merely directory and not mandatory. Let me recall the principles which guide Courts in determining what is directory and what is mandatory. In Sutherland: "Statutory Construction" Third Edition, Volume 3 at page 77, it is observed as follows:

"No statutory provisions are intended by the legislature to be disregarded; but where the consequences of not obeying them in every particular are not prescribed, the courts must judicially determine them. In doing so they must necessarily consider the importance of the literal and punctilious observance of the provision in question to the object the legislature had in view. If it is essential it is mandatory, and a departure

from it is fatal to any proceeding to execute the statute or to obtain the benefit of it." Sutherland further says at the same page:

"The difference between mandatory and directory statutes is one of effect only. The question generally arises in a case involving a determination of rights as affected by the violation of or omission to adhere to, statutory directions. This determination involves a decision of whether or not the violation or omission is such as to render invalid acts or proceedings pursuant to the statute, or rights, powers, privileges or immunities claimed thereunder. If the violation or omission is invalidating, the statute is mandatory; if not, it is directory."

Craies on "Statute Law", Sixth Edition, at page 63 says:

"When a statute is passed for the purpose of enabling something to be done, and prescribes the formalities which are to attend its performance, those prescribed formalities which are essential to the validity of the thing when done are called imperative or absolute; but those which are not essential, and may be disregarded without invalidating the thing to be done, are called directory."

12. A broad survey of the relevant statute is proper and profitable at this stage. Under Section 5 of the Act, every member of the R. A. C. shall, upon his appointment and as long as he continues to be a member thereof, be deemed to be a police officer and subject to any terms, conditions and restrictions, as may be prescribed, to have and be subjected to in so far as they are not inconsistent with this Act or any rules made thereunder, all the powers, privileges, liabilities, penalties, punishments and protection as a Police Officer duly enrolled under the Police Act, 1861. For certain acts and omissions under S. 6, he is liable to heavy punishment. Relevant portion of S. 6 reads as follows:

"An officer of the Rajasthan Armed Constabulary, who—

- (a)
- (b)
- (c)
- (d)
- (e) deserts the service;

shall on conviction, be punished with transportation for life or with imprisonment for a term which may extend to fourteen years and shall be liable to fine."

13. Thus when a person is appointed as an Officer of the R. A. C., he acquires certain rights, privileges and liabilities under the Act as well as under the Police Act. Desertion from duty for which the petitioner before me is facing his trial is punishable with transportation for life or 14 years rigorous imprisonment. The liability arises only if he is an Officer duly appointed under the Act.

14. In this connection, it will be relevant to remember what Maxwell has to say in his "Interpretation of Statutes", Eleventh Edition at page 364:—

"Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the Legislature."

Where heavy penalty by way of a liability is imposed, I have no ground to construe the requirements of the law as merely directory.

15. In AIR 1961 SC 1494 (supra) their Lordships of the Supreme Court have observed:

"When it is said that all penal statutes are to be construed strictly it only means that the court must see that the thing charged is an offence within the plain meaning of the words used and must not strain the words. To put it in other words, the rule of strict construction requires that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute. It has also been held that in construing a penal statute it is a cardinal principle that in case of doubt, the construction favourable to the subject should be preferred. But these rules do not in any way affect the fundamental principles of interpretation, namely, that the primary test is the language employed in the Act and when the words are clear and plain the court is bound to accept the expressed intention of the legislature."

According to the language of S. 4, the appointment of a person to the Rajasthan Armed Constabulary is dependent on his signing and attestation of a declaration as set out in the schedule to the Act. The penalties under S. 6 can only be inflicted if a person is an officer of the Rajasthan Armed Constabulary. The severe penalty envisaged by Section 6 of the Act is the liability of a person who fulfils certain requirements of law. Thus on the plain language of the statute as well as on the principles I have set out above, it is not correct to call the lack of proper attestation as a mere technicality. The legislature intended certain steps to be taken before a person could be subjected to the liabilities. The liability in this case is severely penal. There is no reason why it should not have been rigorously observed. The provision is mandatory.

16. Accordingly on the aforesaid point of law I quash the order of commitment. The revision application is allowed.

Petition allowed.

AIR 1970 RAJASTHAN 36 (V. 57 C 7)

L. S. MEHTA AND C. M. LODHA, JJ.

State of Rajasthan, Appellant v. M/s. Bundi Electric Supply Co., Ltd., Bundi, Respondent.

First Appeal No. 42 of 1960, D/- 14-2-1969 against judgment and decree of Sr. Civil J., Bundi, D/-22-3-1960.

(A) Civil P. C. (1908) O. 6 R. 2, O. 14 R. 4 and O. 41 R. 1 — New plea — Variance between pleading and proof — Point not purely relating to question of law — Neither raised in pleadings nor put in issue specifically — Point should not be gone into — Determination by trial court without any objection being raised — Appellate court may determine it on merits.

It is well settled that no amount of evidence can be looked into on a contention which has not been raised in the pleadings. The question whether the issue of shares by the company in favour of the former Bundi State was the price of the goodwill of the commercial agency owned by the State transferred by the State to the company is not a pure question of law and the question should not have been gone into by the trial Court without there being a specific issue on the point. Where, however, the question had been argued before the trial Court and a decision had been given thereon without any objection being raised the appellate Court thought it proper to decide it on merits. (Para 14)

(B) Partnership Act (1932), Sections 14 and 55 — "Goodwill" — Meaning of — It represents business reputation of a going concern and is treated as part of assets of firm — Words and Phrases — "Goodwill".

The word 'goodwill' in its legal sense means every affirmative advantage as contrasted with negative advantage that has been acquired in carrying on the business, whether connected with the premises, or its name or style and every thing connected with it, or carrying with it, the benefit of the business. It includes the whole advantage of the reputation, and connection of the firm or the owner, which may have been built up by years of hard work or gained by lavish expenditure beyond the mere value of the capital stock and property embarked in the business, in consequence of the general public patronage and encouragement, which is received from habitual or constant customers. It is that species of connection in trade, which induces customers to deal with a particular firm or concern. It differs in its composition in different trades and different businesses in the same trade. It has no meaning, except in connection with a continuing business. It is treated as part of the assets of the firm. In other words goodwill represents business reputation. The sale of a goodwill implies the

probability that the old customers will resort to the old place that is, to the established business, wherever it may be situated. AIR 1957 Bom 111 and AIR 1957 Cal 280, Ref. to. (Para 16)

(C) Evidence Act (1872) Ss. 93 and 98 — Meaning of particular word used in document — Extrinsic evidence admissible to show that it was used in a peculiar sense.

Where the point in dispute is as to the meaning of a particular word in the document, evidence may be admitted to show in what peculiar sense that particular word was used, and extrinsic evidence including the evidence regarding the subsequent conduct of the parties is admissible to determine the effect of the instrument as well as the intention of the parties. (Para 23)

(D) Evidence Act (1872), S. 115 — No estoppel on a point involving mixed question of law and fact.

The question whether certain fully paid up shares were issued by the Company to the State as price of the goodwill of the agency owned by the State and which the company took over or as price of the assets of the agency or in lieu of grant of monopoly rights by the State to the Company depends upon the interpretation of the various documents which passed between the company and the State and is not a pure question of fact but a mixed question of fact and law, and therefore, there cannot be an estoppel in such a matter. (Para 30)

(E) Constitution of India, Art. 13 (3) (a) — Law, meaning of — Law must follow customary forms of law making and must be expressed as a binding rule of conduct — Agreement between two parties one of which is sovereign ruler must be distinguished from law made by latter — Document evidencing license to carry motor transport business with monopoly rights executed in favour of company on behalf of former ruler of Bundi State and signed by him — Held document was only an agreement and not law made by the ruler — AIR 1963 SC 953 and AIR 1964 SC 888, Rel. on—(Words and Phrases — "Law").

(Paras 34 to 36)

(F) Companies Act (1956), Sec. 84 — Share certificate — How far conclusive — Nominal or face value of shares issued is not conclusive — Company is not estopped under any provision of law from showing that consideration for issue of shares had failed or that the transaction of particular shares had become illusory or inoperative under certain circumstances — Halsbury's Laws of England 3rd Edn. Vol. 6 Paragraphs 517 and 518, Ref. (1903) 2 Ch 527 and 1897-1 Ch 796 and AIR 1930 PC 151, Dist. (Para 41)

(G) Contract Act (1872), Ss. 56, 65 — Contract becoming impossible of performance due to supervening event — Each party to restore benefit received — Contract granting monopoly right to ply buses

— After passing of Motor Vehicles Act contract becomes impossible of performance.

It is well established that if after the execution of the contract or at any stage during the operation of the contract its performance becomes impossible by any supervening event then each party is bound to restore to the other any advantage which he had taken under the contract.

Where the former Bundi State had granted a license to the plaintiff company and also gave monopoly rights to carry on motor transport business in the State it was held that after the Motor Vehicles Act came into force it became impossible for the State to allow the company the enjoyment of the monopoly rights to ply the buses and motor lorries exclusively in the territory of the former State of Bundi and thus the performance of the contract pertaining to the monopoly rights became impossible by a supervening event. Consequently, the State was bound to restore the advantage received by it with respect to grant of monopoly rights. (Para 43)

Cases Referred;	Chronological	Paras
(1964) AIR 1964 SC 888 (V 51) = (1963) 2 SC WR 392, Bengal Nagpur Cotton Mills Ltd. v. Board of Revenue M. P.		34
(1963) AIR 1963 SC 953 (V 50) = (1963) Supp 2 SCR 515, Maharaja Shri Umaid Mills Ltd. v. Union of India		34
(1961) AIR 1961 Raj 6 (V 48) = ILR (1960) 10 Raj 501, Kishangarh Municipality v. Maharaja Kishangarh Mills Ltd		43
(1961) AIR 1961 Raj 277 (V 48) = 1961 Raj LW 563, Man Singh v. Khazan Singh		43
(1957) AIR 1957 Bom 111 (V 44) = 59 Bom LR 209, New Gujarat Cotton Mills Ltd. v. Labour Appellate Tribunal		16
(1957) AIR 1957 Cal 280 (V 44) = 99 Cal LJ 11, Dulaldas Mullick v. Ganesh Das		16
(1954) AIR 1954 SC 44 (V 41) = 1954 SCR 310, Satya Brata Ghose v. Mugneeram Bangur and Co.		43
(1954) AIR 1954 All 450 (V 41) = 1954 All LJ 32, Munshi Lal v. Vishnu Das		43
(1950) AIR 1950 SC 15 (V 37) = 1950 SCR 30, Abdulla Ahmed v. Animendra Kissen		23
(1948) AIR 1948 Oudh 54 (V 35) = ILR 22 Luck 93, U. P. Govt. v. C. M. T. Association Ltd.		23
(1943) AIR 1943 PC 29 (V 30) = ILR 18 Luck 130, Raja Mohan Manucha v. Manzoor Ahmad		43
(1930) AIR 1930 PC 151 (V 17) = 57 Ind App 152, Trustees Corporation (India) Ltd. v. Commr. of Income Tax, Bombay		40

(1925) AIR 1925 Cal 346 (V 12) = 40 Cal LJ 322, Sankar Roy v. Secy. of State	23
(1925) AIR 1925 Oudh 264 (V 12) = 75 Ind Cas 267, Ali Abbas v. Sher Bahadur Singh	23
(1920) AIR 1920 Bom 143 (V 7) = ILR 44 Bom 710, Ganpatrao Appaji v. Bapu Tukaram	23
(1918) AIR 1918 Mad 1167 (V 5) = ILR 40 Mad 1016, Subramania Ayyar v. Raja Rajeswara Sethupathi	23
(1903) 1903-2 Ch 527, Cornbrook Brewery Co., Ltd. v. Law Debenture Corpn. Ltd.	39
(1897) 1897-1 Ch 796 = 66 LJ Ch 419, In re, Wragg Ltd.	39
G. C. Kasliwal Advocate General, for the State; M. B. L. Bhargava and S. K. Zindal, for Respondent.	

LODHA, J.: This first appeal by the State of Rajasthan (which will hereinafter be called the State) arises out of a suit filed by it against the defendant Bundi Electric Supply Company Limited, Bundi (which will hereinafter be referred to as "the Company") in the Court of Senior Civil Judge, Bundi. The Company also filed a cross suit against the State. The suit by the State was filed on 4-7-1958 and was registered as Civil Original Suit No. 7 of 1958 and the suit by the Company was filed on 16-10-1958, and registered as No. 9 of 1958. The relevant facts giving rise to these two suits may be stated as follows:

2. There was a commercial concern owned by the former State of Bundi called the Bundi Petrol Automobile Supply Agency (hereinafter referred to as "the Agency") which used to carry on business of running buses and trucks and also dealt in petrol and spare motor parts etc. It is alleged in the plaint filed by the State that the Company was registered under the Bundi Companies Act, 1936. It wanted to obtain a licence for monopoly of motor service within the territory of the former Bundi State and therefore it approached the then Ruler of Bundi for the said purpose and a licence was granted to the Company by the Ruler on 31-7-1944, a copy of which has been placed on the record and marked Exhibit 7. According to the State, one of the conditions contained in the licence was that the defendant Company would "take over the Bundi Petrol and Automobile Supply Agency (a commercial undertaking of the Bundi State) lock, stock and barrel and in lieu thereof pay a sum of Rs. 4,00,000 to the Bundi State". The case of the State is that the Company paid Rs. 1,00,000 in cash and agreed to issue 30,000 fully paid up ordinary shares of the face value of Rs. 10 each (total value of the shares being Rupees 3,00,000) in lieu of the balance of the price money i.e. Rs. 3,00,000. The Bundi State agreed to this proposal and the Company allotted 30,000 ordinary fully paid up

shares. Besides the above mentioned 30,000 shares, Bundi State further acquired 11,600 ordinary fully paid up shares of Rs. 10 each of the Company. With the merger of the Bundi State into the State of Rajasthan, the State became the owner of these shares by virtue of the provisions of Article 295 (2) of the Constitution of India. It is averred by the State that the Company had been declaring and paying dividends on all the aforesaid shares upto the year 1950 but thereafter it stopped doing so. For the year 1950-51 the Company paid Rs. 16,407 as dividend and allotted 1640 bonus shares together with a sum of Rs. 7 in cash but it did not issue share certificates of these 1640 shares. The State has alleged that the Company had declared dividends and other benefits on its ordinary shares for the years 1950-51 to 1955-56 but it has mala fide not paid any dividends to the State for this period. The State therefore claimed the following reliefs in its plaint:

(i) The company be directed to pay a sum of Rs. 1,41,587.50 paise as the amount of dividend along with interest thereon at 6% per annum Rs. 27,740.79 paise.

(ii) It may be declared that the State is entitled to receive dividends and benefits on all the shares held by it as and when the Company declares the dividends on the shares.

(iii) The Company may be directed to allot and issue 2520 ordinary fully paid up shares of the value of Rs. 10 each in lieu of bonus shares to be allotted for the year 1950-51 and also to issue share certificates for 1640 Bonus shares already allotted in 1950-51.

3. The defendant company denied the State's claim, in the written statement filed by it on 10-10-1958. It admitted that the Company was desirous of obtaining monopoly rights with respect to plying of motor stage-carriages and other vehicles within the former Bundi State and had in pursuance thereof offered certain shares to the Ruler of Bundi, who accepted them subject to certain modifications contained in the order dated 6-1-1944, a copy of which has been placed on the record and marked Exhibit 5. It was also admitted that the Company was granted monopoly to ply motor buses and lorries throughout the territory of the State of Bundi for a period of 30 years, commencing from 11th January, 1964 by licence Exhibit 7. It was, however, denied that the purchase price of Rupees 4,00,000 was settled as the price for taking over the Bundi Petrol and Automobile Supply Agency from the Bundi Darbar.

The Company pleaded that the stocks held by the agency were worth about a lakh of rupees at that time, and therefore, Rs. 1,00,000 were paid as price of the agency and the rest of the amount i.e. Rs. 3,00,000 were to be paid in lieu of grant of monopoly rights to ply buses and lorries within the territory of the former

Bundi State for a period of 30 years. It was stated by the Company "that these rights have been denominated as "goodwill rights" and the shares have been called as "goodwill shares" or money by the Bundi Government in their Order dated 10-1-1944 and in clause No. 6 of the license Ex. 7. It was thus pleaded that out of Rs. 4,00,000 agreed to be paid by the Company to the former Bundi State Rs. 3,00,000 were paid by issue of 30,000 shares of Rs. 10 each in consideration of the aforesaid monopoly rights granted to the Company. It was, however, admitted by the Company that the dividends declared up till year 1950 only were paid to the State and the dividends claimed by the State in its suit have not been paid. With respect to these 30,000 shares, it was further pleaded that the price of these shares was agreed to be paid and adjusted by writing off Rs. 10,000 each year during the period 30 years for which monopoly rights had been granted to the Company. The Company went on to say that the Motor Vehicles Act, 1939 was applied in the State of Rajasthan from 1st April, 1951 and with the coming into force of this Act the monopoly granted to the Company came to an end and thus the consideration for the purchase of 30,000 shares viz. the grant of monopoly rights "fell, and became illusory and inoperative as soon as the rights were infringed".

The case of the Company, thus, is that the State is not entitled to any dividend on the 30,000 shares after the Company's financial year 1950-51. So far as the bonus shares of the value of Rs. 16,400, i.e. 10% of the 11,600 (sic) shares of the value of Rs. 1,16,000 is concerned, the company did not raise any dispute as to the ownership of the State of these shares. It was also pleaded by the Company that the State had at no time in general meeting of the Company raised any protest against the Company's intention of not paying the dividends on the said 30,000 shares despite the fact that the notice of each general meeting of the Company was duly sent to the Finance Secretary of the Government of Rajasthan for the last 7 years and thus the State was estopped from claiming dividends on these shares, after the cessation of the monopoly rights granted to the Company.

4. As already stated above, the Company filed the counter suit against the State on 16-10-58 and prayed for a decree for Rs. 4,18,710.59 paise against the State by way of compensation on account of infringement of the monopoly rights granted to it, or in the alternative as the price of the so-called 30,000 illusory shares inclusive of interest thereon. The State also filed a rejoinder on 28-2-1959 in the suit filed by it wherein it denied the position taken by the Company and while admitting that the monopolistic rights granted to the Company had come to an end with the coming into force of the Motor Vehicles

Act, 1939 with effect from April, 1951 yet pleaded that the licence granted by the then Ruler of the former State of Bundi was a sovereign act and not a commercial contract, and at any rate the monopoly rights of the Company had not been disturbed by the State but they had automatically come to an end.

5. Separate issues were framed in both the suits. Both the parties produced a few documents. The Company examined one witness Brijnarain on its behalf, whereas no witness was examined by the State. The learned Civil Judge disposed of both the suits by a common judgment dated 21-12-1959. Suit No. 9 of 1958 filed by the Company was dismissed in entirety while suit No. 7 of 1958 filed by the State has been decreed in part and the Company has been directed to pay Rs. 13,575 to the State as the balance of the dividends still unpaid, and Rs. 1399.13 as interest as also pendente lite and future interest on the principal amount at 3%. It has been declared that the State is entitled to receive in future dividends and all other benefits on 11,600 shares mentioned in Part B of the Schedule 1 attached to the plaint. It has also been declared that the State is entitled to dividend etc. on 7,223 shares only issued in lieu of monopoly, and it has further been directed that the Company shall allot 242 Bonus shares not so far allotted by it. A direction has also been issued to the Company to issue share certificates in respect of 1,882 Bonus Shares. The rest of the claim of the State has been dismissed.

6. The State alone has come in appeal to this Court and consequently we are no more concerned with the claim made by the Company in suit No. 9 of 1958 filed by it against the State. The Company has also not made any grievance with respect to that part of the claim of the State which has been decreed by the lower court, by filing any appeal or cross-objection to this Court.

7. In this appeal it has been prayed by the State that a decree for a sum of Rupees 1,55,752 in addition to the amount already decreed by the trial court be passed, and it may further be declared that the State is entitled to all benefits on the 30,000 shares held by the State. It has also been prayed that a direction be issued to the Company to allot 2520 ordinary shares fully paid up of Rs. 10 each in lieu of the balance of the bonus shares declared in the year 1950-51 and to issue share certificates thereof.

8. We have heard the learned Advocate General on behalf of the State and Shri M. B. L. Bhargava on behalf of the Company at some length. The learned Advocate General has urged the following points:—

(1) That out of the sum of Rs. 4,00,000 agreed to be paid by the Company Rupees 1,00,000 was for the price of the physical and visible assets of the agency and Rupees 3,00,000 (in lieu of which 30,000 fully paid

up shares were issued by the Company) was the price of the goodwill and nothing was paid in consideration of grant of monopoly rights to the Company by the former Bundi State, which had granted monopoly rights to the Company as a bounty.

(2) That the Company is not entitled to question the consideration for which 30,000 fully paid up shares of Rs. 10 each were issued to the State and the Company is bound to pay the dividends to the State on these shares and the State is entitled to all the benefits as a share-holder.

(3) That in any case even if 30,000 shares are held to have been issued in lieu of grant of monopoly rights to the Company, the State is not liable to restore any benefits or advantage under Section 56 or 65 of the Contract Act, or under any other provision of law.

9. The main controversy in the case centers round the question whether the fully paid up shares of Rs. 3,00,000 had been issued by the Company to the State of Bundi in consideration of the grant of monopoly rights by it to the Company to ply exclusively motor stage carriages and lorries throughout the territories of former State of Bundi, and whether on account of these monopoly rights having come to an end on 1-4-1951 with the coming into force of the Motor Vehicles Act, 1939, the State is not entitled to get any dividends or benefits on account of the said 30,000 shares? On a consideration of the various documents produced by the parties and the statement of Brijnarain, the learned Senior Civil Judge has come to the conclusion that out of the amount of Rs. 4,00,000 paid by the Company Rs. 1,00,000 was for the stock or the assets held by the Bundi Petrol and Automobile Supply Agency and the 30,000 fully paid up shares worth Rs. 3,00,000 were issued by the Company in favour of the former State of Bundi as a consideration for the grant of monopoly rights and not as a price for sale of goodwill of the agency. The learned Senior Civil Judge also came to the conclusion that the State of Rajasthan which is the successor to the former State of Bundi was entitled to dividends, bonus and other benefits on account of 30,000 shares of the value of Rs. 3,00,000 at the rate of Rupees 10,000 per year commencing from 11-1-1944 to 31-3-1951 and not thereafter, when the monopoly rights granted to the Company came to an end, and the Company was not bound to declare or pay any dividend on those shares after 31-3-1951.

10. We shall, therefore, deal with this aspect of the case first. But before we do that, we would like to mention that the stand taken by the State before this Court as well as the lower court was that the consideration for shares worth Rs. 3,00,000 was the 'goodwill' of the agency which the former Bundi State had transferred to the Company at the time of selling the assets

and other things belonging to the agency. Mr. N. B. L. Bhargava, however, took a preliminary objection that the State was not entitled to urge that the consideration of Rs. 3,00,000 was the sale of the 'goodwill' of the agency to the Company. He contended that this had not been the case of the State in the pleadings nor any proof had been led in this respect by it and the lower court should not have allowed the State to press this aspect of the case at the stage of arguments. To be more precise, the contention of Mr. Bhargava is that neither in the plaint nor in the rejoinder, the State has ever come forward with a case that the consideration of Rs. 3,00,000 was the transfer of goodwill of the agency to the Company. In this connection he has taken us through the whole of the plaint filed by the State as well as its rejoinder. He has also invited our attention to the issues framed in both the suits, and has argued that the contention of the State incorporated in issue No. 3 which is the only relevant issue on the point is whether the whole of the purchase price of Rs. 4,00,000 was for the assets of the agency alone?

11. For a proper appreciation of the contention raised by Mr. Bhargava we might reproduce here paras. Nos. 2 and 3 of the plaint which are relevant on the point:

"2. That the defendant company was desirous of obtaining a licence for monopoly of Motor Service within the former Bundi State. It approached the Bundi Darbar for that purpose and a licence was granted to the defendant company on the 31st day of July, 1944. One of the conditions of the licence was that the defendant company shall take over the Bundi Petrol and Automobile Supply Agency (a commercial undertaking of the Bundi State) Lock, stock and barrel and in lieu thereof pay a lump sum of Rs. 4,00,000 to the Bundi State.

3. That the defendant company paid only a sum of Rs. 1,00,000 in cash out of the abovesaid sum of Rs. 4,00,000 and desired that the Bundi State may accept 30,000 fully paid up ordinary shares of the face value of Rs. 10 each share total value Rs. 3,00,000 towards the satisfaction of the balance of the above said claim. The Bundi State agreed to this proposal and the defendant company allotted 30,000 ordinary fully paid-up shares and issued the share certificates for the same. The relative share certificates bear the numbers, as shown in Part A of the Schedule I appended herewith."

In reply to Para. No. 2 the Company in its written statement has pleaded inter alia as follows:

"It is, however, not admitted that the purchase price of Rs. 4,00,000, as mentioned in this paragraph, was for the stocks alone held by the Bundi Darbar at that time, which were hardly worth about a lac

of rupees at the relevant date. The rest of the purchase money i.e. Rs. 3,00,000 were for the grant of monopoly rights within the Bundi State territory to be enjoyed for a period of 30 years. These rights have been denominated as goodwill rights and the shares have been called the goodwill shares, or money by the Bundi Government in their Order dated 10-1-1944 or in term No. 6 of the licence granted to the defendant company. The method of payment of these 3 lacs of rupees is clearly embodied in the council Resolution dated 6th January, 1944."

Further Para. No. 3 of the written statement of the company reads as below:

"3. Para. 3 of the plaint is not admitted as stated. The sum of Rs. 1,00,000 was passed in cash to the Bundi Government as the price of the assets of the Bundi Petrol and Automobile Agency and the balance of Rs. 3,00,000 was paid in shares (30,000 of Rs. 10 per share) by the defendant Company as agreed to by the Bundi Government in consideration of monopoly rights for carrying on the business within the Bundi State territory. The number of shares is not denied."

Paragraph No. 6 of the additional pleas of the written statement makes the position taken by the Company still clear:

"6. That no cash consideration as shown above, was paid for the purchase of the 30,000 shares. The consideration, as mentioned above, was the grant of monopoly rights, which failed and became illusory and inoperative as soon as the rights were infringed. The balance of those shares over and above adjusted under the Council Resolution dated 6-1-44 became illusory and inoperative. As such the plaintiff is not entitled to any dividend on those shares after the defendant Company's financial year 1950-51."

It is noteworthy that in spite of this specific plea having been taken by the Company and an opportunity having also been given to the State to file a rejoinder, the State, it so appears, filed a rejoinder rather unwillingly and even then made no mention therein that the consideration of Rupees 3,00,000 for which 30,000 shares had been issued by the Company was in lieu of the price of the goodwill of the agency sold by the Ruler of the Bundi State to the Company. The rejoinder starts as under:

"The plaintiff State did not want to file rejoinder to the written statement of the defendant, but as the Hon'ble Court has directed to do so, the rejoinder is submitted as under."

Paragraph No. 2 of the rejoinder which is relevant, reads as under:

"2. In Paras. 2 and 3 of the written statement the assertion of the defendant company that Rs. 1,00,000 was paid to Bundi State as price of the assets of the Bundi Petrol and Automobile Agency and the balance of Rs. 3,00,000 was paid in

shares (30,000 shares of Rs. 10 each) in consideration of monopoly rights is emphatically denied, under clause 2 (c) of the Motor Monopoly Licence, 1944, the value paid was one and whole and indivisible. The consideration of Rs. 4 lacs was paid for the entire business lock, stock and barrel of the Bundi State concern, viz. 'Bundi Petrol and Automobile Supply Agency.....' Issue No. 3 which is the only relevant issue on the point has been framed as below:

"(3) Was the purchase price of Rs. 4,00,000 made up of Rs. 1,00,000 for the assets of the Bundi Petrol and Automobile Agency and Rs. 3 lacs for the amount of the monopoly rights or goodwill to be enjoyed for 30 years or was it for the assets alone?"

While framing the issues the lower Court has observed that:

"Issues have been framed with the consent of the parties. Issue No. 2 has been framed by me of my own accord. No other issue has been suggested by any of them."

12. Learned counsel for the Company has urged that the only contention in this respect raised by the State was that the whole purchase price of Rs. 4,00,000 was for the assets alone and nothing was paid by the Company as consideration for the grant of monopoly rights to it. The use of the word 'goodwill' in issue No. 3, it is contended by Mr. Bhargava, was in the sense that the monopoly rights were denominated as goodwill. In other words he submits that the monopoly rights were described as goodwill in this transaction.

13. The learned Advocate General conceded that the State had, no doubt, nowhere pleaded either in the plaint or in the rejoinder that Rs. 3,00,000 was the price of the goodwill. He had also to admit that the contention that Rs. 3,00,000 was the price of the goodwill had not been put in any issue. But his submission was that since this aspect of the case has been considered by the lower Court in its judgment without any objection from the Company, he should not be shut out from pressing this point before us also.

14. After bestowing our careful consideration on the objection raised by Mr. Bhargava we are of opinion that it is not without force. It is well settled that no amount of evidence can be looked into on a contention which has not been raised in the pleadings. We are further of opinion that the lower Court should not have allowed the State to argue that the consideration for the issue of 30,000 shares worth Rs. 3,00,000 was the price of the goodwill of the agency transferred by the former Bundi State to the Company. We are also clear in our minds that this is not a pure question of law and this question should not have been gone into without there being a specific issue on the point. However, since the Company did not raise objection to the case being argued on this point before the lower Court and the lower Court has given its decision thereon, we think it proper to decide this point on merits also.

15. Apart from the fact that it has nowhere been pleaded by the State that Rs. 3,00,000 were in consideration for the transfer of the goodwill to the Company, the State has chosen not to lead any evidence on this point either in Ex. 7, which has been described as a licence granted by the Ruler of the former State of Bundi to the Company, reference to the word 'goodwill' has been made in clause No. (6) which reads as under:

"6. The Bundi State shall always have the right to terminate the operation of the licence granted by these presents to the Company but only after giving one year's previous notice as a condition precedent and shall take over all the stock-in-trade such as stated in Para. 2 (c) above as shown in the books of the Company as well as the benefits of all the then existing contracts in favour of the said Company provided that in the case of such termination the Bundi Darbar shall pay to the Company the value of all the then existing assets of the Company including the balance of the goodwill money then outstanding as shown in its books together with an additional sum calculated at 10% of such valuation as compensation for compulsory acquisition."

16. The Indian Contract Act does not define the word 'goodwill' but in its legal sense the word 'goodwill' means every affirmative advantage as contrasted with negative advantage that has been acquired in carrying on the business, whether connected with the premises, or its name or style and everything connected with it, or carrying with it, the benefit of the business. It includes the whole advantage of the reputation, and connection of the firm or the owner, which may have been built up by years of hard work, or gained by lavish expenditure, beyond the mere value of the capital stock and property embarked in the business, in consequence of the general public patronage and encouragement, which is received from habitual or constant customers. It is that species of connection in trade, which induces customers to deal with a particular firm or concern. It differs in its composition in different trades, and different businesses in the same trade. It has no meaning, except in connection with a continuing business. It is treated as part of the assets of the firm. In other words goodwill represent business reputation. The sale of a goodwill implies the probability that the old customers will resort to the old place, that is, to the established business, wherever it may be situated. Reference in this connection may also be made to N. G. C. Mills Limited v. L. A. Tribunal, AIR 1957 Bom 111 and Dulaldas Mullick v. Ganesh Das, AIR 1957 Cal 280 in which their Lordships have discussed the meaning and implications of the term 'goodwill'.

17. We then find it difficult to accept that if the term 'goodwill' was used in the sense in which it is used in the commercial

world, or in its legal sense there would arise any question of paying the balance of the goodwill by the State of Bundi to the Company in case of compulsory acquisition of all the stock-in-trade of the Company. The fact that the word 'goodwill' was used in cl. (6) of the licence not in its ordinary sense but in a peculiar sense becomes clear from the Council Resolution dated 6-1-1944 which preceded the grant of the licence Ex. 7 on 31-7-1944. Para. (e) of this Council Resolution (Ex. 5) reads as below :

"(e) Each year a sum equal to 1/30th of the purchase price, excluding the value of the stock in hand, must be set aside or writing of the goodwill."

This paragraph shows that the Company was to write off Rs. 10,000 every year as expenditure in the account of the 'goodwill' money. It passes our comprehension how could a goodwill account be opened and where would be the question of setting aside a sum of Rs. 10,000 every year for writing off the goodwill if by the word 'goodwill' was meant 'business' reputation? There is thus force in the contention of Mr. Bhargava, that the word 'goodwill' has been used in clause 6 of the licence Ex. 7, as well as in Para (c) of the Council Resolution Ex. 5 not in its ordinary sense but in a peculiar sense, and that it was meant to refer to monopoly rights granted to the Company by the State of Bundi.

18. As already observed above there is nothing on the record to show that Rupees 3,00,000 were settled as the price of the 'goodwill' separately. On the other hand the frame of Issue No. 3 shows that the case of the State was that the whole of the price of Rs. 4,00,000 was in lieu of the assets of the agency and nothing was paid for the grant of monopoly rights to the Company. We are, therefore, of opinion that there is no substance in the contention raised by the Advocate General that 30,000 fully paid up shares of the value of Rs. 3,00,000 had been issued by the Company in favour of the State as price of the 'goodwill' of the agency. We are firmly of the view that no separate price was fixed for the 'goodwill' of Bundi Petrol and Automobile Supply Agency to be charged from the Company even assuming that it possessed 'goodwill'.

19. The only question, therefore, which we have to determine is whether the whole of the purchase price of Rs. 4,00,000 was for the assets of the agency including the 'goodwill' if it had any, or the 30,000 fully paid up shares of the value of Rs. 3,00,000 were issued by the Company in favour of the former State of Bundi as consideration for the grant of monopoly rights to the Company by the then State of Bundi.

20. The learned Advocate General has argued that for the decision of this question we should not look at any document except the licence Ex. 7 which is the sole memorial of the transaction and all other evidence should be excluded by virtue of the provi-

sions of Section 91 of the Indian Evidence Act. We shall examine this argument later on but for the present we shall concentrate our attention on the licence Ex. 7 only :

21. Paragraph No. 2 of the licence shows that the Company shall have the monopoly of running the lorry and bus services throughout the Bundi State territory for a period of 30 years and shall run such lorry and bus services on the following terms and conditions :

"(a)

(b)

(c) The Company shall take over the Bundi Petrol and Automobile Supply Agency together with all the motor lorries, buses spare parts, petrol and oils and other assets in stock as shown in the books of the Bundi Petrol and Automobile Supply Agency after Payments of the Dividend due on the 1st November, 1943 as well as the contracts for the Railway Out-agency and Postal Mail and agencies for Burmah-Shell Petrol and Motor and Lubricating Oils, kerosene oils, shell-tax Grease Diesel oils, Automobiles, spare parts Dunlop Tyres and tubes, Batteries and Simpson's Charcoal Gas producer plants and also all other business which at present is being carried by the said Bundi Petrol and Automobile Supply Agency and in consideration for and in lieu of the foregoing shall pay to the Bundi State a lump sum of Rs. 4,00,000 (Rupees four lacs)."

22. The argument of the learned Advocate General is that the word 'foregoing' used in clause (c) of the licence refers to the things mentioned in clause (c) only and not to the preceding clauses (a) and (b) and the main Para. (2), and, thus he contends that nothing was paid in lieu of the grant of monopoly rights by the Bundi State. In other words his submission is that the Ruler of the former Bundi State in exercise of the powers as a sovereign granted monopoly rights to the Company ex-gratia. We, however, find it difficult to accept the interpretation put by the learned Advocate General. The main para (2) of the licence says that "the Company shall have the monopoly of running the lorry and bus-services throughout the Bundi State territory for a period of 30 years, and shall run lorry and bus services on the following terms and conditions" and then follow the sub-para (a) to (h). In sub-para (c) it is mentioned "that in consideration for and in lieu of the foregoing the Company shall pay to the Bundi State a lump sum of Rs. 4,00,000" i. e. the consideration for the payment of Rs. 4,00,000 is all that has preceded. The word "foregoing" is used in the sense 'what is previously mentioned' and therefore in the present case it would include the grant of monopoly rights to the Company which is mentioned in the main para (2) as well as sub-para (a) and (b) also. The word 'foregoing' cannot be restricted to only what has been described in sub-para (c) and must be taken to refer not only to what is contained in the sub-para (c), but also to all that has preceded this sub-paragraph.

We are, therefore, of opinion that the consideration of Rs. 4,00,000 was not only the price for taking over the Bundi Petrol and Automobile Supply Agency together with all its assets as mentioned in sub-para (c) but also the grant of monopoly rights by the former State of Bundi to the Company. In this connection it may be useful to make reference to clause (6) of the agreement also. At one stage the learned Advocate General argued that clause (6) is altogether independent of clause (2) and there is no connection between the two and therefore for interpreting clause (2) we need not go to clause (6) at all. Even if it be so, as we have already held above on an interpretation of clause (2) alone, we are of the view that the consideration for the payment of Rs. 4,00,000 by the Company was not only taking over of the Bundi Petrol and Automobile Supply Agency but also the grant of monopoly rights to the Company by the State. However, we are not prepared to accept the contention of the learned Advocate General that clause (6) need not be looked into at all. To find out the intention of the parties at the time of issue of licence Ex. 7 and for the purpose of finding out the consideration for payment of Rs. 4,00,000 we must take into consideration the document as a whole and it would not be proper to confine our attention to a particular clause of the licence only. Thus, in our opinion, it would be permissible to look to the contention of clause (6) of the licence. Clause (6) provides that the Bundi State would have a right to terminate operation of the licence after giving one year's previous notice and it will also be entitled to take over the stock-in-trade of the Company as shown in the books of the Company as well as the benefits of all the then existing contracts in favour of the company provided that in the case of such termination the Bundi Darbar would have to pay to the Company the value of all the then existing assets of the Company including the balance of the 'goodwill' money then outstanding as shown in the books together with compensation for compulsory acquisition at 10 per cent of such valuation. As we have already held in the earlier part of the judgment the use of the 'goodwill money' in this clause does not refer to 'goodwill' as it is understood in the commercial sense or the legal sense but it referred to nothing else but the consideration for monopoly.

23. We now deal with the objection raised by the learned Advocate General that for the purpose of finding out what were the terms of the licence we should not look into any other evidence except the license itself. In support of his argument the learned Advocate General has relied upon Sections 91 and 92 of the Evidence Act and has submitted that when the terms of a contract or of grant or of any other disposition of property, have been reduced into the form of a document, no evidence can be given in terms of such contract, grant or other disposition of the property except the document itself. He has further submitted that Section 92 of the Evi-

dence Act excludes evidence of any oral agreement between the parties to such document for the purpose of contradicting, varying, adding to, or subtracting from its terms.

On the other hand the learned Counsel for the Company has relied upon proviso 6 to Section 92 which says that any fact may be proved which shows in what manner the language of a document is related to existing facts. He has also referred to Section 98 of the Evidence Act, according to which evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense. He has argued that where the terms of the deed are ambiguous, the subsequent conduct of the parties is admissible for the purpose of interpreting the deed. He submits that the word 'goodwill' used in clause (6) of the agreement has been used in a peculiar sense and not in the ordinary sense. He submits that the evidence led by the Company both oral and documentary would show in what manner the language of clause (6) of Ex. 7 related to the existing facts. In support of his argument learned Counsel has also relied upon *Ganpatrao Appaji v. Babu Tukaram*, ILR 44 Bom 710 = (AIR 1920 Bom 143); *Subramania Ayyar v. Raja Rajeswara Selhupathi*, ILR 40 Mad 1016 = (AIR 1918 Mad 1167); *Abdulla Ahmed v. Animendra Kissen*, AIR 1950 SC 15; *Sankar Roy v. Secretary of State*, AIR 1925 Cal 346; *Ali Abbas v. Sher Bahadur Singh*, AIR 1925 Oudh 264 and *U. P. Government v. C. M. T. Association Ltd.*, AIR 1948 Oudh 54. We do not consider it necessary to discuss these cases, as in our view, the principle is well settled that where the point in dispute is as to the meaning of a particular word in the document, evidence may be admitted to show in what peculiar sense that particular word was used, and extrinsic evidence including the evidence regarding the subsequent conduct of the parties is admissible to determine the effect of the instrument as well as the intention of the parties. It is not the case of the State that the document suffers from any patent ambiguity. The Company has come forward with the allegation that the monopoly rights granted to them by the Bundi State were denominated as 'goodwill rights' and the shares have been called as 'goodwill shares' or 'money'.

24-26. Let us therefore, examine how far the contention of the Company that the word 'goodwill' used in clause (6) of the licence refers to monopoly is correct?

(After discussion of some documents and oral evidence the judgment proceeded):

27. Thus after taking into consideration the various documents referred to above along with the statement of P. W. 1 Brijnarain there is no escape from the conclusion that the consideration for grant of monopoly rights by the Bundi State to the Company for run-

ing the service and lorries exclusively within the territory of former State of Bundi was settled as Rs. 3,00,000 and in lieu thereof 30,000 fully paid up shares were issued by the Company in favour of the Bundi State and it was further agreed that Rs. 10,000 would be deemed to have been adjusted for each year the Company enjoyed the monopoly rights and thus the so-called 'goodwill' account was as a matter of fact account of monopoly rights and the expression 'goodwill money' means nothing else but money paid for grant of monopoly rights.

28. Our conclusion in this respect is further fortified by the correspondence which passed between the Company and the State. In its letter dated 7-5-1953 a copy of which has been placed on the record and marked Ex. 12 the Company has written to the Government of Rajasthan that apart from 11,600 shares the Company had issued without any payment shares of Rs. 3,00,000 in consideration for the grant of transport monopoly for a period of 30 years. It is further mentioned in this letter that such amount of Rs. 3,00,000 was to be adjusted in 30 equal annual instalments so that at the end of monopoly period the Government may have owned shares of Rs. 3,00,000 as cash paid. In reply to this letter the Government vide its letter dated 3-6-1953 (Ex. 14) informed the Company "that the question of claim for compensation arising out of the abolition of the monopoly rights has to be treated separately from the dividend that has become due." It is remarkable that the State has not denied the assertion made by the Company in its letter Ex. 12 that shares of Rs. 3,00,000 were in consideration for the grant of monopoly for a period of 30 years. On the other hand, the Government has merely said that the question of claim for compensation arising out of the abolition of monopoly rights will be treated separately. Then again the Company wrote a letter on 17-6-1953 to the State (Ex. 8) stating therein 'that the question of compensation is inseparably linked with the goodwill shares and as a matter of course should have been settled simultaneously. The Company also asserted in this letter 'that the Government's letter dated 3-6-1953 (Ex. 14) makes it clear 'that the Government has surrendered the goodwill shares of the value of Rs. 2,51,930 and no dividend has accrued thereon from 31-7-1950.' It was also stated in this letter that a cheque for Rs. 11,828/9/6 was being remitted to the State on the assumption of the correctness of the position taken by the Company and should the State find a position different from the one taken by the Company, the State may return the cheque and fix the time and place for thrashing out the matter. It is significant that the cheque was accepted by the State and the Company was informed vide letter dated 15-2-1956 (Ex. 10) that the matter was being enquired into by the State. The State, however, did not proceed further in the matter and the Company gave a notice to the State

under Section 80, Civil P. C. on 28-7-1958 in which the Company again asserted that no consideration had been paid by the State of Bundi for the 30,000 shares in dispute and the consideration consisted of monopoly rights to ply stage carriages and trucks in the Bundi State. It was claimed in the notice that the Company should be paid compensation for infringement of the monopoly rights granted by the former State of Bundi. This notice was served on the State on 30-7-1958, and thereafter the present litigation started by institution of suit No. 7 of 1958 by the State and a counter suit No. 9 of 1958 by the Company.

29. We have given this brief resume of the correspondence which took place between the State and the Company, and the facts leading to the institution of the suits by both of them to show that the State had never denied the stand taken by the Company that 30,000 fully paid up shares had been issued by the Company in lieu of grant of monopoly rights, nor it ever asserted that these shares were issued by the Company in lieu of the price of goodwill of the agency sold to the Company by the State.

30. In this connection we may also refer to Ex. A. 7 the 14th Annual Report of the Directors of the Company, along with profit and loss account and the balance sheet for the year ending 31st July, 1951. Among the Directors were, Major His Highness Maharawal of Bundi, who was the Chairman, and Shri Kesari Singh Mehta, Collector, Bundi, nominee of the State, and also Shri Mehtab Chand, Officer on Special Duty, Finance Department, Jaipur, nominee of the State. The report of the Chairman is in Hindi, and the third paragraph of the report when translated into English reads as under:—

"As you all know shares of the Company of the value of Rs. 3,00,000 were goodwill shares issued to the Government in lieu of monopoly rights. The monopoly rights have come to an end on 1-4-1951 and the Motor Vehicles Act has been applied to Rajasthan. In these circumstances in the opinion of your Directors goodwill shares stand cancelled and this matter is also under the consideration of the Rajasthan State. The Board of Directors of the Company have, therefore, resolved in its meeting on 28-2-1952 that no dividend need be paid on these goodwill shares."

It is argued by Mr. Bhargava on the basis of this report that among the Directors His Highness of Bundi was the Chairman, and the Collector, Bundi and Shri Mehtab Chand Officer-on-Special Duty Finance Department, Jaipur were the nominees of the State Government. No objection was taken to the resolution of the Company referred to in the report of the Chairman. Thus it is argued that this report also lends support to the contention of the Company that the disputed shares of the value of Rs. 3,00,000 were issued by the Company in lieu of grant of mono-

poly rights. Mr. Bhargava went a step further and submitted that the State was estopped from challenging the position stated in the aforesaid Chairman's report. All that we need mention is that the report of the Chairman of the Board of Directors referred to above undoubtedly supports the stand taken by the Company before us but we find it difficult to hold that it operates as an estoppel against the State inasmuch as the essential ingredients of estoppel are not satisfied in the present case. It is obvious that the State has not by any declaration, act or omission intentionally caused or permitted the Company to believe this position to be true and to act upon such belief. Moreover the question whether the 30,000 fully paid up shares were issued by the Company as price of the goodwill of the agency or as price of the assets of the agency or in lieu of grant of monopoly rights by the State to the Company depends upon the interpretation of the various documents which passed between the Company and the State and is not a pure question of fact but a mixed question of fact and law, and therefore, there cannot be an estoppel in such a matter. We may, however, state that the learned Advocate General was not able to give any satisfactory reply to this part of the argument of Mr. Bhargava as to how this report emanated from His Highness of Bundi and the two nominees of the Government of Rajasthan who were on the Board of Directors of the Company?

31. There is another aspect of the matter which may be mentioned here. We have not been told what was the goodwill of the agency nor any explanation has been furnished to us at the Bar as to how the goodwill of the agency came to be valued three times the price of its assets? We find it difficult to accept that the price of the goodwill of the agency, without there being anything on the record was considered to be worth thrice its visible assets. For this reason also, we are not prepared to accede to the submission of the learned Advocate General that the price of the goodwill of the agency was settled as Rs. 3,00,000.

32. Before we take leave of this topic we would also refer to the balance sheets of the Company which have been placed on the record from the year 1944 i.e. for the year ending on 31st July, 1945 upto the year ending on 31-3-1951. In the balance sheets of all the years upto the year ending on 31-7-1950 an amount of Rs. 1,07,21/-/1 has been shown to have been written off as the goodwill amount in each year. However, from the year ending 31-7-1951, nothing is shown to have been written off in the goodwill account and Rs. 2,51,930 has been shown as assets and property under the head goodwill. This shows that upto the period the monopoly rights were enjoyed by the Company i.e. upto the date of coming into force of the Motor Vehicles Act, 1939 on 1-4-1951, the goodwill amount was being written off as envisaged by clause (e) of the Council Reso-

lution (Ex. 5), and thereafter nothing was written off in the 'goodwill account'. This also shows that the 'goodwill amount' was nothing else but the amount of the monopoly rights granted to the Company by the former State of Bundi, which was treated by the Company as asset and was being written off by Rs. 10,000 each year upto the period the monopoly rights were enjoyed by the Company. It is true that the balance sheet of the Company and whatever is contained therein cannot bind the State but we cannot forget that on the Board of Directors of the Company, the Chairman during the year ending on 31-7-1951 was no other person than His Highness of Bundi and the Board also consisted of two nominees of the State Government. These balance sheets therefore also support the contention raised on behalf of the Company.

33. From whichever aspect we look at the matter, we feel convinced that the 30,000 fully paid up shares of the Company valued at Rs. 3,00,000 were issued by the Company in favour of the former State of Bundi not in lieu of the price of the assets or the goodwill of the agency but in lieu of monopoly rights granted to the Company by the former State of Bundi for a period of 30 years. This also disposes of the contention of the learned Advocate General that the monopoly rights were granted by the then Bundi Darbar to the Company ex-gratia, or as a bounty.

34. It would be relevant here to dispose of another contention of the learned Advocate General that the instrument Ex. 7 by which monopoly rights were granted by the former Ruler of the Bundi to the Company was law and not an agreement. In our opinion, it is too late in the day to put forth this argument in view of the pronouncement of their Lordships in *Maharaja Shri Umaid Mills Ltd. v. Union of India*, AIR 1963 SC 953. In that case the then Ruler of Jodhpur State agreed to exempt or remit the State or Federal Excise duty on goods manufactured in the Mill premises and State or Federal Income-tax or super-tax or surcharge or any other tax or income-tax. Their Lordships were pleased to hold inter alia that the agreement entered into by the then State of Jodhpur rested solely on the consent of the parties and it was entirely contractual in nature and was not law because it had none of the characteristics of law. Their Lordships were further pleased to lay down that any and every order of a sovereign Ruler who combines in himself all functions cannot be treated as law irrespective of the nature or character of the order passed. In the words of their Lordships:

"From this point of view there is a valid distinction between a particular agreement between two or more parties even if one of the parties is the Sovereign Ruler, and the law relating generally to agreements. The former rests on consensus of mind and

latter expresses the will of the Sovereign. If one bears in mind this distinction, it seems clear enough that the agreement of April 17, 1941 even though sanctioned by the Ruler and purporting to be on his behalf, rests really on consent.

This view was further affirmed by their Lordships of the Supreme Court in a subsequent case *Bengal Nagpur Cotton Mills Ltd. v. Board of Revenue M. P.*, AIR 1964 SC 888.

35. In the case in hand, it is plain that an agreement of the Ruler of the former State of Bundi was expressed in the shape of a contract which was signed by Shri Brijnaran on behalf of the Bundi Electric Supply Company and by the then Ruler of the Bundi State, Ishwari Singhji, G. C. I. E. Maharao Raja of Bundi and was attested by one Shri Kedarmal Accountant General, Bundi State. It is plain that such an agreement cannot be regarded as law. As observed by their Lordships in the case of *Bengal Nagpur Cotton Mills Ltd.*, AIR 1964 SC 888 (*supra*):

"A law must follow the customary forms of law-making and must be expressed as a binding rule of conduct. There is generally an established method for the enactment of laws, and the laws, when enacted, have also a distinct form. It is not every indication of the will of the Ruler, however expressed, which amounts to a law. An indication of the will meant to bind as a rule of conduct and enacted with some formality either traditional or specially devised for the occasion, results in a law but not an agreement to which there are two parties, one of which is the Ruler."

36. Judged from this angle, it is quite obvious that the document dated 31-7-1944, was merely intended to bind consensually and not by a dictate of the Ruler. The document is not worded, as a law is ordinarily expected to be. It records a contract and has been described as 'Motor Service Monopoly Licence, 1944'. The words used in this document are that 'the Company shall.....in consideration for and in lieu of the foregoing shall pay to the Bundi State a lump sum of Rs. 4,00,000' indicate that the State of Bundi was binding itself in consideration of certain payments made by the Company, and, therefore, the document Ex. 7 is an agreement.

37. We are, therefore, of opinion that the finding of the learned Senior Civil Judge, on Issue No. 3 that the purchase price of Rs. 4,00,000 paid by the Company was made up of Rs. 1,00,000 as the price for the stock of the agency and Rs. 3,00,000 for monopoly rights, is correct and does not call for any interference.

38. We now come to the second main contention raised on behalf of the State viz. that the Company having issued 30,000 fully paid up shares in favour of the former State of Bundi cannot question the consideration for the same and is bound to pay the dividends on all these shares and extend all

other benefits due thereon to the State. We called upon the learned Advocate General to show to us whether there was any provision in the Company Law or any other law which debarred the Company from showing that the consideration for issuing particular shares was fictitious or had failed and become illusory and inoperative. We may state that the learned Advocate General expressed his inability to point out any such provision in the Company Law. But in support of his argument he placed reliance on paras 517 and 518 at pages 246 and 247 in Halsbury's Laws of England, Third Edition, Volume 6. Under the head 'Effect of share certificate', it has been observed by the author that a certificate under the common seal of the Company specifying any shares held by any member is *prima facie* evidence of the title of the Member to the shares. The certificate is the only documentary evidence of title in the possession of a share-holder. It is not a negotiable instrument or a warranty of title by the Company issuing it. It declares to all the world that the person who is named in it is the registered holder of certain shares in the Company. Further on in para 518 under the Head 'Estoppel' it is mentioned that the Company is estopped from disputing the truth of any statement in a share certificate as against any person not knowing that the statement is untrue, who has acted or refrained from acting on the faith of and has thereby suffered loss. The ratio decidendi or all the cases cited by Lord Halsbury under the head of 'Estoppel' is that a Company is estopped from denying that a share is fully paid as against a holder without a notice, and a person who by reason of the issue of a certificate is entitled to shares by estoppel and who acts on the certificate to his detriment may recover from the Company as damages the value of the share at the time of the refusal of the Company to recognise him as a share-holder together with interest from that date. In our view the observations made by Lord Halsbury in paras 517 and 518 referred to above do not at all help the State inasmuch as the State is not a transferee or holder of shares without notice and the principle of estoppel can have no application in the present case.

39. The learned Advocate General also relied on *Cornbrook Brewery Co. Ltd. v. Law Debenture Corporation Ltd.*, 1903-2 Ch 527 and *In re Wragg*, 1897-1 Ch 796. We have looked into these authorities and it would be sufficient to state that they do not support the argument advanced by the learned Advocate General and deal with a different set of facts and circumstances with which we are not concerned.

40. On the other hand Mr. Bhargava, learned counsel for the Company has invited our attention to *Trustee Corporation (India) v. Commissioner of Income-tax, Bombay*, 57, Ind App 152 = (AIR 1930 PC 151). We have gone through this authority also and may state that this case has also no direct

bearing upon the question which is being agitated before us. This was an appeal in the Privy Council arising out of a reference made to the High Court under the provision of the Indian Income-tax Act, 1922, and the question submitted for answer was whether in respect of super tax in year 1924-25 the appellant company was entitled to deduct the loss to them in respect of the transaction of the shares allotted to them from the English Companies at their nominal value of Rs. 200 each? It was found by the Commissioner that in 1920 each share in the appellant company was worth Rs. 95. It was held that no loss was proved as the English Companies were liable to the appellant Company for the amount by which the sum realised was less than the nominal value of the allotted shares. It was further held that apart from the above consideration the Commissioner was not bound in law to take as the price paid the nominal value of the shares allotted.

41. In absence of any rule of law on the point we find ourselves unable to accede to the contention of the learned Advocate General that the nominal or face value of the shares is conclusive, and that the Company cannot under any circumstances show that the consideration for the issue of shares had failed or that the transaction of particular shares had become illusory or inoperative.

42. This brings us to the last contention raised on behalf of the State that even though the monopoly rights granted to the Company came to an end on 1-4-1951 the State is not liable to restore any benefits or advantage to the Company under Section 56 or 65 of the Indian Contract Act or under any other provision of law.

43. The learned Advocate General has argued that neither Section 56 or Section 65 of the Indian Contract Act would apply in the present case inasmuch as the act of the former Bundi State for granting monopoly rights to the Company was not impossible in itself nor it became impossible after the contract had been made and therefore Section 56 has no application, and consequently Section 65 also cannot apply as the agreement was neither discovered to be void nor became void. The contention raised by the learned Advocate General stands fully answered by their Lordships of the Supreme Court in *Satya Brata Ghose v. Mugneeram Bangur and Co.*, AIR 1954 SC 44. Their Lordships said:

"The word 'Impossible' has not been used here (in Section 56) in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do."

It is well established that if after the execution of the contract or at any stage during

the operation of the contract its performance becomes impossible by any supervening event then each party is bound to restore to the other any advantage which he had taken under the contract. We may in this connection refer to *Kishangarh Municipality v. Maharaja Kishangarh Mills Ltd.*, AIR 1961 Raj 6; *Man Singh v. Khazan Singh*, AIR 1961 Raj 277; *Raja Mohan Manucha v. Manzoor Ahmed*, AIR 1943 PC 29 and *Munshi Lal v. Vishnu Das*, AIR 1954 All 450. There is no doubt in our minds that with the coming into force of the Motor Vehicles Act, 1939 into Rajasthan on 1-4-1951 which was not under the contemplation of the parties at the time they entered into it, the performance of the contract regarding enjoyment of monopoly rights became impossible. After the Motor Vehicles Act came into force it became impossible for the State to allow the Company the enjoyment of the monopoly rights to ply the buses and motor lorries exclusively in the territory of the former State of Bundi and thus the performance of the contract pertaining to the monopoly rights became impossible by a supervening event. Consequently, the State is bound to restore the advantage received by it with respect to grant of monopoly rights.

44. The learned Senior Civil Judge has held that in respect of 30,000 shares of the value of Rs. 3,00,000 given to the then State of Bundi by the Company, the State is entitled to dividend bonus and other benefits and rights accruing to it on shares representing the value calculated at the rate of Rs. 10,000 per year beginning from 11-1-1944 to 31-3-1951 but not on the remaining shares. The learned Advocate General, however, submitted that even though the Motor Vehicles Act had come into force on 1-4-1951 no permits were granted to other persons by the Transport Authorities till 31-3-1954 and therefore it is contended that the Company is not entitled to any relief with respect to the period prior to the grant of permits to other persons. This contention does not appear to be tenable because after coming into force of the Motor Vehicles Act, 1939 the Company obtained temporary permits in 1951 even though they were cancelled by the High Court. If for any reason the permits to other persons were not granted till 1954, the State cannot urge that the monopoly rights in favour of the Company remained in existence after 1-4-1951. It must be conceded that the monopoly in favour of the Company became void on 1-4-1951 and it follows as a necessary corollary that the liability of the State to restore the advantage it had received under the contract, arose on 1-4-51 when the monopoly became void. Thus there is no force in this contention of the learned Advocate General also.

45. No other point was argued before us.

46. The result is that we do not find any force in this appeal and dismiss it with costs.
Appeal dismissed.

AIR 1970 RAJASTHAN 48 (V 57 C 8)

B. P. BERI, J.

Devi Sahai Agarwal, Petitioner v. Transport Appellate Tribunal, Rajasthan, Jaipur and another, Opposite Party.

Civil Writ Petn. No. 47 of 1964 D/- 10-3-1969.

Motor Vehicles Act (1939), Ss. 60 and 64 — Cancellation of permit is by way of penalty — Order is quasi-judicial — Principles of natural justice apply — Cancellation of petitioner's permit without giving precise notice of accusation and without recording statements of witnesses produced — Order of cancellation held vitiated by error apparent on face of record and by violation of principles of natural justice — Order quashed under Article 226 of Constitution — AIR 1959 Mad 531, Diss. from — (Constitution of India, Article 226).

The cancellation of a permit under S. 60 Motor Vehicles Act, 1939 is a penalty which may be imposed against a holder; but before it can be done, the holder has to be afforded an opportunity to furnish his explanation, he has to be told on what grounds the permit has been cancelled and he has a right of appeal. Therefore, the order of cancellation of a permit being in the nature of a penalty, the action of the authority is of a quasi judicial nature and calls for the application of the principles of natural justice. 1960 RLW 157; AIR 1966 Madh Pra 144, Rel. on; AIR 1965 Mad 471 and AIR 1959 Mad 531, Ref. (Para 8)

It is a flagrant violation of the principles of natural justice to condemn a man without telling him what he is accused of. (1958) 2 All ER 579 and AIR 1957 All 297, Rel. on. (Para 25)

In a proceeding under S. 60 if there is any factual controversy regarding the facts alleged for the cancellation of a permit, then the substance of what the witnesses for and against have deposed must be recorded. This is necessary because there is an appeal provided under Section 64 of the Act itself and no appellate authority can possibly apply its mind on the facts and assess them unless it has some sort of memoranda regarding the evidence adduced before the subordinate tribunal. It is true that there is no provision for enforcing the attendance of witnesses before the Regional Transport Authority even in the Rajasthan Rules but from that no inference can be deduced that witnesses cannot be or should not be examined. All that can be said is that if the parties produce their witnesses they must be heard and factual controversies should be resolved by reference to those witnesses. Cancellation of a permit is a penalty and before a person can be punished, law gives him an opportunity to be heard and that hearing would be perhaps in some cases a mere ritual if his witnesses are not heard. AIR 1959 Mad 531, Diss. from.

FM/GM/C637/69/KSB/D

Held on facts that the resolution of the RTA suffered from an error apparent on the face of the record as it was inconsistent with the notice. The resolution condemned the petitioner on a ground of which he had no notice and thereby violated the principle of natural justice. The Transport Appellate Tribunal was also handicapped for want of record of the alleged statement of the Traffic Inspector on whose complaint the notice was issued to the petitioner and it could not apply its mind in the absence of the specific allegation on the basis of which the permit had been cancelled. Hence the order of R. T. A. as well as that of TAT on appeal cancelling the petitioner's permit should be quashed.

(Para 29)

Cases Referred: Chronological Paras

(1966) AIR 1966 Madh Pra 144 (V 53) =

1966 MPLJ 39, Madan Mohan v.

S. T. A. Authority, M. P.

10

(1965) AIR 1965 Mad 471 (V 52) =

1965 (2) Cri LJ 652 (1), S. V. M.

Transport v. S. T. A. Tribunal 11, 28

(1960) 1960 Raj LW 156 = ILR

(1959) 9 Raj 1009, Krishna Gopal v.

Regional Transport Authority 9

(1959) AIR 1959 Mad 531 (V 46) =

1959 Cri LJ 1443, Dhanmull v.

Regional Transport Authority, Salem

12, 28

(1958) 1958-2 All ER 579 = 1958-1

WLR 762, Byrne v. Kinematograph

Renters Society, Ltd.

22

(1957) AIR 1957 All 297 (V 44) =

1956 All LJ 878, Mukhtar Singh v.

State of U. P.

24

(1957) AIR 1957 Andh Pra 608 (V 44) =

1956 Andh LT 309, Y. Thirupathi v.

Andhra State

27

(1957) AIR 1957 Trav-Co 141 (V 44) =

ILR (1956) Trav-Co 1293, K. Balagan-

gadharan v. C. R. Traffic Board

9

(1935) 105 LJBK 125, Marriot v.

Minister of Health

23

R. K. Rastogi, for Petitioner; M. M. Vyas, Addl. Advocate General, for Opposite Side.

ORDER: This is a petition under Article 226 of the Constitution of India complaining against the cancellation of a stage carriage permit under Section 60 of the Motor Vehicles Act and seeks a writ of Certiorari against the order of the Transport Appellate Tribunal, Rajasthan dated the 23rd January, 1964.

2. The petitioner is a transport operator and held one stage carriage permit on Shahpura-Behror route and another on Jaipur-Bikaner route of 235 miles length travelling over the Jaipur and Bikaner regions under the Motor Vehicles Act. The non-temporary stage carriage permit was granted to the petitioner in lieu of compensation as he was displaced on account of nationalisation of Jaipur-Alwar route of which the petitioner held a permit. There is no dispute so far. The petitioner contends that the Jaipur-Bikaner permit was granted to him by the State Transport Authority (hereinafter called the State Transport Authority) whereas the

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